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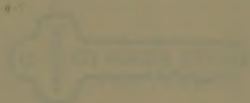
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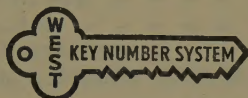
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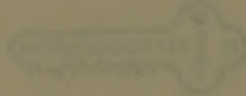
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SECOND SERIES

5 Cal.2d 446

MAX FACTOR & CO. et al. v. KUNSMAN.
L. A. 14662.

Supreme Court of California.

Feb. 27, 1936.

As Modified on Denial of Rehearing
March 26, 1936.

1. Constitutional law ☞70(3)

Court has neither power nor duty to determine wisdom of economic policy, which is function resting solely with Legislature, but power of court is limited to determining whether subject of legislation is within state's power, and, if so, to determine whether means adopted to accomplish result are reasonably designed for that purpose and have real and substantial relation to object sought to be obtained.

2. Constitutional law ☞26

In exercise of police power, states are not limited by powers enumerated in Constitution.

3. Constitutional law ☞87

No constitutional right exists to own property as such free from regulation, and that a state statute deprives person of right which he formerly possessed does not *per se* brand statute as unconstitutional.

4. Constitutional law ☞89(1)

In exercise of police power, state has power, acting in interest of general welfare, to regulate property and contract rights, including power to regulate right of free bargaining.

5. Constitutional law ☞50

Within limits of police power, Legislature is supreme.

6. Constitutional law ☞81

Limits of police power cannot be fixed by precedent, but, as state progresses, police power within reason develops to meet changing conditions.

7. Constitutional law ☞276

Liberty of contract guaranteed by Constitution is freedom from arbitrary restraint, rather than immunity from reasonable regulation to safeguard public interest (Const.U. S. Amend. 14).

8. Constitutional law ☞81

State's police power is not limited to measures designed to protect life, safety, health, and morals of citizens, but extends to measures designed to promote public convenience and general prosperity.

9. Constitutional law ☞89(1)

Power of state to regulate right of free bargaining in exercise of police power includes power to regulate price.

10. Constitutional law ☞89(1)

Price fixing in statute affecting entire class of articles which is reasonably subject of classification is valid, notwithstanding that articles involved may not be affected with public interest (Gen.Laws 1931, Act 8782, § 1; Gen.Laws Supp.1933, Act 8782, § 1½).

11. Constitutional law ☞89(1)

Purchase and sale of article or entire class of articles is affected with public interest where subject to regulation under police power.

12. Trade-marks and trade-names and unfair competition ☞68(2)

Provision of Fair Trade Act that sale of trade-marked commodity sold in fair and open competition for price less than that specified in contracts, between producer and retailers should be actionable as unfair competition *held* intended to protect property and contract rights of manufacturer or producer of commodities by prevention of price cutting, and not primarily as price-fixing statute (Gen.Laws Supp.1933, Act 8782, § 1½).

13. Trade-marks and trade-names and unfair competition ☞68(2)

Provision of Fair Trade Act that sale of trade-marked commodity sold in fair and open competition for price less than that specified in contracts between producer and retailers should be actionable as unfair competition *held* not unconstitutional as arbitrary or discriminatory (Gen.Laws 1931, Act 8702, and Act 8782, § 1; Gen.Laws Supp.1933, Act 8782, § 1½).

14. Constitutional law ☞242

Provision of Fair Trade Act that sale of trade-marked commodity sold in open and fair competition at price less than price stipulated in contract between producer and vendees should be actionable as unfair competition *held* not unconstitutional denial of equal protection of laws (Gen.Laws 1931, Act 8782, § 1; Gen.Laws Supp.1933, Act 8782, § 1½).

15. Commerce ☞60(1)

Provision of Fair Trade Act that sale of trade-marked commodities sold in open and fair competition at price less than that fixed by contracts between producer and vendees should be actionable as unfair competition *held* not unconstitutional as attempt to regulate interstate commerce, where complaint showed that transaction before court was one arising and involving goods wholly located within state (Gen.Laws 1931, Act 8782, § 1; Gen.Laws Supp.1933, Act 8782, § 1½).

16. Constitutional law ☞48

Although terms of statute prohibiting price cutting where price was fixed by contract with vendor were broad and could con-

celvably be interpreted to include interstate transactions, Supreme Court *held* required to construe statute providing that sale of trade-marked commodity sold in open and fair competition for price less than that fixed by producer in contracts with vendees should be actionable unfair competition as applying only to transactions within state; that being sole territorial extent of Legislature's powers (Gen.Laws 1931, Act 8782, § 1; Gen.Laws Supp.1933, Act 8782, § 1½).

17. Constitutional law ☞38

Statute may be invalid as applied to one set of facts and valid as applied to another.

18. Constitutional law ☞47

Attack on statute providing that sale of trade-marked commodity at price less than that fixed by producer in contracts with vendees should be actionable as unfair competition *held* limited to factual situation presented to court, especially where principal remedy granted by statute was injunctive relief which would be denied by court, where such relief would be inequitable (Gen.Laws 1931, Act 8782, § 1; Gen.Laws Supp.1933, Act 8782, § 1½).

SHENK, and THOMPSON, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Suit by Max Factor & Co. and another against Clarence G. Kunsman. Judgment for defendant, and plaintiffs appeal.

Reversed with directions to trial court to enter judgment.

See, also, *Pyroil Sales Co. v. The Pep Boys* (Cal.Sup.) 55 P.(2d) 194.

Henry Haves, of Los Angeles, and Sloss & Turner, Sloss, Turner & Finney, and M. C. Sloss, all of San Francisco, for appellants.

Jules C. Goldstone, John H. Tracy, Bart F. Wade, and Paul J. Ziegler, all of Los Angeles, for respondent.

Travers, Landels, Weigel & Crocker, Stanley A. Weigel, and George N. Crocker, all of San Francisco, for Northern California Retail Druggists Association, Limited, and California Pharmaceutical Association as amici curiæ.

Loeb, Walker & Loeb and Harry J. Miller, all of Los Angeles, amici curiæ.

WASTE, Chief Justice.

This case presents an attack upon the provisions of the Fair Trade Act adopted

by the Legislature in 1931 (St.1931, p. 583, Deering's Gen.Laws 1931, Act 8782), as amended in 1933 (St.1933, p. 793, Deering's Gen.Laws Supp.1933, Act 8782).

Prior to the adoption of these provisions, the Legislature adopted an act commonly known as the Cartwright Act, in order to promote free competition in commerce, which, among other things, declares it to be unlawful for two or more persons to enter into any combination or contract by which they agree to establish the price of any commodity to the public or consumer, and declares any such combination or contract to be against public policy, and void. St.1907, p. 984, as amended by Stats. 1909, p. 593, Deering's Gen.Laws 1931, Act 8702. The Fair Trade Act departs widely from the restrictive provisions of the Cartwright Act, in that it provides (in section 1) that "no contract relating to the sale or resale of a commodity which bears, or the label or content of which bears the trademark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the state of California" by reason of any provision which may be contained in such contract, among others, (1) "that the buyer will not resell such commodity except at the price stipulated by the vendor;" and (2) "that the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee." This statute, as originally passed, limits its application to persons who voluntarily enter into such contracts with respect to such resale prices, thus apparently seeking to except such contracts from the application of accepted principles respecting combinations and monopolies restraining trade through price-fixing agreements. The amendment to the Fair Trade Act added in 1933 (St.1933, p. 793), designated as section 1½, presents the crucial point of this case. It reads as follows: "Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of section 1 of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competi-

tion and is actionable at the suit of any person damaged thereby."

These facts appear from the allegations of the complaint: The plaintiff Max Factor & Co., a Delaware corporation, engaged in the manufacture of cosmetics and toilet articles manufactured by it under certain adopted and registered trade-marks. These trade-marks have long been used in connection with the manufacture, sale, and distribution of the cosmetics and toilet articles manufactured and sold by the corporation; that the corporation is the sole owner of the business and good will in the state of California and all the states in the United States connected with the distribution and sale of the articles associated with such trade-marks; that, prior to the commencement of this action, Max Factor & Co. transferred and sold to the plaintiff Sales Builders, Inc., the exclusive right and privilege of distributing and selling in the states of the United States, including the state of California, the cosmetics and toilet articles then and thereafter manufactured by Max Factor & Co., and the good will pertaining thereto, with the right to use the trade-marks, and the sole right to sell and distribute the cosmetics and toilet articles in all these states. Plaintiff Sales Builders, Inc., has ever since been, and is, the sole owner of the exclusive right to sell and distribute in all of the states, including California, all of the cosmetics and toilet articles manufactured by the plaintiff Max Factor & Co., and associated with the use of the trade-marks adopted by Max Factor & Co.

The defendant is, and at the times mentioned has been, the owner, proprietor and operator of a retail drug store situated in the city of Beverly Hills in this state, and was, and now is, engaged in selling at retail to consumers of cosmetics, toilet articles, and other merchandise.

For many years there has developed in the drug trade in California the practice of cutting prices, both wholesale and retail, of well-advertised commodities well known to the public, and sold and identified under distinctive trade-marks, brands, and names. Such products have been, and are, offered by retail dealers at prices conspicuously lower than the marked or established prices of said commodities as so-called "leaders," for the purpose of creating the impression that other goods of which the prices are not so well known are sold at corresponding reductions, and

that all articles dealt in by the particular dealer are sold by him at less than they could be obtained elsewhere. The stores in which these practices are prevalent have become known as "cut-rate drug stores." The complaint here sets out at some length matter relative to the fact that the practice of cutting known and established prices has engendered a condition by which other dealers were forced to meet the cut prices advertised by their competitors, one cut producing another in retaliation, so that ultimately, in a particular community, well-known articles identified by trade-marks, brands, and names with an established price are offered at prices cut to a point which yields no profit, and in many cases represents a loss. Other alleged evils of the practice are set forth at length. It is also alleged that to remedy this evil the Legislature of California has enacted the Fair Trade Act, *supra*, the constitutionality of which act is here sought to be established.

In order to protect itself against the alleged injuries and uneconomic practices described in the complaint, plaintiff Sales Builders, Inc., adopted a system of doing business, as set out in the complaint, under which contracts are entered into between the plaintiff and its wholesale jobbing distributors, and between plaintiff and retail druggists and other persons, firms, or corporations selling the Factor products in the state of California, by the terms of which contracts the distributors are obligated to sell these products only to retailers who will resell the same at specified prices, and who, in turn, have entered into a written contract with the plaintiff Sales Builders, Inc., to sell the Factor products at the specified prices. The prices fixed and established by plaintiff Sales Builders, Inc., in said contracts, it is alleged, are fair and reasonable, and no higher than is required to yield to distributors at wholesale and retail a reasonable compensation for their services. It is also alleged that, as known to defendant, practically all of the wholesale druggists in the state of California have executed these wholesale distributors' contracts, and practically all of the retail druggists in the state of California, including the prominent department stores dealing in cosmetics and toilet articles, have executed the retail distributors' contracts, and are observing and conforming with the terms of the contracts. Price cutting on products of plaintiff Max Factor

& Co. has ceased, and plaintiff Sales Builders, Inc., is enjoying, under the terms of the California Fair Trade Act, a reasonable profit from the sale of its goods, and immunity from destructive and uneconomic price-cutting. The distribution of its goods has been unobstructed, and its business has been greatly benefited.

However, the defendant, a retail distributor of plaintiffs' goods, is engaged in selling such goods at prices conspicuously lower than other retail dealers in the state of California, in many instances at less than the cost of the commodities to the defendant, with the result that other dealers are forced to meet defendant's price competition by offering plaintiffs' goods for sale at prices competitive with those quoted by defendant. Sales Builders, Inc., upon inauguration of its system of contracts heretofore referred to, tendered to defendant a contract and an opportunity to deal in plaintiffs' goods on the same terms offered to every other retail dealer in the commodity in the state of California. The defendant refused and declined to execute the contract or to conform to the system of distribution employed by Sales Builders, Inc., or to observe the sales price fixed in the contract.

The plaintiff Sales Builders, Inc., declined, and has continued to decline, to sell its commodities to the defendant unless and until the defendant enters into the tendered contract with plaintiffs. Defendant has proceeded, and is proceeding, to carry out the alleged unlawful and wrongful scheme, and, it is alleged, in so doing has been, and is, acting maliciously and without legal justification therefor. In pursuance and as part of the wrongful and unlawful plan and scheme, defendant, unbeknown to plaintiffs, has procured, and continues to procure, commodities manufactured by Max Factor & Co. bearing the trade-marks, brands, and names of Max Factor & Co., and has sold, and is now selling, the commodities at prices less than the retail sales prices which are being sustained by substantially all of the retail dealers in cosmetics and toilet articles in the state of California. Defendant has been, and now is, engaged in informing retail dealers under contract with plaintiff Sales Builders, Inc., as well as the public generally, of defendant's intention to sell plaintiffs' goods at cut-rate prices, which act and the others in the complaint complained of are unduly influencing retail

and wholesale distributors of Max Factor & Co.'s products; and the wholesale and retail distributors have complained that they will be compelled to cancel the contracts with plaintiff Sales Builders, Inc., and to sell the Max Factor & Co. products not in conformity with the terms of the contracts entered into by them, but at prices which will meet those announced by the defendant, and at which prices the defendant sells at retail the Max Factor & Co. products. The result of such cancellation, it is claimed, will be the destruction of the business of plaintiffs and the good will pertaining thereto.

It is further alleged that the defendant threatens to, and will, unless restrained by judgment of court, continue to sell and dispose of the products of the plaintiff Max Factor & Co. at retail prices less than the retail sales prices regulated by plaintiffs, the continuance of which acts will produce great and irreparable injury to plaintiffs, in that it will be extremely difficult, if not impossible, to ascertain the amount of damage that will afford plaintiffs adequate relief for the loss of sales and the destruction of business of plaintiffs and the good will pertaining thereto. For these reasons, plaintiffs seek equitable relief by way of injunction against the wrongs complained of.

To the complaint containing the foregoing allegations, defendant interposed a general demurrer, which the trial court sustained without leave to amend. Judgment was thereupon entered for the defendant, and the plaintiffs have appealed, presenting the single question: "Is section 1½, added to the Fair Trade Act of the state of California in 1933 (Stats.1933, p. 793, *supra*), constitutional?"

The title of the Fair Trade Act as passed in 1931 indicates its purpose. It is as follows: "An act to protect trademark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trademark, brand or name." St.1931, p. 583. In its entirety, the act aims at preventing price cutting of articles sold under a trade or brand name or under a trade-mark. As amended in 1933 (St.1933, p. 793), section 1½ provides, in order to accomplish the above purpose, that all retailers, whether the goods were originally sold to them under a contract fixing the resale price or not, who have knowledge of such contracts of

resale, must sell at not less than the fixed price. It is respondent's main contention that such a statute violates the due process and equal protection clauses of the Federal and State Constitutions, in that it denies to him the liberty and freedom of contract.

[1] We think there are certain fundamental concepts which are decisive of the present case:

1. In the first place, this court has neither the power nor the duty to determine the wisdom of any economic policy; that function rests solely with the Legislature. We recognize that economic and juridical thought is, and for many years has been, divided on the economic question as to the benefits to the consuming public of free and open competition, and its necessary corollary, price cutting. The Sherman Anti-Trust Act (15 U.S.C.A. §§ 1-7, 15 note) and Clayton Anti-Trust Act (38 Stat. 730), passed by Congress, and the Cartwright Act, passed by our state Legislature, and many other similar statutes, are indications that the particular Legislatures involved, at the time such statutes were passed, were of the view that, from a social standpoint, free and open competition was desirable. The basis of this view is that, in the long run, it is against public interest to allow the manufacturer, producer, or distributor to fix the resale price of an article. In recent years, there has developed, in opposition to the above views, the concept that a manufacturer of a trade-marked article that is sold in competition with articles of a similar nature and who has fixed a fair price at which he, as well as his distributor and retailer, can make a fair profit, has a property right in the good will towards his product which he has created, and that it is sound public policy to protect that property right against destruction by others who have no interest in it except to use it in a misleading way to deceive the public. The basic theory on which this concept rests is that, from a social standpoint, price cutting, in the long run, adversely affects the public interest, and that the public will be adequately protected against excessive prices by the ordinary play of fair and honest competition between manufacturers of similar products. This latter protection is found in section 2 of the present act, which prohibits manufacturers contracting between themselves to fix the resale price.

As already indicated, the state Legislature, by the adoption of the Cartwright

Act, supra, adopted in 1907, partially, at least, the first economic policy above discussed. By the enactment of the Fair Trade Act in 1931, as amended in 1933, the state Legislature, for reasons known to it and which we must presume were sufficient, has seen fit to attempt to change its former policy and to adopt the second economic concept above discussed. In so far as the statute involves a mere change in the economic policy of the state, this court has no power or right to interfere. The members of the court may or may not agree with the economic philosophy of the Fair Trade Act, but it is no part of the duty of this court to determine whether the policy embodied in the statute is wise or unwise. It is primarily a legislative and not a judicial function to determine economic policy. The power of the court is limited to determining whether the subject of the legislation is within the state's power, and, if so, to determine whether the means adopted to accomplish the result are reasonably designed for that purpose, and have a real and substantial relation to the objects sought to be attained. These principles have frequently been stated by the United States Supreme Court. In the recent case of *Nebbia v. New York*, 291 U. S. 502, at page 537, 54 S.Ct. 505, 516, 78 L.Ed. 940, 89 A.L.R. 1469, Mr. Justice Roberts, speaking for the majority of the court, said:

"So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio. 'Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine.' *Northern Securities Co. v. United States*, 193 U.S. 197, 337, 338, 24 S.Ct. 436, 457, 48 L.Ed. 679. And it is equally clear that if the legislative policy be to curb unrestrained and

harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. The course of decision in this court exhibits a firm adherence to these principles. Times without number we have said that the Legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.

"The lawmaking bodies have in the past endeavored to promote free competition by laws aimed at trusts and monopolies. The consequent interference with private property and freedom of contract has not availed with the courts to set these enactments aside as denying due process. Where the public interest was deemed to require the fixing of minimum prices, that expedient has been sustained. If the lawmaking body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the Legislature to be fair to those engaged in the industry and to the consuming public. And this is especially so where, as here, the economic maladjustment is one of price, which threatens harm to the producer at one end of the series and the consumer at the other. The Constitution does not secure to any one liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people. Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the Legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty."

In *Central Lumber Co. v. South Dakota*, 226 U.S. 157, 160, 33 S.Ct. 66, 67, 57 L.Ed. 164, Mr. Justice Holmes stated:

"If the legislature shares the now prevailing belief as to what is public policy, and finds that a particular instrument of trade war is being used against that policy in certain cases, it may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed."

As was said in *Re Lasswell*, 1 Cal.App. (2d) 183, 188, 36 P.(2d) 678, 680:

"It is a salutary doctrine that statutes should be sustained by the courts wherever and whenever this is reasonably possible. It is the purpose, right, and duty of the legislative branch of the government to enact such legislation as it deems desirable and its limitations are natural law and the written Constitutions; the courts have no voice in the policy nor in the wisdom of legislative action; they construe the language of the statute and determine its constitutional status."

[2,3] 2. In the second place, it must be kept in mind that the present statute is one passed in the exercise of the *state's* police power, and so differs fundamentally from statutes passed by the federal government. The latter is, of course, limited by the powers enumerated in the Constitution, while the states are not subject to such limitation. When the statute is viewed from the standpoint of police power, it is at once apparent that it is not a complete answer to the question of constitutionality to merely point out that the statute restricts a retailer from selling property of a certain class owned by him at prices fixed by himself, and so, of course, restricts his freedom of contract. There is no constitutional right to own property, as such, free from regulation. That a state statute deprives a person of a right which he formerly possessed, whether it be a right to go where he pleases, conduct himself as he pleases, or buy what he pleases, or sell what he pleases at prices fixed by himself, does not per se brand the statute as unconstitutional. The process of civilization has consisted largely of the gradual regulation of the individual in his liberty of action and ownership of property for the public good. As society has become more

complex, the necessity for such regulation has become more acute. Neither the State nor the Federal Constitution guarantees any person absolute liberty of action. The liberty guaranteed by our law is a liberty subject to regulation in the public good—an equal liberty rather than an absolute liberty. In *Jacobson v. Massachusetts*, 197 U.S. 11, 26, 25 S.Ct. 358, 361, 49 L.Ed. 643, 3 Ann.Cas. 765, this principle is expressed as follows: "But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others."

In holding a state statute constitutional which provided that all employees should be paid in cash and paid semimonthly, and that such regulation should apply even to existing contracts, the United States Supreme Court, in *Erie R. Co. v. Williams*, 233 U.S. 685, 699, 34 S.Ct. 761, 764, 58 L. Ed. 1155, 51 L.R.A.(N.S.) 1097, stated: "The legislation having been passed in the exercise of the reserved power of the state, is it valid, notwithstanding it prohibits both the plaintiff and its employees from contracting against its provisions? Plaintiff asserts the negative, and attempts to sustain the assertion by a very comprehensive argument in which a number of decisions of this court and of other courts are cited and reviewed. They illustrate by various instances the fundamental and indisputable principle that personal liberty includes the power to make contracts. But liberty of making contracts is subject to conditions in the interest of the public welfare, and which shall prevail—principle or condition—cannot be defined by any precise and universal formula. Each instance of asserted conflict must be determined by itself, and it has been said many times that each act of legislation has the support of the presumption that it is an exercise in

the interest of the public. The burden is on him who attacks the legislation, and it is not sustained by declaring a liberty of contract. It can only be sustained by demonstrating that it conflicts with some constitutional restraint, or that the public welfare is not subserved by the legislation. The legislature is, in the first instance, the judge of what is necessary for the public welfare, and a judicial review of its judgment is limited. The earnest conflict of serious opinion does not suffice to bring it within the range of judicial cognizance."

[4-6] Under its police power, the state, in a proper case, has the power, acting in the interests of the general welfare, to regulate property and contract rights, and this includes, of course, the power to regulate the right of free bargaining. The fact that a state can lawfully pass a statute requiring free and open competition, such as the Cartwright Act, *supra*, which regulates the rights of a manufacturer or producer, and limits his freedom of contract, indicates this power exists.

The fact that a statute limits the rights of the owner of property, lowers its value, or limits its use, or limits the right of free bargaining in other ways, does not, of itself, determine the validity of the enactment. There are innumerable illustrations of statutes, passed under the police power, which interfere with the right of free bargaining which have been upheld on the theory the regulation is in the public interest. There are limits to this power, of course, but within those limits the Legislature is supreme. These limits cannot be fixed by precedent. As the state progresses, the police power, within reason, develops to meet the changing conditions. *Miller v. Board of Public Works*, 195 Cal. 477, 484, 234 P. 381, 38 A.L.R. 1479; *People ex rel. v. Associated Oil Co.*, 211 Cal. 93, 100, 294 P. 717.

Many illustrations of the power of the state to regulate, in the public interest, the right of free bargaining could be given. The United State Supreme Court has held that a Legislature may (1) fix the charges the owners of grain elevators and warehouses may make (*Munn v. Illinois*, 94 U. S. 113, 24 L.Ed. 77; *Budd v. New York*, 143 U.S. 517, 12 S.Ct. 468, 36 L.Ed. 247); (2) fix the charges of insurance companies (*German Alliance Ins. Co. v. Lewis*, 233 U.S. 389, 34 S.Ct. 612, 58 L.Ed. 1011, L.R. A.1915C, 1189); (3) fix the time within

which the services of employees must be paid for and provide for semimonthly payments of wages, and prohibit contracts varying the times of payment (*Erie R. Co. v. Williams*, 233 U.S. 685, 34 S.Ct. 761, 58 L.Ed. 1155, 51 L.R.A.[N.S.] 1097); (4) fix the fees chargeable by attorneys appearing for employees before workmen's compensation commissioners (*Yeiser v. Dysart*, 267 U.S. 540, 45 S.Ct. 399, 69 L.Ed. 775); (5) fix the rate of pay for overtime work (*Bunting v. Oregon*, 243 U.S. 426, 37 S.Ct. 435, 61 L.Ed. 830, Ann.Cas. 1918A, 1043); (6) establish maximum hours of labor for men in certain industries (*Holden v. Hardy*, 169 U.S. 366, 18 S.Ct. 383, 42 L.Ed. 780); (7) establish maximum hours of labor for women (*Muller v. Oregon*, 208 U.S. 412, 28 S.Ct. 324, 52 L.Ed. 551, 13 Ann.Cas. 957; *Miller v. Wilson*, 236 U.S. 373, 35 S.Ct. 342, 59 L.Ed. 628, L.R.A.1915F, 829); (8) prohibit the payment of wages in advance (*Patterson v. The Bark Eudora*, 190 U.S. 169, 23 S.Ct. 821, 47 L.Ed. 1002); (9) require loaves of bread of only a certain size be sold (*Schmidinger v. Chicago*, 226 U.S. 578, 33 S.Ct. 182, 57 L.Ed. 364, Ann.Cas.1914B, 284); (10) establish maximum rentals (*Block v. Hirsh*, 256 U.S. 135, 41 S.Ct. 458, 65 L.Ed. 865, 16 A.L.R. 165; *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170, 41 S.Ct. 465, 65 A.L.R. 877); (11) fix the maximum rate of interest chargeable on loans (*Griffith v. Connecticut*, 218 U.S. 563, 31 S.Ct. 132, 54 L.Ed. 1151); (12) regulate the net weight of retail packages (*Armour & Co. v. North Dakota*, 240 U.S. 510, 36 S.Ct. 440, 60 L.Ed. 771); (13) declare sales of commodities on margin or for future delivery void (*Booth v. Illinois*, 184 U.S. 425, 22 S.Ct. 425, 46 L.Ed. 623); (14) forbid unfair competition by charging of lower prices in one locality than those exacted in another (*Central Lumber Co. v. South Dakota*, 226 U.S. 157, 33 S.Ct. 66, 57 L.Ed. 164); (15) fix the retail price of milk (*Nebbia v. New York*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469).

[7] In each of the above cases the police power of the state was held broad enough to warrant an interference with free bargaining. As was said by Chief Justice Hughes in *Miller v. Wilson*, supra, 236 U.S. 373, at page 380, 35 S.Ct. 342, 343, 59 L.Ed. 628, L.R.A.1915F, 829, "As the liberty of contract guaranteed by the Constitution is freedom from arbitrary restraint,—

not immunity from reasonable regulation to safeguard the public interest,—the question is whether the restrictions of the statute have reasonable relation to a proper purpose."

[8] The police power is no longer limited to measures designed to protect life, safety, health, and morals of the citizens, but extends to measures designed to promote the public convenience and the general prosperity (*People ex rel. v. Associated Oil Co.*, supra; *Chicago, B. & Q. Ry. Co. v. Illinois*, 200 U.S. 561, 26 S.Ct. 341, 50 L.Ed. 596, 4 Ann.Cas. 1175), and includes economic measures regulating competition (*Northern Securities Co. v. United States*, 193 U.S. 197, 24 S.Ct. 436, 48 L.Ed. 679; *Nebbia v. New York*, supra).

[9] The above cases conclusively establish that there is no absolute right of free bargaining guaranteed by the Constitution. Since, under the proper circumstances, the right of free bargaining can be, and in the past has been, regulated, it necessarily follows that, in a proper case, this power to regulate free bargaining includes the power to regulate the price. Every one of the cases above cited, and many more that could be cited, illustrate the breadth of the power invested in the state Legislature to affect the terms of a business bargain between individuals, and in every case the regulation affected the price. As was said in the *Nebbia Case*, supra, 291 U.S. 502, at page 532, 54 S.Ct. 505, 514, 78 L.Ed. 940, 89 A.L.R. 1469: "The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property. The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling the price itself. This view was negated many years ago. *Munn v. Illinois*, 94 U.S. 113, 24 L.Ed. 77."

[10, 11] Respondent seriously urges that the Legislature can only regulate prices as to those articles "affected with a public interest." There are several answers to this contention. As already pointed out, this statute does not aim primarily at regulating prices, but at protecting the property and contract rights of the manufacturer,

producer, distributor, and retailer. Moreover, the statute does not attempt to regulate the price of any one article. It may be that, when the Legislature attempts to regulate the price of a particular commodity, in order to justify classifying that article differently from other commodities, its purchase and sale must affect the public interest. But here the legislation affects an entire class of articles, which class, as will later appear, is reasonably the subject of classification. Another complete answer to this contention is that, if the purchase and sale of any one article or entire class of articles is subject to regulation under the police power, for reasons already stated, then its purchase and sale does affect the public interest. This was the exact holding in the *Nebbia Case*, supra, 291 U. S. 502, at pages 533 and 536, 54 S.Ct. 505, 516, 78 L.Ed. 940, 89 A.L.R. 1469, where it is stated:

"Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large.' * * * Thus understood, 'affected with a public interest' is the equivalent of 'subject to the exercise of the police power'; and it is plain that nothing more was intended by the expression. * * *

"The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. In several of the decisions of this court wherein the expressions 'affected with a public interest,' and 'clothed with a public use,' have been brought forward as the criteria of the validity of price control, it has been admitted that they are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices. These decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect. But there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells."

[12] 3. The next major factor that must be emphasized is that the statute here involved is not solely a price-fixing or regulating statute. It is true that the statute

permits the producer to fix by contracts with his distributor, and the latter by contracts with retailers, the minimum resale price of the product, and that by section 1½ of the act the minimum price so fixed is made binding on all retailers who have knowledge of the contracts, and in this sense it is a price regulating statute. However, to regulate prices as such was not the main purpose of the statute. The statute only applies to certain articles sold under the trade-name or brand or trade-mark of the producer. As to such articles, the producer or manufacturer, through advertising or other means, has built up a good will in connection with the articles, which good will is a species of property entitled to protection. When the retailer sells such an article to a customer, the article is not sold solely on the reputation of the retailer, but partially, at least, on the reputation built up by the owner of the trade-mark, brand, or trade-name. Moreover, section 1½ comes into operation only when the manufacturer or producer has entered into contracts fixing the resale price. The statute, as its title indicates, by preventing price cutting, is aimed at protecting these valuable property and contract rights of the manufacturer or producer—rights just as valuable and just as much entitled to protection as the right of the retailer, who is attempting, by exercising his claimed right of freedom of action, to injure the property and contract rights of the manufacturer or producer. The statute, in other words, does not merely prohibit price cutting in order to regulate prices, but prohibits price cutting in an attempt to protect the validly acquired rights of others. The common law, without statutory authorization, long recognized that unjustifiable interference with contract rights of others constituted a tort. *Lumley v. Gye*, 2 El.&Bl. 216. The statute here involved in a large measure merely extends that common-law doctrine to the transactions enumerated in the statute.

[13] 4. Another important factor that must be kept in mind is that in so far as the Fair Trade Act permits the producer to fix the resale price of his product by contract, the act merely embodies a rule of law well settled in this state. In *Grogan v. Chaffee*, 156 Cal. 611, 105 P. 745, 27 L.R.A.(N.S.) 395, and in *D. Ghirardelli Co. v. Hunsicker*, 164 Cal. 355, 128 P. 1041, it was held that as far as articles in intrastate commerce are concerned, without statutory

authorization, the manufacturer, by contract with a retailer, may fix the resale price. The Fair Trade Act as passed in 1931 merely codifies the rule of those cases, which was partially changed by the Cartwright Act, *supra*.

When the above concepts are applied to section 1½ of the Fair Trade Act, we have no hesitancy in holding that the section is constitutional. The object sought to be attained is clearly within the sphere of state regulation, and the means provided in the statute have a reasonable relation to this object. In our opinion the statute is neither arbitrary nor discriminatory.

California apparently is the first state to have passed a statute containing the provisions found in section 1½ of the Fair Trade Act. New Jersey, in 1916 (Comp. St. Supp. N.J. 1924, § *225—1), however, passed a statute that permitted the manufacturer to fix the resale price of a trademarked article, or article sold under a trade or brand name, by attaching a notice fixing the resale price to the container in which the article was sold. The resale price so fixed was made binding on all retailers. In *Ingersoll & Bro. v. Hahne & Co.*, 88 N.J. Eq. 222, 101 A. 1030, Id., 89 N. J. Eq. 332, 108 A. 128, the New Jersey court, in two opinions, held the statute constitutional on substantially the same reasoning set forth in this opinion.

Since the oral argument and submission of the cause, respondent has cited a decision of the New York Court of Appeals, in which that court held the New York Fair Trade Act (Laws N.Y. 1935, c. 976) unconstitutional. *Doubleday, Doran & Co., Inc., v. R. H. Macy & Co., Inc.*, 269 N.Y. 272, 199 N.E. 409, decided January 7, 1936. Because the New York act was copied almost verbatim from the California statute, respondent cites the opinion of the New York court as "strongly persuasive." We are not prepared to share counsel's optimistic view of the weight to be given the decision. While, on first impression, it seems entitled to the importance attached to it by respondent, we are of the view that, upon careful analysis, it loses its persuasive force. A brief discussion of the decision will, we believe, be helpful in throwing in relief some of the highlights of the situation now before this court. For several reasons, the decision of the New York court impresses us as not being in point in the discussion here. It is expressly limited to a declaration that section

2 of the New York act (identical with section 1½ of the California act) is unconstitutional "as applied to the facts set forth," which are different from those of the case now before this court. The plaintiffs in the New York case were Doubleday, Doran & Co., Inc., publishers, and Doubleday, Doran Book Shops, Inc., retailers. The contract mentioned in the decision is one between the publishing corporation and the retailing corporation. Aside from any inference to be drawn from the similarity of names, the opinion states that the two plaintiffs, in reality, were one and the same, for it refers to "the price which they [the plaintiffs] stipulated as a retail price in a contract between themselves." Other language indicates the book shop corporation is merely a subsidiary and agent of the publishing company. Again, the plaintiff publishers sold the books in question to the defendant without exacting or, in so far as appears, attempting to exact, from the buyer any restriction on the price for resale. In other words, the producer of goods placed a retail price upon its product by its own independent action, and voluntarily sold the goods to a retailer (Macy & Co.) for resale without seeking, or at least obtaining, any agreement by the retailer to observe any retail price. In the action, it seeks to prevent the retailer, to whom it has sold the goods without restrictions, from selling the goods at prices less than those which the producer saw fit to fix, in a contract between it and a subsidiary. The New York court accepts, for the purpose of the decision, the interpretation of the act as covering such situation, and, upon that assumption, and apparently that assumption alone, holds section 2 of the act to be unconstitutional. The plaintiffs in the New York case allege only a single contract purporting to fix the resale prices, and that in a pretended contract made with itself, far different from the factual set-up in the *Max Factor & Co. Case*. Here there has been adopted a system of making written contracts, generally between producers and retail distributors, under which the products may and will be sold only to retailers who will resell at specified prices and have entered into contracts with the distributor to so sell such products. Practically all of the wholesale and retail druggists in California have executed such contracts, and are observing them, and the plaintiffs' distributors have refused, and will refuse, to sell such products to whole-

salers or retailers who do not enter into such contracts. A contract has been tendered to defendant for execution, but defendant will not enter into the agreement. The plaintiffs therefore decline to sell the commodities to defendant unless the defendant enters into the contract. The defendant, with full knowledge of the system of contracts, and the extent of the execution and compliance with their terms by the trade, has obtained Factor products "unknown" to plaintiffs, and is selling them at prices less than the prices fixed by the contracts so extensively entered into by others. These facts serve to vitally differentiate the situation in New York from that here. In place of a single pretended contract made by the producer with itself, we have here a uniform system of contracts applied generally to wholesale and retail distributors in the state. In place of a voluntary sale without restriction by the producer to a retailer, there is here a consistent refusal by the producer or owner to sell to the defendant or to any other buyer who will not agree to maintain resale prices. A retailer who has been given an opportunity to enter into the contract has refused to do so, and, having obtained goods, not from the producer or owner, but indirectly and without the consent or knowledge of the producer, is engaged in cutting prices of the products. The New York decision does not discuss the fundamental basis and purpose of the legislation represented in the California Fair Trade Act, and does not disclose the ground upon which the section of the New York act, as interpreted for the purpose of the decision, is unconstitutional. We cannot find, in this casual treatment of a constitutional question, sufficient justification for regarding the decision as applicable to the facts here.

[14] Respondent also urges that the statute denies equal protection of the laws in that it applies only to articles sold under a trade-mark or trade or brand name, and does not apply to nontrade-marked commodities, and, among trade-marked articles, applies only to those in free and open competition with others of a similar nature. As already pointed out, it is only in reference to those commodities included within the statute that the manufacturer or producer has a property right in the nature of good will, which, in the public interest, should be protected. Such a classification is reasonable. The exclusion of

trade-marked articles not in free and open competition with others of a similar nature is likewise reasonable. By that provision the public is protected from artificially high prices imposed by one with an exclusive market. See *Borden's Farm Products Co. v. Ten Eyck*, Commissioner, 56 S.Ct. 453, 80 L.Ed. 669, decided by the United States Supreme Court, February 10, 1936.

[15, 16] The contention made by the respondent that the Fair Trade Act attempts to regulate interstate commerce, and so is unconstitutional, is without merit. The allegations of the complaint clearly establish that as to the transaction now before the court it is one arising and involving goods wholly located within this state. Although the terms of the statute are broad, and could conceivably be interpreted to include interstate transactions, we must necessarily construe the act as applying only to transactions within the state, that being the sole territorial extent of the Legislature's powers. *California Adjustment Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 179 Cal. 140, 175 P. 682, 13 A.L.R. 274; *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 29 S.Ct. 511, 53 L.Ed. 826, 16 Ann.Cas. 1047.

[17] Respondent presents several hypothetical situations under which enforcement of the act would be inequitable or difficult, or, perhaps, even unconstitutional. It is elementary, of course, that a statute may be invalid as applied to one set of facts, yet valid as applied to another. *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 42 S.Ct. 106, 66 L.Ed. 239. The situations conjured up by respondent are not here involved, and respondent is limited in his attack to the application of the statute to the factual situation now before the court. Moreover, the principal remedy granted by the statute is injunctive relief. The equity court has broad and flexible discretionary powers, and can, and undoubtedly would, deny injunctive relief where such relief would be inequitable.

It is beyond denial that, under our form of government, the use of property and the making of contracts are normally matters of private concern. Here no question of impairment of existing contracts is involved. No criminal proceedings have arisen under the circumstances of the case. The plaintiffs are seeking, in a civil action, to restrain conduct on the part of the defendant which the Legislature, in determining

a question of economic policy, has declared to be "unfair competition, and actionable at the suit of any person damaged thereby." We are of the view that its action, measured by the yardstick of the cases cited, and other authorities of similar import, must be held to be free from constitutional objections, and, not being shown to be unreasonable or arbitrary, it must be sustained as a proper legislative declaration of the policy of the state on the practice of price cutting. The demurrer of defendant to the complaint should have been overruled.

The judgment entered on the order sustaining the demurrer without leave to amend is reversed, and respondent having filed an election to stand on his demurrer, it is ordered that the trial court enter judgment in the within cause in favor of the appellant as prayed for in the complaint.

We concur: CURTIS, J.; LANGDON, J.; SEAWELL, J.

THOMPSON, Justice (dissenting).

I dissent. I cannot bring myself to agree with the majority opinion in this case. The question herein is not whether the court or the Legislature is authorized to determine the wisdom of an economic policy. It is, of course, elementary that it is beyond the function of the court to attempt to define or limit the economic policy or to determine the wisdom of a chosen course by the state. And it is also fundamental that simply because such determination does not fall within the judicial function it does not follow that it belongs in the legislative field. It may be reserved by the State Constitution to the people, or the state may be prevented from acting by the inhibition of the Federal Constitution. The question, then, in this case, may be phrased as follows: Has the Legislature exceeded its powers as limited by some inhibition of the Constitution in which the people have defined for themselves an economic policy and in which they have set up a safeguard against the infringement by the Legislature of some natural right with which they are endowed? If the act in question exceeds the legislative power thus measured, it is likewise beyond the judicial function to sap the inhibition or safeguard of its essential vitality, by construction, in order to accomplish or permit a course of action the court may deem to constitute a wise economic policy. See opinion of Mr. Justice Burnett in *Ex parte*

Newman, 9 Cal. 502, 510, for a comprehensive statement of this principle. The respondent insists that the section brought under our scrutiny in this cause does do violence to sections 1 and 13 of article 1 and section 25 of article 4 of our State Constitution, as well as the Fourteenth Amendment to the Federal Constitution. It seems to me the argument in this regard is unanswerable. Section 1 of article 1 reads as follows: "All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property; and pursuing and obtaining safety and happiness." Section 13 of the same article provides that no person shall "be deprived of life, liberty or property without due process of law," which is, of course, in keeping with a portion of the Fourteenth Amendment to the Federal Constitution. Section 25 of article 4 forbids the enactment of special laws respecting enumerated subjects or where a general law can be made applicable.

Sections 1 and 13 of the first article have been considered by this court in previous cases, and I believe, if the amendment under attack is to be sustained, they must be directly overruled or the court forced to the extent of saying all trade-marked goods, including the specific item of cosmetics here involved, have been so devoted to a public use that they have become "affected with a public interest." I can scarcely believe that any one would adopt the latter alternative. Hence I advert to the construing authorities. It was held in the early case of *Ex parte Newman*, to which I have already referred, that the declaration of principles contained in article 1, and which were intended for the protection of every individual, "can be enforced by judicial determination." In *Ex parte Quarg*, 149 Cal. 79, 84 P. 766, 5 L.R. A. (N.S.) 183, 117 Am.St.Rep. 115, 9 Ann. Cas. 747, this court proceeded to enforce the section upon which the respondent relies for his protection. With respect to an enactment which attempted to prohibit the sale of theater tickets at a price in excess of that originally charged, it is there said: "The constitutional guaranty securing to every person the right of 'acquiring, possessing and protecting property,' refers to the right to acquire and possess the absolute and unqualified title to every species of property recognized by law, with all the rights incidental thereto, and, in con-

nection with the right of personal liberty, *it includes the right to dispose of such property* in such innocent manner as he pleases, and *to sell it for such price as he can obtain in fair barter.*" (Italics added.) To the same practical effect is *Ex parte Dickey*, 144 Cal. 234, 77 P. 924, 925, 66 L.R.A. 928, 103 Am.St.Rep. 82, 1 Ann. Cas. 428, in which we find this expression: "This right of contract common to all legitimate occupations is an asset of the petitioner in his chosen occupation, and, as has been said, is a part of the property in the enjoyment of which he is guaranteed protection by the Constitution. By the act in question he is arbitrarily stripped of this right of contract, and deprived of his property, and left, in following his vocation and in pursuit of his livelihood, circumscribed and hampered by a law not applicable to his fellow men in other occupations." See, also, *In re Smith*, 193 Cal. 337, 223 P. 971. Again in *People v. Pace*, 73 Cal.App. 548, 238 P. 1089, 1095, after approving the language which we have quoted from *Ex parte Quarg*, it was held that the legislature could not require a person to secure a permit as a condition precedent to the sale of his own stock, although in repeated and successive transactions. The court said: "In these days when the urge is strong upon legislative bodies to extend the paternal arm of government into the realm of economic activities, it is particularly important that courts, in the exercise of the particular functions imposed upon them by the Constitution, shall scrutinize with care legislation which tends to encroach upon the constitutional guaranties, to the end that the right of the individual to liberty and possession of property shall become, not a mere theory, but shall be maintained as a practical reality. And while it is true that the increasing conflict between the rights of the individual and the general welfare of society presents oftentimes difficult and perplexing problems, nevertheless courts should not and will not permit the violation of those most fundamental rights that underlie our very existence as a nation. *Dobbins v. Los Angeles*, 195 U.S. 223, 25 S.Ct. 18, 49 L.Ed. 169; [see, also, *Rose's U.S. Notes*]; *Pacific Palisades Ass'n v. City of Huntington Beach et al.* [196 Cal. 211] 237 P. 538 [40 A.L.R. 782].

There are a host of authorities from other jurisdictions which might be cited to the same effect, but for my purposes it will be sufficient to refer to but two. First

we find comparable language in the case of *Tyson & Bro. United Theatre Ticket Offices v. Banton*, 273 U.S. 418, 47 S.Ct. 426, 428, 71 L.Ed. 718, 58 A.L.R. 1236, as follows: "In the endeavor to reach a correct conclusion in respect of this inquiry, it will be helpful, by way of preface, to state certain pertinent considerations. The first of these is that the right of the owner to fix a price at which his property shall be sold or used is an inherent attribute of the property itself, *Case of the State Freight Tax*, 15 Wall. 232, 278, 21 L.Ed. 146, and, as such, within the protection of the due process of law clauses of the Fifth and Fourteenth Amendments. See *City of Carrollton v. Bazzette*, 159 Ill. 284, 294, 42 N.E. 837, 31 L.R.A. 522." Second I refer to *Doubleday, Doran & Co., Inc., v. R. H. Macy & Co., Inc.*, 269 N.Y. 272, 199 N.E. 409, 411, which case involved a practically verbatim copy of the section here involved, adopted by the Legislature of New York. Bearing in mind that the New York Court of Appeals was the same court which first sustained the New York Milk Control Act (*People v. Nebbia*, 262 N.Y. 259, 186 N.E. 694), which was the subject of judicial inquiry in the case of *Nebbia v. New York*, from which the majority opinion has quoted so extensively, the expressions we find in the case are especially illuminating. It is there said:

"That the states cannot fix the selling price of any and all commodities has been settled. *Williams v. Standard Oil Co.*, 278 U.S. 235, 49 S.Ct. 115, 73 L.Ed. 287, 60 A. L.R. 596; *Tyson & Bro. United Theatre Ticket Offices v. Banton*, 273 U.S. 418, 47 S.Ct. 426, 71 L.Ed. 718, 58 A.L.R. 1236; *Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522, 43 S.Ct. 630, 67 L.Ed. 1103, 27 A.L.R. 1280; *Straus v. Victor Talking Machine Co.*, 243 U.S. 490, 37 S.Ct. 412, 61 L.Ed. 866, L.R.A.1917E, 1196, Ann.Cas.1918A, 955.

"Books, at least these books, are not 'affected with the public interest' any more than theater tickets; No emergency has yet arisen in literary publications, and the business is not such as comes within the class which must submit to rate fixing. Circumstances which cannot be foreseen from one generation to another may arise which will require certain articles to submit to regulatory prices in order that the public may get them at all or get them in a pure and beneficial state. We cannot always express legislative power in exact formulas nor decide a case before it happens.

Experience is the mother of teachers. Under the *Nebbia* Case for instance (*Nebbia v. New York*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469), no one would doubt now that New York state would have the power to get milk to the public somehow if any combination of forces threatened to shut off all supply or to deteriorate that which was supplied. The price might be an element to be considered with other things in such a case. So we thought in *People v. Nebbia*, 262 N.Y. 259, 186 N.E. 694. But to fix arbitrarily the price of books by legislation and not by agreement comes within the condemnation of the decisions which have heretofore dealt with like legislation. What the Legislature cannot do directly it cannot do indirectly, nor does it cease to be a price fixed by the Legislature because that body has clothed the publisher with the power or authority to establish it." I think it so fundamental and so well established that the right to sell at any price obtainable by the owner is a part of the property itself and within the protection of the constitutional guaranties that I shall not devote more space to that thought.

However, it must be conceded that there is a factor which takes some kinds of businesses outside of the strict protection of the inhibition, and to an ascertainment or rather statement (because it has heretofore been well explained and adhered to) of that element I now turn. What is it? For the purposes of a ready statement we say that, where a business is "affected with a public interest," it is subject to regulatory measures. Just what is meant by the expression is well stated in *Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522, 535, 43 S.Ct. 630, 632, 67 L.Ed. 1103, 27 A.L.R. 1280, as follows:

"Businesses said to be clothed with a public interest justifying some public regulation may be divided into three classes:

"(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities.

"(2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws

by Parliament or colonial Legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs, and grist mills. *State v. Edwards*, 86 Me. 102, 29 A. 947, 25 L.R.A. 504, 41 Am.St.Rep. 528; *Terminal Taxicab Co. v. District of Columbia*, 241 U.S. 252, 254, 36 S.Ct. 583, 60 L.Ed. 984, Ann.Cas.1916D, 765.

"(3) Businesses which, though not public at their inception, may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest although the property continues to belong to its private owner and to be entitled to protection accordingly."

Again it is said therein (262 U.S. 522, at page 536, 43 S.Ct. 630, 633, 67 L.Ed. 1103, 27 A.L.R. 1280): "In a sense, the public is concerned about all lawful business because it contributes to the prosperity and well being of the people. The public may suffer from high prices or strikes in many trades, but the expression 'clothed with a public interest,' as applied to a business, means more than that the public welfare is affected by continuity or by the price at which a commodity is sold or a service rendered. The circumstances which clothe a particular kind of business with a public interest, in the sense of *Munn v. Illinois* and the other cases, must be such as to create a peculiarly close relation between the public and those engaged in it, and raise implications of an affirmative obligation on their part to be reasonable in dealing with the public."

Making the meaning of the unanimous court still more clear, the author of the opinion says (262 U.S. 522, at page 537, 43 S.Ct. 630, 634, 67 L.Ed. 1103, 27 A.L.R. 1280):

"An ordinary producer, manufacturer, or shopkeeper may sell or not sell as he likes, *United States v. Trans-Missouri Freight Association*, 166 U.S. 290, 320, 17 S.Ct. 540, 41 L.Ed. 1007; *Terminal Taxicab Co. v. District of Columbia*, 241 U.S. 252, 256, 36 S.Ct. 583, 60 L.Ed. 984, Ann. Cas.1916D, 765, and while this feature does not necessarily exclude businesses from the

class clothed with a public interest, *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389, 34 S.Ct. 612, 58 L.Ed. 1011, L.R.A. 1915C, 1189, it usually distinguishes private from quasi-public occupations.

"In nearly all the businesses included under the third head above, the thing which gave the public interest was the *indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation.*" (Italics added.)

To revert to the case of *Tyson & Bro. United Theatre Ticket Offices v. Banton*, supra, 273 U.S. 418, at page 430, 47 S.Ct. 426, 428, 71 L.Ed. 718, 58 A.L.R. 1236, for a moment we find apt language describing the expression as follows:

"The authority to regulate the conduct of a business or to require a license, comes from a branch of the police power which may be quite distinct from the power to fix prices. The latter, ordinarily, does not exist in respect of merely private property or business, *Chesapeake & Potomac Tel. Co. v. Manning*, 186 U.S. 238, 246, 22 S.Ct. 881, 46 L.Ed. 1144, but exists only where the business or the property involved has become 'affected with a public interest.' * * *

"A business is not affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance. Nor is the interest meant such as arises from the mere fact that the public derives benefit, accommodation, ease, or enjoyment from the existence or operation of the business; and, while the word has not always been limited narrowly as strictly denoting 'a right,' that synonym more nearly than any other expresses the sense in which it is to be understood."

It can hardly be denied that the public is interested in the maintenance and continuity of the oil business, particularly as the same relates to the sale of gasoline and lubricating oils. And yet the Supreme Court of the United States denied the power of the Legislature to regulate the price in the case of *Williams v. Standard Oil Co.*, 278 U.S. 235, 239, 49 S.Ct. 115, 116, 73 L.Ed. 287, 60 A.L.R. 596, saying in part as follows:

"It is settled by recent decisions of this court that a state Legislature is without constitutional power to fix prices at which commodities may be sold, services render-

ed, or property used, unless the business or property involved is 'affected with a public interest.' * * * By repeated decisions of this court, beginning with *Munn v. Illinois*, 94 U.S. 113, 24 L.Ed. 77, that phrase, however it may be characterized, has become the established test by which the legislative power to fix prices of commodities, use of property, or services, must be measured. As applied in particular instances, its meaning may be considered both from an affirmative and a negative point of view. Affirmatively, it means that a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been devoted to a public use and its use thereby in effect granted to the public. * * * Negatively, it does not mean that a business is affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance. * * *

"In support of the act under review it is urged that gasoline is of widespread use; that enormous quantities of it are sold in the state of Tennessee; and that it has become necessary and indispensable in carrying on commercial and other activities within the state. But we are here concerned with the character of the business, not with its size or the extent to which the commodity is used. Gasoline is one of the ordinary commodities of trade, differing, so far as the question here is affected, in no essential respect from a great variety of other articles commonly bought and sold by merchants and private dealers in the country. The decisions referred to above make it perfectly clear that the business of dealing in such articles, irrespective of its extent, does not come within the phrase 'affected with a public interest.'"

I might add other authorities in which the legislative power has been denied, but there has never been a departure from the announced principle. Even in the case of *Nebbia v. New York*, supra, to which reference has been made, the court justifies its conclusion by the fact that milk was indispensable and that it was easily contaminable; that, in order to secure pure and wholesome milk for the public during the emergency which the Legislature declared to exist, it was necessary for the state to take control. The facts of the case when studied reveal that the comfort claimed to be found by appellant in the opinion does

not in truth exist. And here I desire to point out a fallacy involved in the majority opinion. The language quoted is taken from cases involving businesses "affected with a public interest" as hereinbefore defined, or from authorities dealing with the health or public safety. The result is that the language, lifted from its context and placed in a different setting, takes on a meaning altogether foreign to that which it originally possessed.

Nor can it be seriously contended that the amendment is not a price-fixing statute. It fixes the price indirectly and it has this additional vice that it leaves the fixed price to the dictates of the producer—in other words, the Legislature has, as said in the Doubleday-Doran Case, attempted to delegate authority to the producer of a trade-marked article to set the retail price. No one can object to the contract which he may enter into, but to make this contract binding by legislative fiat as to retail price upon persons who are not privy thereto violates every principle guaranteed the individual by the constitutional guaranties. The element of knowledge on the part of the seller is a minor factor, provided very simply by notice on the goods or label. It is manifest that the act here in question was not based upon the public interest, or that the consumer was considered. Its effect is to grant to the producer a privilege and preference unwarranted by the basic law. Not only that, but seeking to justify its enactment upon the theory that it is designed to prevent price cutting which injures a competitor, it reaches all merchants who, though they may be satisfied with a smaller profit than others engaged in the business, or who by reason of a greater efficiency are able to sell at lower prices and yet make the same profit, are still compelled to exact from the consumer a fixed retail price. It strikes at every merchant alike, regardless of intention, who desires to manage and control his own business. It is thus made perfectly clear that the object of the act is not to prevent unfair competition, but to fix prices. Such being its purpose and operation, it falls under the condemnation of cases involving similar efforts, such as *Fairmont Creamery Co. v. Minnesota*, 274 U.S. 1, 47 S.Ct. 506, 71 L.Ed. 893, 52 A.L.R. 163, and the other cases already cited.

But the amendment has other fatal defects. A study of the authorities which deal with the regulation of businesses, both

those which sustain and those which reject the claim of legislative power, reveals that the question of whether all the surrounding circumstances have operated to change the status of a private business free from legislative regulation into one in which the public has an interest is one for judicial inquiry and determination. *Wolff Packing Co. v. Court of Industrial Relations*, supra. But the act here in question attempts to lump all businesses into a common regulatory basket, provided only that the product is trade-marked and is originally in competition.

I have already mentioned the fact that the Legislature has attempted to delegate the price-fixing power to the producer or manufacturer. Before concluding, I wish to direct attention to the almost obvious and inescapable fact that there is no authority in the law for such action. A person may not be bound with respect to his property by the action, whim or caprice of another, particularly where the latter is not vested with any official responsibility or duty. The delegation of such power is contrary to the Fourteenth Amendment to the Federal Constitution. *Washington v. Roberge*, 278 U.S. 116, 49 S.Ct. 50, 73 L. Ed. 210, 86 A.L.R. 654; *Panama Refining Co. v. Ryan*, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446. Of course, I concede the producer's right to sell or not to sell at his own price, but when his property has been sold and passed into hands not hampered by contractual covenants the producer's control and right therein has altogether ceased. It takes no great amount of imagination to visualize the discriminatory practices and abuses which might be indulged were the power of the producer to establish a fixed retail price upheld.

Since the preparation of the foregoing opinion I have read the dissenting opinion by Mr. Justice Shenk and desire to express my concurrence therein.

The judgment should be affirmed.

SHENK, Justice (dissenting).

In concurring in the dissent of Mr. Justice Thompson I desire to comment on certain matters not touched upon in his opinion. In the first place let me point out that the particular statute under attack should not be confused with the Unfair Practices Act of 1935 (St. 1935, p. 1546), which denounces unfair competition and so-called piratical trade transactions, and

was designed to afford full relief against such abuses on behalf of anyone aggrieved. That act is said to have been passed at the behest of the business interests of the state, including the manufacturer, middleman and retailer. While the validity of that statute has not been passed upon by this court, it is enough to say for present purposes that it appears to be a painstaking endeavor by the Legislature to combat the abuses which the business interests have deemed unfair practices in the competitive field. It appears to have been designed to permit fair competition to function under its own economic laws.

The act now under attack as originally passed in 1931 was confined to the field of contract in the fixing of prices by agreement as between manufacturer, jobber, and retailer, and, when so limited, no valid objection to it has been pointed out. It is the amendment of 1933 which makes the prices so fixed binding on all who are not parties to the contract. In other words, it places within the power of the manufacturer or producer to fix the retail price of all commodities regardless of their reasonableness. It does not purport to denounce unfair competition alone, but affects fair competition as well. Carried to its length, it would enable the manufacturer or producer to destroy all competition and thus place the consumer at their uncontrolled mercy even as to food, clothing, and all commodities which are the subject of manufacture or production. This, too, without regard to serious marketing problems which have confronted some of the basic industries of the state. It is said that whether these results should follow is an economic problem with which the courts have nothing to do. But it is the business of the courts to see to it that, in carrying out any such program, the fundamental and guaranteed rights of the citizen to deal with his property as he chooses, subject to such reasonable regulations as may properly be imposed, are not destroyed. The statute under attack does not regulate.

It prohibits. It is essentially a price-fixing statute. To me it is beyond question that the Legislature itself could not fix the retail prices of all or any commodities not affected with a public interest or clothed with a public use. We are bound by the decisions of the Supreme Court of the United States on that subject, as pointed out in the opinion of Mr. Justice THOMPSON. If the Legislature itself is without power to fix the retail price of such commodities, how then can it delegate that power to one who is governed by no power except his own self interest?

It is said in the majority opinion that the statute under attack is confined to retail prices of trade-marked or branded commodities, that this is a valid classification, and that the Legislature has the right to single out commodities so marked as a proper subject of preferment. This is not so, for the reason that there is no limitation on the acquisition of trade-marks and brands, except the ingenuity, or lack of it, but aided by prize contests, on the part of the manufacturer or producer in conjuring up names to suit his purposes. He then may acquire an exclusive right to the *name* under sections 3196-3202 of the Political Code. Under this easy plan all commodities, essential or otherwise, may be trade-marked or branded. It does not follow that, because the right to the use of the name is exclusive, the right to shackle the commodity with a retail price is vested in the owner of the name, regardless of where the commodity may find itself in the channels of trade, divorced from any contractual relation with the owner of the name.

As to the price-fixing feature of the statute, the highest court in the land has spoken in terms which I feel bound to respect. Also, the state of New York enacted the same statute now under attack. The highest court of that state recently and correctly held it void under the Federal Constitution. In deference to what I deem to be the established law, I arrive at the same conclusion.

5 Cal.2d 784

**PYROIL SALES CO., Inc., v. THE PEP
BOYS, MANNY, MOE & JACK OF
CALIFORNIA.***

L. A. 14954.

Supreme Court of California.

Feb. 27, 1936.

**As Modified on Denial of Rehearing
March 26, 1936.**

**Trade-marks and trade-names and unfair com-
petition** §68(2)

Producers of branded and trade-marked article held entitled to injunction restraining dealers from selling article at retail prices lower than those fixed by producer, although retail dealers had not bound themselves by contract to resell at specified price, where other dealers had agreed with producer not to resell at less than fixed prices (Gen.Laws 1931, Act 8782, § 1; Gen.Laws Supp.1933, Act 8782, § 1½).

**SHENK and THOMPSON, JJ., dissent-
ing.**

In Bank.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by the Pyroil Sales Company, Inc., against The Pep Boys, Manny, Moe & Jack of California. Judgment for defendants, and plaintiff appeals.

Reversed.

John C. Mead, of Los Angeles, for appel-
lant.

Travers, Landels, Weigel & Crocker,
Stanley A. Weigel, and George N. Crocker,
all of San Francisco, for Northern Califor-
nia Retail Druggists Association, Ltd., and
California Pharmaceutical Association,
amici curiae.

Loeb, Walker & Loeb and H. F. Selvin,
all of Los Angeles, for respondents.

PER CURIAM.

By stipulation of counsel and order of court, the above-entitled cause was ordered submitted, and to be decided concurrently with Max Factor & Co. et al. v. Kunsman (Cal.Sup.) 55 P.(2d) 177, decision in which cause has been this day filed.

The appeal here, as in the Factor Case, is by the plaintiff from a judgment of dismissal entered after demurrer to the complaint sustained without leave to amend. Although not as extensive in its allegations as the complaint in the Factor Case, the complaint is sufficient to raise the same general question of the constitutionality of the 1933 amendment to the Fair Trade Act (St.

1931, p. 583, Gen.Laws 1931, Act 8782, St. 1933, p. 793, Gen.Laws Supp.1933, Act 8782, § 1½). Plaintiff herein seeks an injunction pursuant to the provisions of the act, restraining the defendants from selling Pyroil, a branded and trade-marked article, at retail prices lower than those sought to be maintained by the plaintiff. As in the Factor Case, defendants have not bound themselves by any form of contract to resell the commodity at any specified price, but an obligation to so resell is sought by the plaintiff to be imposed on defendants (by the application of section 1½ of the Fair Trade Act, amendment of 1933) by virtue of the fact that other dealers have agreed with plaintiff not to resell at less than certain prices.

As the questions on appeal are identical in the two actions, the decision in the Factor Case is decisive of the general question on appeal in this case. Because of that fact, we do not deem it necessary to consider certain specifications urged in the demurrer that the complaint was uncertain, ambiguous, and unintelligible. Therefore, on the authority of the decision in Max Factor & Co. et al. v. Kunsman (Cal.Sup.) 55 P.(2d) 177, this day filed, the judgment herein is reversed and it is ordered that the trial court enter judgment in the within cause in favor of appellant as prayed.

Mr. Justice SHENK and Mr. Justice THOMPSON dissent. See their opinions filed in Max Factor & Co. et al. v. Kunsman (Cal.Sup.) 55 P.(2d) 177, filed today.



11 Cal.App.2d 126

**FITZGERALD v. TERMINAL DEVELOP-
MENT CO.**

Civ. 5506.

Supreme Court of California.

March 5, 1936.

In Bank.

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

On rehearing.

For prior opinion, see 53 P.(2d) 177.

Treadwell, Laughlin & Treadwell, of San Francisco, and Rex Hardy, of Los Angeles, for appellant.

Chapman & Chapman, of Los Angeles, for respondent.

PER CURIAM.

In denying the petitions for hearing herein, we withhold approval from that portion of the decision of the District Court of Appeal of the Third Appellate District to the effect that the deed here involved, even if ineffective as a corporation instrument, was nevertheless a sufficient conveyance from the president of the corporation, as an individual, to vest title in the grantee named therein.



5 Cal.2d 438

**MERMAN v. CALISTOGA JOINT UNION
HIGH SCHOOL DIST. et al.**

Sac. 4951.

Supreme Court of California.

Feb. 28, 1936.

Schools and school districts — 141(2)

School teacher *held* not entitled to complain of dismissal on ground that she was a permanent teacher and could be dismissed only for cause, where she resigned before requisite three years of successive employment was served and was thereafter re-employed, notwithstanding resignation was allegedly demanded as a condition of re-employment, where no fraud or duress was shown (School Code, §§ 5.500 to 5.502, repealed and re-enacted by St.1931, p. 1394).

In Bank.

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Action by Ivy S. Merman against the Calistoga Joint Union High School District and others as trustees thereof. From an adverse judgment, the plaintiff appeals.

Affirmed.

Nathan F. Coombs and E. L. Webber, both of Napa, for appellant.

Mervin C. Lernhart, Dist. Atty., and Wallace Rutherford, both of Napa, for respondents.

LANGDON, Justice.

Plaintiff sued to restrain defendants from discharging her from a position as teacher in the Calistoga High School, her claim be-

ing that she was a permanent teacher with tenure. The lower court gave judgment for defendants, and plaintiff appeals.

Plaintiff was first employed by defendant district as a substitute teacher in 1928, and then as a probationary teacher from November 5, 1928, to June 30, 1931. Thereafter the resignations of plaintiff and several other teachers were requested by the board, and plaintiff presented her resignation, which was accepted. Thereafter she reapplied for a position and was elected for the school year 1931-32, and subsequently for the years 1932-33, and 1933-34. On May 4, 1934, she was discharged.

Plaintiff claims that she became a permanent teacher with tenure, and was subject to dismissal only for misconduct, as a result of her continuous teaching from 1928 to 1934. Normally such tenure would be acquired by three years of successive employment. School Code, §§ 5.500, 5.502, repealed and re-enacted by St.1931, p. 1394. Plaintiff, however, resigned her position before the requisite period was served. She charges that her resignation was demanded as a condition of re-employment, in pursuance of a policy of the board to circumvent the tenure law. It appears that in 1931, section 5.501 of the School Code was enacted, providing that in a school district with an average daily attendance of less than 850 pupils, the classification of teachers as "permanent" after three years should be wholly optional with the trustees. Doubtless the defendants intended to avail themselves of the provisions of this statute, and to avoid any possible carrying over of permanent employees, would have dismissed plaintiff if she had not resigned. Plaintiff has not established any fraud, duress, or intent on the part of defendants to defeat the purposes of the law; but in any event, such claims would have been more properly raised at the time her resignation was requested. The record shows that she acquiesced in the request, resigned without protest, and applied for re-employment without asserting any tenure rights. Under these circumstances her resignation must be held to have terminated any prospective permanent status based upon past service. See *Montgomery v. Board of Education*, 137 Cal.App. 668, 31 P.(2d) 243.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.

LARSEN et al. v. APOLLONIO.
Sac. 4911.

Supreme Court of California.
Feb. 28, 1936.

As Modified on Rehearing March 26, 1936.

1. Waters and water courses $\S$ 152(8)

In action to quiet appropriator's title to waters of stream, where rented water was emptied into stream above appropriator's diversion dam and ditch and entire stream was there diverted to appropriator's land, evidence *held* to sustain finding that appropriator acquired a prescriptive right to all waters of stream.

2. Waters and water courses $\S$ 144½

Where appropriator's use of ditch for conveying water from stream for 37 years was open, notorious, and under a claim of right to all waters of stream, appropriator acquired not only right to maintain such ditch but also to waters flowing therein.

3. Waters and water courses $\S$ 152(8)

In action by appropriator to enjoin taking of water directly from stream by means of hydraulic ram and well sunk within 38 feet of stream in loose, porous subsoil, evidence *held* to sustain finding that such user caused substantial diminution in flow of stream.

4. Waters and water courses $\S$ 144

Riparian proprietor *held* not entitled to use of waters from stream for domestic purposes, where appropriator had acquired prescriptive right to use of all the waters of stream.

5. Waters and water courses $\S$ 142

Rights gained by prescription to use of waters from stream are absolute; there being no correlative rights between riparian owner and one who gains title by prescription.

6. Waters and water courses $\S$ 152(3)

Removal of some 16,000 gallons of water a day from stream having maximum amount of 15 miner's inches *held* not such an unsubstantial injury to appropriator entitled to full use of all the waters as to justify denial of injunction restraining such removal, where appropriator was compelled to rent water in addition to that from stream to satisfy his needs.

In Bank.

Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

Action by Catherine C. Larsen and Emil E. Larsen against Norman L. Apollonio

to quiet plaintiffs' title to the waters of a stream. From an adverse decree, defendant appeals.

Affirmed.

George B. White, of San Francisco, for appellant.

Henry S. Lyon, of Placerville, Stanley W. Reckers, of Sacramento, and Robert E. Roberts, of Placerville, for respondents.

CURTIS, Justice.

This action was brought to quiet plaintiffs' title to the waters of a stream, which will be later referred to and described, and to enjoin the defendant from diverting, pumping, or otherwise interfering with said waters. The stream involved is a small tributary of the south branch of Brush Canyon creek in the county of El Dorado. The stream runs in the bed of a ravine in a northwesterly direction, and plaintiffs' lands are situated in a westerly direction from the stream. The evidence shows that in or about the year 1895, some 37 years before this action was brought, plaintiffs constructed a dam in the stream and a ditch extending from said dam to their said lands, and by means of said dam and ditch they diverted all the waters of said stream to their said lands, where they have been used by plaintiffs for household and domestic purposes and for the irrigation of their said lands. Some 4½ years before the institution of this action, the defendant acquired a portion of the tract of land through which said stream runs. Defendant's land is situated above the dam and ditch constructed by plaintiffs, and said stream enters defendant's land at the south boundary thereof and runs in a northwesterly direction through the entire tract and then down to plaintiffs' point of diversion. There seems to be some disagreement between counsel as to the distance from defendant's northerly line to the plaintiffs' dam and ditch. One claims it is 300 to 350 feet, while the other insists that it is 1500 feet. The exact distance is not material. After defendant acquired his tract of land, he sunk a well thereon and within less than 40 feet from said stream, and has installed a pump in said well, by means of which he pumps from said well a substantial quantity of water which he has used upon his said tract of land. He also has installed a hydraulic ram at the mouth of an old tunnel located in the bed of said ravine by which he pumps and diverts water which he uses

upon his said land. The pump installed in the well has a capacity of 900 to 1000 gallons per hour. He pumped from the well approximately 16,000 gallons a day, and from the tunnel by the hydraulic ram some 240 gallons per day. Plaintiffs claim to be the owners of the use to all the waters in the stream, and brought this action, as above noted, to quiet their title to said waters and to enjoin the defendant from interfering with their exclusive use of said waters. Upon the trial of the action, the court made findings in favor of plaintiffs and entered its judgment quieting plaintiffs' title to the waters of said stream, the amount of which the court fixed at 15 miner's inches, and enjoining defendant from using any of said waters during the irrigating season of each year, beginning May 1 and ending October 31. The defendant has appealed from this judgment.

[1,2] Defendant first contends that the evidence is insufficient to support the court's finding that the plaintiffs are the owners of the right to take and divert all the waters flowing in said stream. In support of this contention defendant calls to the attention of the court that, at the time plaintiffs constructed said dam in said stream and the ditch leading from said dam to their lands, they constructed another ditch which was connected with said stream at a point some distance above the point where they constructed said dam. This second ditch was used by plaintiffs for the purpose of conducting water which they rented from a third party, and which they conveyed in said second ditch, where it was discharged into said stream, from whence it flowed down to plaintiffs' said dam and into their ditch and then onto plaintiffs' lands, where it was used for the purpose of irrigating plaintiffs' said lands. Defendant argues that the ditch constructed from said dam to their lands was for the purpose of conveying this rented water to their lands and not for the purpose of conveying thereto the waters of the stream. There is absolutely nothing in the evidence to support this claim. Plaintiffs testified that the ditch leading from their land to their premises was constructed for the purpose of conveying both the rented water and the water from the stream. It would seem most illogical that plaintiffs would rent water from a third person and at the same time neglect to use water which they could take from the stream without any charge. The evidence shows that, not only did plaintiffs use all the water of the

stream upon their lands, but that they had need of more water and rented it from other parties, using the same ditch to convey both supplies to their premises. The evidence shows that plaintiffs' use of this ditch for conveying the water from the stream was open, notorious, and under a claim of right to all of said water. They thus acquired not only a right to maintain their ditch but also to the waters flowing therein. *Smith v. Gaylord*, 179 Cal. 106, 108, 109, 175 P. 449.

[3] It is next contended that there is no showing of any injury to plaintiffs by any act of defendant, for the reason that the evidence fails to show that the water diverted by defendant is a part of said stream; in other words, defendant contends that there is no showing that his taking of water by means of his well and pump, and also by his hydraulic ram, causes any substantial diminution in the flow of the stream. As to the water taken by means of the ram, the evidence shows that the ram is located at the mouth of the tunnel and that the water flowing through the tunnel is in fact a part of the water of the stream. There can be no question, then, that whatever water is taken by means of defendant's hydraulic ram is taken direct from the stream and is a part thereof. Such taking, of course, diminishes the amount flowing in the stream.

As to the water diverted by means of defendant's well and pump, the evidence shows that the well is located about 38 feet from the stream, and that the land underlying the bed of the stream and extending on either side thereof is of a loose, porous soil, that the water level in the well corresponds with the bed of the stream, and that the effect of pumping from the well is followed by a slight lessening of the amount of water flowing in the stream. We must concede that the evidence on this point is not as satisfactory as might be desired. It satisfied the trial court, and we cannot say that it was so lacking in evidentiary value as not to support the court's conclusion. The mere location of defendant's well in so close proximity to the stream, with the other attending circumstances, would seem to make out a *prima facie* case in favor of plaintiffs and cast upon defendant the burden of proving that his development of water had not interfered with the waters in the stream. *Silver King Consol. Mining Co. v. Sutton* (Utah) 39 P.(2d) 682.

[4, 5] A further contention of defendant is that he is a riparian proprietor, and therefore is entitled to use water for domestic purposes. As between riparian proprietors on a stream, the claim of one such owner to use of water for certain necessary purposes may be correct, but the present controversy is not such a one. The plaintiffs have gained a right to use all the waters of the stream by appropriation. There are no correlative rights between a riparian owner and one who gains title by appropriation. The latter's rights are absolute. *Clemens Horst Co. v. Tarr Min. Co.*, 174 Cal. 430, 163 P. 492. *Katz v. Walkinshaw*, 141 Cal. 116, 70 P. 663, 74 P. 766, 64 L.R.A. 236, 99 Am.St.Rep. 35, has no application to the facts of this case. That action dealt with percolating waters alone, and had no reference to subsurface waters which, due to their close proximity to the surface stream, are in law a part of the stream itself.

[6] Finally, the defendant contends that the injury sustained by plaintiffs through the taking of the small quantity of water through his well and pump is so slight as to be unsubstantial, and therefore an injunction will not lie to prevent the same. Defendant cites a passage from *Hudson v. Dailey*, 156 Cal. 617, 630, 105 P. 748, 754, that, "in order to make a case for an injunction, it was necessary for the plaintiff to show substantial injury." We are not prepared to say that the evidence in this case brings defendant within the rule just stated. The stream involved is small; the court fixing its run during the irrigating season at 15 inches. Defendant claims that this finding was beyond the evidence, and that the stream is much less in size than that found by the court. We think there is evidence to support such finding. But to take from the stream the quantity of water which the evidence shows defendant's pump and hydraulic ram are capable of diverting, when the maximum amount of the stream is even 15 inches, cannot, we think, be held to be an unsubstantial injury to plaintiffs. The evidence shows that the latter have need of all the water flowing in the stream for domestic, household, and irrigating purposes, and that they are also compelled constantly during the irrigating season to rent other water in order to properly care for the crops produced upon their lands. **Whatever diminution in the stream is caused by**

defendant's developments, if allowed to continue, would be at plaintiffs' expense, and the latter would be compelled to increase the amount of rented water used by them. We think this contention is without merit and has no support in the facts before us or the law applicable thereto.

We are satisfied with the conclusion reached in this case by the trial court, and are of the opinion that its judgment should be affirmed. It is so ordered.

We concur: WASTE, C. J.; LANGDON, J.; THOMPSON, J.; SHENK, J.; SEAWELL, J.



11 Cal.App.2d 235

**HILD v. JUSTICE'S COURT OF STOCKTON
TP., SAN JOAQUIN COUNTY, et al.**

Civ. 5533.

Supreme Court of California.

March 12, 1936.

In Bank.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

On petition for hearing.

Prior opinion, 53 P.(2d) 763.

Lafayette J. Smallpage and Charles H. Epperson, both of Stockton, for appellant.

Nutter & Rutherford, D. R. Jacobs, and Stephen Dietrich, all of Stockton, for respondents.

PER CURIAM.

In denying petition for hearing in this case, after decision of the District Court of Appeal, Third Appellate District, attention should be called to the fact that the opinion apparently contains a clerical error in its reference to rule V. The court evidently intended to refer to section 1 of rule V. Rule V consists of three sections, and, while none of the sections is applicable to the present case, yet the rule refers to several matters other than motions to dismiss for failure to file transcript or briefs on appeal.

5 Cal.2d 431

**FREEMAN et al. v. RIVER FARMS CO.
OF CALIFORNIA et al.
S. F. 15474.**

Supreme Court of California.
Feb. 29, 1936.

Rehearing Denied March 26, 1936.

1. Frauds, statute of Ⓒ84

Oral contract of landowning corporation to purchase warrants received by contractor from levee district for repairing levee adjacent to lands of corporation *held* not invalid under statute of frauds, where repairs were necessary to protect land from floods and contractor would not have undertaken work without such agreement (Civ.Code, § 1624, subd. 4).

2. Corporations Ⓒ410

President of landowning corporation, empowered by by-laws to make and sign agreements and given general and active management of business and affairs of company, *held* authorized to agree to purchase warrants given by levee district to contractor making repairs on levee adjacent to lands of corporation which were necessary to protect land from floods, where contractor would not have undertaken work without such agreement.

3. Corporations Ⓒ310(1)

Managers of corporations are not limited to use of means usual or necessary to objects contemplated by organization of corporation, but, where not restricted by law, may choose means convenient and adapted to such end, although neither usual means, nor absolutely necessary for purpose intended.

In Bank.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by George R. Freeman and another, copartners doing business under the firm name and style of Freeman & Murch, against the River Farms Company of California and others. Judgment for plaintiffs, and defendants appeal.

Affirmed.

For prior opinion, see 44 P.(2d) 422.

John E. Truman, of San Francisco, for appellants.

John L. McNab and Robert Littler, both of San Francisco, amici curiæ for James S. McCandless and John A. McCandless & Co., Limited.

George R. Freeman, of Willows, for respondents.

THOMPSON, Justice.

A dismissal having been filed as against all defendants except the River Farms Company, there is but one defendant involved herein, although by the title it appears otherwise.

Plaintiffs brought this action to recover from defendant the amount due for work done for the Sacramento River West Side Levee District by way of repairs to the levee on the west side of the Sacramento river, north of Knights Landing and adjacent to lands owned by the defendant. It appears that the district comprises about 107,000 acres and that the defendant owns about 30,000 acres in the southern portion of the district; that for a few years subsequent to 1915 the usual procedure followed by the district in paying for work was to issue its warrants to the contractors; that thereafter an assessment would be levied for the purpose of retiring the warrants. However, later on, and particularly commencing in 1929, conditions became so bad that the district "could do no work and compel the contractors to take warrants, for which reason the district was obliged to make arrangements with some bank or landowner whereby the bank or landowner would agree to cash the warrants for the contractor." In fact, the district had an agreement with Dr. Dow as president of the defendant if it would not call on him for any financing for the thirty miles north of defendant's land, that when it became necessary to do work along the twenty miles of the water front of defendant's land, he would see to it that the warrants were financed. When the particular work involved in this case became necessary Dr. Dow told the board of commissioners of the district to instruct any contractor who might be interested in doing the work to see him about cashing the warrants. Prior to the time plaintiffs bid on the present work, one of them called Dr. Dow on the telephone and asked "if the River Farms Company would pay the warrants." Upon assurance that it would, plaintiffs bid upon and secured the work. Had it not been for that assurance, it was testified, plaintiffs would not have submitted a bid. The work was completed. Dr. Dow died and the River Farms Company refused to take up the warrants at a 5 per cent. discount. This action was accordingly brought, and judgment having gone for plaintiffs, the defendant prosecutes this appeal.

The trial court found, among other things, as follows: "That said agreement between defendant and the Board of Commissioners of said Levee District (t)o buy or cash said warrants was made expressly for the benefit of the successful bidder for such contemplated work and that after the making of said agreement and prior to the making of any contract by plaintiffs with the Board of Commissioners of said Levee District for the performance of said work, and prior to the doing of any of said work provided in said contract, defendant agreed with plaintiffs to accept the said warrants so to be issued by said Levee District if and when they were issued and to pay therefor the face value of said warrants less a discount of five per cent, said face value to include the interest accrued thereon to the date of delivery of said warrants to defendant, and the Court finds that plaintiffs would not have entered into a contract with the Levee District and would not have performed any of the work in said Levee District without such agreements on the part of defendant, and the Court further finds that defendant knew that plaintiffs contracted to do said levee work for said Levee District upon the faith of said agreement between the Levee District and the defendant and upon the faith of the contract between these plaintiffs and the defendant, and knew that plaintiffs would not have performed said work had it not been for said agreements and each of them; and the Court further finds that in consideration of the promise of the defendant corporation to pay for said work, plaintiffs did perform said work in compliance with the requirements of the engineer of the district." A reading of the transcript reveals that the quoted finding is supported by substantial testimony. Briefly stated, the appellant contends that the president of appellant could not bind it to take the warrants; that there is a fatal variance between an allegation that the contract was for the benefit of respondents and the proof to the effect that the contract was made directly with appellant; that the contract being an agreement to purchase warrants, and being oral, is invalid by reason of the statute of frauds (Civ.Code, § 1624, subd. 4); and lastly, that plaintiffs did not sustain the burden of proof.

[1] We have, in effect, already passed upon the last of these contentions. The most serious of the remaining is the assertion that the contract is invalid. But as we view the situation, and as the trial court

held, it cannot be sustained. It was necessary to the protection of appellant's lands that repairs be made to the levee prior to the danger of flood waters in the year 1930-31. The levee district was charged with that responsibility, it is true, but the appellant was the concern vitally interested therein. There can be no doubt that appellant had the right under such circumstances to take such action as was essential or advisable to the protection of its property. The district was apparently at a loss to secure the work to be done without the assistance and cooperation of a third party. The logical answer was to seek the assistance of the concern, the property of which would be endangered by high water. The contractors would not bid without such cooperation. The result was that the contractors offered to do the work if the appellant would pay therefor, by taking the warrants and giving them the money. It was as though the contract were triangular. The plaintiffs performed everything on their part to be performed and appellant should be compelled to pay therefor. In other words, we cannot view the contract as one simply for the purchase of the warrants, but as a contract for performance of work for which appellant was to pay through the medium of accepting the warrants and giving cash. Under such circumstances the plea of the statute of frauds must fall. That the trial court viewed the matter in the same light is evident from the finding we have already quoted.

This disposition of the point practically eliminates the argument that there is a fatal variance between the allegations and the proof, although it should be added that an amendment was permitted to conform to the proof, to the effect that there was a direct agreement between plaintiffs and appellant, as well as the agreement first alleged between the district and respondents.

[2, 3] Finally, with respect to the argument that the president of the company was not authorized to bind the company by either actual or ostensible authority, it must be said that appellant cannot prevail. The by-laws of appellant discloses that the president was given the power to "make and sign agreements in the name and behalf of the company," and also "the general and active management of the business and affairs of the company." It cannot be successfully contended that under this provision the president would not have been

authorized to take action to prevent the flooding of appellant's land. See *Western Lithograph Co. v. Vanomar Producers*, 185 Cal. 366, 197 P. 103, and cases there cited. The fact that the contract took a form different from the one we might ordinarily expect to find should make no difference. In truth, apt language is found in *Woods Lbr. Co. v. Moore*, 183 Cal. 497, 502, 191 P. 905, 907, 11 A.L.R. 549, as follows: "With respect to the means which the corporation may adopt to further its objects and promote its business its managers 'are not limited in law to the use of such means as are usual or necessary to the objects contemplated by their organization, but, where not restricted by law, may choose such means as are convenient and adapted to the end, though that be neither the usual means, nor absolutely necessary' for the purpose intended. *Winterfield v. Cream City B. Co.*, 96 Wis. 239, 71 N.W. 101." We think appellant falls into the error of concluding the agreement to be one solely for the purchase of warrants, because it calls our attention to another portion of the by-laws which reserves to the directors the power "to purchase or otherwise acquire for the company any property rights or privileges which the company is authorized to acquire at such prices and on such terms as they may think fit." But, as we have already said, we view the transaction, as did the trial court, as not one for the purchase of property so much, as one for the general protection of the property and affairs of the company.

Judgment affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.



5 Cal.2d 407

FORBIS et al. v. HOLZMAN.
L. A. 15408.

Supreme Court of California.
Feb. 26, 1936.

Rehearing Denied March 26, 1936.

1. Physicians and surgeons Ⓒ18(9)

In action against anaesthetist for death of patient during operation, whether patient died of asphyxiation as result of anaesthetist's negligence *held* for jury.

2. Appeal and error Ⓒ1001(1)

Where evidence was sufficient to take case to jury, jury's verdict thereon was binding in absence of serious error in law.

3. Appeal and error Ⓒ1050(1)

Admission of physician's testimony in answer to hypothetical question that in his opinion patient's death resulted from asphyxiation in administering anaesthetic during operation *held* not prejudicial error, notwithstanding omission in question of evidence of drop in blood pressure before cessation of respiration, where evidence and conclusions therefrom were conflicting.

4. Evidence Ⓒ553(3)

Hypothetical question may be framed on any theory of questioning party which can be deduced from evidence, and statement may assume any fact within limits of evidence on which opinion of expert is desired, and may omit any facts not deemed by questioner material to inquiry.

5. Trial Ⓒ260(1)

Failure to give proposed instructions which had already been covered by other instructions *held* not error.

In Bank.

Appeal from Superior Court, Los Angeles County; H. Parker Wood, Judge.

Action for damages for death by Frank H. Forbis and another against Ralph R. Holzman. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Prior opinion, 45 P.(2d) 215.

Gibson, Dunn & Crutcher and Philip C. Sterry, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Neal Chalmers, Deputy Atty. Gen., W. C. Rucker, Dist. Atty., of Marysville, and Simpson & Simpson, W. E. Simpson and Troy Pace, all of Los Angeles, for respondents.

PER CURIAM.

This is an action for wrongful death by the surviving husband and daughter of Beulah Forbis, deceased. The jury brought in a verdict for plaintiffs, and defendant appealed.

Mrs. Forbis engaged defendant, a physician and surgeon, as anaesthetist during an operation for the removal of the appendix and drainage of the gall bladder. She died while on the operating table. Plaintiffs contend that she died of asphyxiation as a

result of defendant's negligence. Defendant contends that she died of heart failure.

The evidence shows that after Mrs. Forbis was anaesthetized, the operation was performed, and the operating surgeon was closing the incision when he requested deeper anaesthesia. The anaesthetic used in this case was ethylene gas, carbon dioxide gas, ether, and oxygen. Defendant, at the time of the request by the operating surgeon, noticed that the oxygen in the tank was being depleted. He ordered a fresh supply, which the hospital orderly brought. It took about five minutes to connect up the new tank, and when this had been completed, Mrs. Forbis was dead.

Mary Hotaling, a visitor in the spectator's gallery above the operating table, testified for plaintiff that she heard defendant say, "The oxygen is gone, bring in a fresh tank, and make it snappy." Edith Tudor, the attending nurse, testified to the same effect. The nurse further testified: "At the time I heard the statement with reference to the need for more oxygen I observed that the anaesthetic mask was being held on the patient's face by Dr. Holzman. It was removed after the patient stopped breathing. During the time intervening it was held on the face of the patient by Dr. Holzman." Mary Hotaling also testified that during the five-minute period in which the tanks were changed, the mask was held on the patient's face, and lifted only for an instant. Defendant testified that he did not close the valve on the ethylene tank when he called for more oxygen. The nurse testified that when the new tank was brought in she observed that the patient's skin was blue (indicating cyanosis resulting from insufficient oxygen in the blood stream). Dr. Trenery, an osteopathic physician called by plaintiff, and duly qualified as a medical expert experienced in the use of anaesthetics, testified in answer to an hypothetical question, to the effect that the deceased died of asphyxiation resulting from the administering of ethylene gas without oxygen. The medical testimony was all in agreement on the fact that the breathing of such gas without oxygen for a few minutes would probably be fatal.

Defendant testified on his own behalf that he did not hold the mask tightly over the patient's face, but kept his finger under it, raising it slightly, so that she could breathe, during the period of the change of the oxygen tanks. A number of medical

experts testified for defendant that the patient's symptoms, particularly a drop in blood pressure prior to cessation of respiration, indicated death of heart failure, and that the symptoms of asphyxiation were not present.

[1,2] Undoubtedly the evidence was in conflict, and though the weight of expert medical opinion produced by defendant was greater than that brought in by plaintiffs, there was direct evidence offered by plaintiffs which supported their theory of death, and such evidence was sufficient to go to the jury, with the result that their verdict is binding in the absence of serious error in law.

[3,4] Defendant urges that such error occurred in the hypothetical question asked Dr. Trenery, plaintiffs' expert witness, the contention being that the question asked was not based upon the facts developed by the testimony, and that therefore the opinion given in answer was worthless as evidence and highly prejudicial. The chief fault found with the question was that it assumed that there was nothing unusual in the blood pressure of the patient during the anaesthesia. Defendant's evidence pointed to such a drop in blood pressure before cessation of respiration, and it is contended that the omission of this fact from the hypothetical question made the answer one which was not truly applicable to the case of the deceased. But it is apparent that the actual symptoms of the patient were in dispute, defendant's expert witnesses assuming that the mask was held away from the patient's face so that she received sufficient oxygen, and plaintiffs' witness assuming the contrary. The alleged fact of a drop in blood pressure before respiration ceased, brought out by defendant's witnesses, is only one symptom, and the conclusion derived from it is in conflict with that derived from other evidence produced by plaintiffs. It may be noted also that the last blood pressure reading showed a normal result, and that the exact time of cessation of respiration was not observed. Hence it was possible that the drop in blood pressure testified to by defendant's witnesses did not precede the cessation of respiration. It was for the jury to determine the truth or falsity of these purported facts; and an opinion of an expert does not become valueless by reason of omission from the question of some disputed facts. "The question may be framed upon any theory of the questioning party

which can be deduced from the evidence, and the statement may assume any facts, within the limits of the evidence, upon which the opinion of the expert is desired. It may omit any facts not deemed by the questioner material to the inquiry." *Treadwell v. Nickel*, 194 Cal. 243, 228 P. 25, 35.

On cross-examination of Dr. Trenery defendant brought out the conflicting evidence, and the jury were fully informed. Under these circumstances, we cannot say that prejudicial error has been shown.

[5] Defendant also complains of the failure to give a number of requested instructions. Every one of the proposed instructions which was correct and relevant was already covered by other instructions given by the court, and no error appears in this connection.

The judgment is affirmed.



5 Cal.2d 401

FREY & HORGAN CORPORATION v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

S. F. 15485.

Supreme Court of California.

Feb. 26, 1936.

1. Prohibition Ⓒ5(2)

Order of superior court denying a motion to quash service of process may be reviewed on writ of prohibition.

2. Process Ⓒ62

Service of notice of a petition for an order directing arbitration to proceed is "process," and subject to general rule that a court may not acquire jurisdiction in personam over defendant by service of notice or other process outside territory or state in which forum exists.

[Ed. Note.—For other definitions of "Process," see Words & Phrases.]

3. Courts Ⓒ25

Provision for arbitration by a designated committee and that contract would be governed by law of California *held* an agreement to submit to jurisdiction of California, since statute relating to enforcement of arbitration agreements would be read into contract, rendering defendant amenable to extraterritorial

service of process of court enforcing arbitration (Code Civ.Proc. § 1282).

In Bank.

Original proceeding by Frey & Horgan Corporation for writ of prohibition against the Superior Court of the State of California in and for the City and County of San Francisco, Hon. I. L. Harris, a Judge thereof, and others.

Writ denied.

Thomas H. Breeze, of San Francisco, for petitioner.

Williamson & Wallace, of San Francisco (Willard S. Johnston, of San Francisco, of counsel), for respondents.

CONREY, Justice.

[1] Petition for writ of prohibition commanding the respondents to desist and refrain from further proceedings in an application in the respondent court for an order directing arbitration. In answer to the first question stated by the petitioner, it should be said that an order of the superior court denying a motion to quash service of process may be reviewed on writ of prohibition. *Jardine v. Superior Court*, 213 Cal. 301, 304, 2 P.(2d) 756, 79 A.L.R. 291.

El Dorado Oil Works, a California corporation, filed its petition in the superior court of the city and county of San Francisco under the provisions of section 1282 of the Code of Civil Procedure for an order directing arbitration to proceed under certain alleged contracts between said El Dorado Oil Works and the present petitioner, Frey & Horgan Corporation, alleging that each of said contracts provide: "Any dispute arising hereunder shall be submitted to arbitration before a committee of the Foreign Commerce Association of the San Francisco Chamber of Commerce. * * * This contract in all respects shall be governed and construed by the laws of the State of California."

After the arbitration proceeding had been filed in the superior court, attempted service was made upon the Frey & Horgan Corporation by delivery to the secretary of that corporation, in the city of New York, of a written notice, authorized by said section 1282 of the Code of Civil Procedure, that the application and motion for the desired order would be presented to the court at a time stated. Thereafter Frey & Hor-

gan Corporation, appearing specially for that purpose, pursuant to notice duly given, moved the court for an order quashing service of said notice of motion for an order directing arbitration to proceed. This motion to quash was made upon the ground that the notice authorized by said section 1282 is process of court and as such cannot have effect outside of this state and cannot be effective to compel Frey & Horgan Corporation to submit to jurisdiction of the court. The motion to quash having been denied, the court ordered that the arbitration proceed and, unless prohibited by this court, such arbitration will proceed before the specified arbitrators, and respondent court, when an award shall have been made, will proceed, on the application of El Dorado Oil Works, if such award shall be in its favor, to make its order and judgment thereon in accordance with said award.

Section 1282 of the Code of Civil Procedure provides, as preliminary procedure in the enforcement of arbitration agreements, that an aggrieved party may petition the superior court for an order directing that such arbitration proceed in the manner provided for in the agreement; that "five days' notice in writing of the hearing of such application shall be served personally upon the party in default"; that "the court shall hear the parties, and upon being satisfied that the making of the agreement or such failure to comply therewith is not in issue, shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." If the making of the agreement or the default be in issue, additional provision is made for a summary trial thereof.

[2] The second question presented by petitioner herein is stated as follows: "Is the notice of a petition to a superior court for an order directing arbitration to proceed, provided for by section 1282 of the Code of Civil Procedure, 'process'?" To this the answer must be in the affirmative, whenever the object is to acquire jurisdiction. We need not extensively discuss the various technical meanings of the word "process." It has been well said that a notice may be properly designated as "process" when it is given by authority of law for the purpose of acquiring jurisdiction of a defendant.

In the absence of any existing jurisdiction of the person, necessarily the notice

questioned in this proceeding would be a notice given for the purpose of acquiring jurisdiction over the Frey & Horgan Corporation, defendant. It follows that upon valid service thereof its effect necessarily must be to give the court personal jurisdiction over said defendant and to vest in the court authority to enter a personal judgment against it upon such award as might be made in the proceeding. But first there must be service, valid as service of process required for the purpose of acquiring personal jurisdiction.

The general rule has long been established that a court may not acquire jurisdiction in personam over the defendant in an action, by service of notice or other process outside the territory or state in which the forum exists. It was so decided in the case of *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565, and there are innumerable decisions in accordance with that authority. We find no reason for denying application of the stated principle to a special proceeding like that here under review.

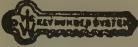
[3] But as we have seen, each of the contracts contained an agreement, both that any dispute arising thereunder should be submitted to arbitration before the designated arbitration committee, and that the contract "*in all respects shall be governed and construed by the laws of the State of California.*" The contracts having been made with direct affirmative reference to the right of arbitration, and particularly with reference to the laws of California, the provisions of section 1282, Code of Civil Procedure, should be read into the contracts as part thereof. The agreement to submit the dispute to the arbitration committee is an agreement to cooperate in that proceeding. It is presumed that the contract was made in good faith. Therefore it was an agreement to submit to the jurisdiction within which the arbitration must operate in order to give it the effect contemplated by the contract and by the law.

It is conceded by petitioner that under the laws of this state, jurisdiction of the person can be acquired by a court, by service of process on the defendant extraterritorially, when the defendant by agreement with the plaintiff has consented to be amenable to process so served. See *Sturges & Burn Mfg. Co. v. Unit Construction Co.*, 207 Ill.App. 74; *Mitsubishi Goshi*

Kaisha v. Carstens Packing Co., 116 Wash. 630, 200 P. 327.

We conclude that sufficient reasons do not exist for the issuance of the writ demanded. Therefore, the petition is denied.

We concur: WASTE, C. J.; SHENK, J.; THOMPSON, J.; CURTIS, J.; LANGDON, J.



5 Cal.2d 436

Ex parte McCONNELL.

Cr. 3924.

Supreme Court of California.

Feb. 28, 1936.

Rehearing Denied March 26, 1936.

Criminal law §1202(1)

Proof that defendant had served terms under previous sentences held not essential to jurisdiction to sentence defendant as habitual criminal where defendant was convicted before amendment of statute, providing that defendant must have served terms under two prior convictions to be sentenced as habitual criminal (Pen.Code, § 644, as amended by St.1931, p. 1052, and St.1927, p. 1066; § 667, as added by St.1909, p. 364).

In Bank.

Original proceeding by William McConnell for writ of habeas corpus and a writ of certiorari ancillary thereto.

Writ discharged and petitioner remanded.

William McConnell, in pro. per.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for respondent.

PER CURIAM.

This is a petition for a writ of habeas corpus and writ of certiorari ancillary there-

to. On December 31, 1928, petitioner was charged in the superior court of Contra Costa county with grand theft, a felony, and with two prior convictions of grand larceny. He pleaded guilty to the charge of grand theft, admitted the two prior convictions, and was thereupon adjudged an habitual criminal, and sentenced to life imprisonment at Folsom prison, under the terms of section 644 of the Penal Code.

Petitioner's theory is that proof of an essential element necessary to adjudge him an habitual criminal is lacking, namely, service of a term of imprisonment on each of the prior convictions. In re Fontino, 135 Cal. App. 466, 27 P.(2d) 413, is cited in this connection.

Petitioner's contention is based upon the present wording of Penal Code, § 644, as amended in 1931 (St.1931, p. 1052). The amendment added to the provision for two prior convictions the requirement that the accused have "served a term therefor in any state prison and/or federal penitentiary." But the section contained no such requirement in 1928 (Pen.Code, § 644, as amended by St.1927, p. 1066), when petitioner was convicted, and there is consequently no merit in the argument.

Some confusion has been engendered by the failure of occasional decisions to take note of the date of the above-mentioned amendment, or to distinguish situations arising under section 667 of the Penal Code, which before 1931 contained the requirement of service of a term of imprisonment (St.1909, p. 364). Thus, People v. Dawson, 210 Cal. 366, 292 P. 267, and In re Boatwright, 216 Cal. 677, 15 P.(2d) 755, were concerned with section 667. Reliance upon those decisions in cases coming within section 644 before the amendment of 1931 was manifestly improper, and In re Fontino, supra, in so far as it confuses the rules applicable at the time of the decision, must be disapproved.

The writ is discharged, and the petitioner is remanded.

5 Cal.2d 349

**LOS ANGELES COUNTY v. LEGG, Chairman
of Board of Supervisors.**

Sac. 5018.

Supreme Court of California.

Feb. 19, 1936.

1. Counties ⇨171

Statute authorizing county board to borrow money on tax anticipation notes to pay obligations incurred in current fiscal year *held* not invalid as authorizing board to incur indebtedness payable from revenue of future years without required vote of electors; such notes not being general county obligations (Pol.Code, § 3719, as added by St.1935, p. 1600; Const. art. 11, § 18).

2. Constitutional law ⇨48

Statute fairly and reasonably capable of meaning consistent with constitutional requirements will be given that meaning, rather than another in conflict with Constitution.

3. Constitutional law ⇨64

Statutory provision, making repayment of county tax anticipation notes first lien against taxes and other income collected by county during current fiscal year, *held* not unconstitutional as delegating to purchaser of notes power to control and interfere with county moneys (Pol.Code, § 3719, as added by St.1935, p. 1600; Const. art. 11, § 13).

4. Statutes ⇨64(4)

Statutory provision, making repayment of county tax anticipation notes first lien against county revenue collected during current fiscal year, *held* not so connected with other provisions of same section as to affect validity of latter provisions or entire section, even if void (Pol.Code, § 3719, as added by St. 1935, p. 1600; Const. art. 11, § 13).

5. Counties ⇨171

Tax anticipation notes for sums borrowed by county to pay obligations, including salaries accruing, maintenance and operation charges incurred, and capital expenditures required during current fiscal year after borrowing, *held* not void under statute limiting purpose of borrowing to payment of obligations already lawfully incurred (Pol.Code, § 3719, as added by St.1935, p. 1600).

6. Counties ⇨171

County board's resolution "that it is necessary for the county to borrow" stated sum, "needed for the immediate requirements of said county" in certain fiscal year, "to pay obligations lawfully incurred" therein, sufficiently set forth necessity for borrowing (Pol. Code, § 3719, as added by St.1935, p. 1600).

7. Counties ⇨171

County board's resolution that it was necessary for county to borrow stated sum, needed to pay obligations incurred in current fiscal year before receipt of sufficient income to meet such payments, sufficiently complied with statute as against contention that income schedule in resolution included items of anticipated revenue, which were not "income and revenue provided" within statute requiring statement of amount thereof (Pol.Code, § 3719, as added by St.1935, p. 1600).

In Bank.

Proceeding by Los Angeles County for a peremptory writ of mandate to compel Herbert C. Legg, as Chairman of the Board of Supervisors of such County, to sign certain tax anticipation notes.

Writ granted.

Everett W. Mattoon, Co. Counsel, and J. H. O'Connor, Asst. Co. Counsel, both of Los Angeles, for petitioner.

O'Melveny, Tuller & Myers, James L. Beebe, and Homer I. Mitchell, all of Los Angeles, for respondent.

CONREY, Justice.

In this proceeding the petitioner asks for a peremptory writ of mandate to compel respondent, as chairman of the board of supervisors of the county of Los Angeles, to sign certain tax anticipation notes proposed to be issued by the county under authority of section 3719 of the Political Code (Stats.1935, p. 1600, c. 523). Respondent has refused to sign the notes, and contends that for various reasons the proposed notes, if issued, will be invalid, and that therefore he is under no legal obligation to sign them.

The first sentence of said section 3719 reads as follows: "*When funds shall be needed* for the immediate requirements of any county, any city or any school district in any fiscal year to pay obligations lawfully incurred in such fiscal year and before the receipt of income for such fiscal year sufficient to meet such payments, the *board of supervisors* of such county on the recommendation of the auditor and treasurer, or such school district on the request of two-thirds of the members of its governing board, approved by the auditor and treasurer of the county, and the legislative body of such city on the recommen-

dation of the auditor and treasurer of such city, *shall have power* at any time subsequent to approval of the final budget of such county, city or school district and the levy of taxes for such fiscal year *to borrow money* on notes, tax anticipation warrants or other evidences of indebtedness on behalf of such county, city or school district in an aggregate amount not to exceed fifty per cent of the estimated income and revenue provided for such current fiscal year." (Italics ours.) It is further provided that the notes shall be issued only after the adoption, by a four-fifths vote, "of a resolution setting forth the necessity for such borrowing." And in said section it is further provided: "The repayment of any sum so borrowed pursuant to the authority of this section shall constitute a first lien and charge against the taxes, revenue and other income *collected during the fiscal year in which said money was borrowed and shall be repaid from the first moneys* received from said taxes, revenue and income. All such notes, tax anticipation warrants or other evidences of indebtedness issued *for funds borrowed* prior to December 31 in any fiscal year shall be repaid *not later* than said December 31, and all other evidences of indebtedness for funds borrowed in any fiscal year shall be repaid *not later than May 30* of such fiscal year, and no notes, tax anticipation warrants or other evidences of indebtedness shall be issued after December 31 in any fiscal year in the event that funds borrowed prior to said December 31 are not repaid prior to said date. It is the intention of this section that such loan shall be made *solely for the purpose* of anticipating receipt of income and *shall be made solely upon the credit of income and revenue provided for the fiscal year in which said loans are made.*" (Italics ours.)

Counsel for respondent have set forth, in their brief, the alleged illegalities upon which they rely. We shall assume that in all other particulars the proceedings have been conducted according to law.

[1, 2] First, respondent contends that the statute under which the proposed notes are to be issued does not limit the payment of said notes to income and revenue provided for the fiscal year in which the notes would be issued, and is invalid as purporting to authorize the incurring of indebtedness payable from the income and revenue

of future years without the vote required by section 18 of article 11 of the Constitution of this state. In that section of the Constitution it is provided that: "No county * * * shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose."

It must be admitted that the statute (section 3719) contains no express declaration that obligations issued pursuant to its provisions must be repaid solely from the income and revenue provided for the fiscal year in which the evidences of indebtedness are issued. It will be sufficient, however, if the statute as written makes that declaration and limitation by necessary inference from the words used. That this has been done very clearly appears when the section is read, keeping in mind the purposes of the enactment. The loans are to be short-time loans, to obtain funds in advance of the current year's tax receipts, and are made "solely for the purpose of anticipating receipt of income"; they are to be repaid within the fiscal year, and from the first moneys received in the course of collection of those taxes. Also they are to be made "solely upon the credit of income and revenue provided for the fiscal year in which said loans are made."

The Constitution and the statute are to be read together. If the terms of a statute are by fair and reasonable interpretation capable of a meaning consistent with the requirements of the Constitution, the statute will be given that meaning, rather than another in conflict with the Constitution. Following this rule in the instant case, we conclude that the notes when issued will not be general obligations of the county, and will not be payable out of any funds other than those included within the income and revenue of the county provided for the current fiscal year.

[3, 4] Respondent attacks the statute on one further ground, which is set forth in these words: "The provision of the statute which makes the repayment of such notes a first lien against the taxes, revenue, and other income of the county collected during the fiscal year is invalid as constituting an attempted delegation of power by the legislature to the purchaser of the notes to control and interfere with

county money in violation of section 13 of article 11 of the Constitution of the State of California." By said section 13, article 11, of the Constitution, it is provided: "The Legislature shall not delegate to any special commission, private corporation, company, association or individual any power to make, control, appropriate, supervise or in any way interfere with any county, city, town or municipal improvement, money, property, or effects, whether held in trust or otherwise."

There does not appear to be any merit in the contention of respondent, hereinabove stated. Lien or no lien, the obvious remedy would be mandamus to the proper officers, to compel payment of the notes out of the charged funds, whenever the conditions exist requiring such payment, and those funds have come into the county treasury. And, even if the lien provision should be held void, it is not tied in with the other provisions of the section so as to affect their validity or so as to justify a court in declaring void the entire section. The duty would still exist to satisfy the obligation "from the first moneys received from said taxes, revenue and income."

[5] Point III. Respondent contends that the sum proposed to be borrowed is to be used to pay, not only obligations incurred at the time of the borrowing, but also obligations which may or will be lawfully incurred subsequent to the borrowing and prior to December 30, 1935, in violation of the provisions of the statute which limit the borrowing to the payment of obligations lawfully incurred at the time the money is borrowed. The statute requires, as a preliminary to the resolution of the board of supervisors authorizing the borrowing, that there be a recommendation therefor by the county auditor and the county treasurer. The communication from those officers to the board of supervisors, appearing in the record here, shows that, at the time of those proceedings and at the time (October 21, 1935) of respondents' refusal to sign the notes, of the \$5,000,000 of obligations to be met by this borrowing, "it is estimated that \$1,500,000 of said sum of \$5,000,000 will be needed for the payment of salaries accruing on November 1, 1935, \$1,500,000 for payment of salaries accruing on December 1, 1935, and that \$2,000,000 will be needed for the payment of obligations lawfully incurred for maintenance and operation charges

and capital expenditures between October 1, 1935, and December 30, 1935." Counsel for respondent, in support of their objection, refer to that clause of section 3719 which expresses the condition on which these tax anticipation loans may be made, viz., that "funds shall be needed for the immediate requirements" of the county in any fiscal year "to pay obligations lawfully incurred," etc. Then calling upon the rule of strict construction of powers of municipalities and much good law pertaining thereto, they argue that these notes would be void because some of the obligations which would be paid out of the fund were not yet actually incurred. But they were within the scope of immediately to be foreseen emergency, they were certain to be existing demands before the collection of taxes sufficient to pay them, and, if not "incurred" in the fully completed sense yet they were about to be incurred and were impending demands requiring immediate preparation for their payment. We think that this point III should be overruled.

[6] Points IV and V. It is further contended by respondent that the resolution of the board did not "set forth" the necessity for such borrowing as is required by the statute; also that the statement in the resolution of the amount of income and revenue provided for the county for the current fiscal year does not comply with the statute, but includes sums which are not actually revenues provided for such fiscal year. We are convinced that in both of these matters the resolution sufficiently complied with the requirements of the statute. The resolution stated: "The Board of Supervisors of Los Angeles County does hereby determine that it is necessary for the county of Los Angeles to borrow the sum of \$5,000,000.00, for a period of sixty days, which said sum shall be needed for the immediate requirements of said county in the fiscal year 1935-36 to pay obligations lawfully incurred in such fiscal year and before the receipt of income for such fiscal year sufficient to meet such payments, to wit: the payment of salaries, maintenance and operation charges and capital expenditures." Such statement does set forth the necessity, not only by declaring the fact, but also by words which suggest, concisely, the circumstances out of which the necessity is derived. That is enough to meet the requirements.

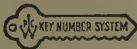
[7] With respect to the contention of respondent that the statement in the resolution of the amount of income provided for the county for the current fiscal year does not comply with the statute, we think that the argument is critical beyond the standards of practical solution of the problem. The provision of the statute requiring such statement of income bears a direct relation to that other provision which limits the amount of these authorized loans to an aggregate amount not to exceed 50 per cent. of the estimated income and revenue provided for such current fiscal year.

The argument of respondent is that the income schedule set forth in the resolution fails to state the amount of income and revenue provided, because it includes items of anticipated revenue which cannot be said to be "income and revenue provided." But these items are separated, so that inspection reveals the true amount, and also shows that the proposed loan is far within the 50 per cent. limit.

There being no other stated objections, we conclude that the proceedings in question are valid and that the relief sought by petitioner should be granted.

Let the peremptory writ issue.

We concur: WASTE, C. J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.; LANGDON, J.; CURTIS, J.



BERKELEY HIGH SCHOOL DIST. OF ALAMEDA COUNTY v. COIT, County

Treasurer, et al. *
S. F. 15560.

Supreme Court of California.
Feb. 19, 1936.

Rehearing Granted March 19, 1936.

I. Schools and school districts 96

County treasurer and auditor held bound to sign tax anticipation notes, issued by county board's order on high school district governing board's request to provide funds for payment of obligations to be incurred during current fiscal year, as against contention that

statute only authorizes issuance thereof to pay obligations already incurred during such year (Pol.Code, § 3719, as added by St.1935, p. 1600).

2. Schools and school districts 90

Issuance of high school district tax anticipation notes to provide funds for payment of obligations to be incurred during current fiscal year held not invalid as constituting incurrence of indebtedness exceeding revenue provided for such year without required assent of electors (Pol.Code, § 3719, as added by St.1935, p. 1600; Const. art. 11, § 18).

3. Evidence 83(2)

Requests by high school district governing board for issuance of tax anticipation notes and county board's resolutions, approving requests and ordering issuance of notes, are presumptive evidence of facts therein declared (Pol.Code, § 3719, as added by St.1935, p. 1600).

4. Evidence 83(1)

It is presumed that official duty has been regularly performed.

5. Schools and school districts 95(1)

Principle that general Legislature's determinations are conclusive is inapplicable to inferior legislative bodies' proceedings in respect to common power to exercise discretion, in business administration, as in deciding whether to issue interest-bearing treasury warrants or procure short-time loans to provide funds for payment of high school district obligations (Pol.Code, § 3719, as added by St.1935, p. 1600).

6. Mandamus 187(9)

Record, made by presentation to and consideration by county board of high school district governing board's request for issuance of tax anticipation notes should be accepted as conclusive of recited facts by Supreme Court in proceeding by district for writ of mandate compelling county treasurer and auditor to countersign notes, in absence of fraud or other official misconduct (Pol.Code, § 3719, as added by St.1935, p. 1600).

7. Mandamus 69

Where local or subordinate legislative body's act is not only legislative, but discretionary in required exercise of judgment, court cannot interfere therewith, unless board exceeded its legislative powers or its discretion was fraudulently or corruptly exercised.

8. Mandamus 154(4)

High school district's petition for writ of mandate, compelling county treasurer and auditor to countersign tax anticipation notes, held not insufficient for failure to allege that

petitioner included in its budget separately stated amount of anticipated disbursements to meet interest on notes, where proposed loan thereon was less than fourth of district's estimated revenue for current fiscal year (Pol. Code, § 3719, as added by St.1935, p. 1600).

9. Statutes ☞47

Statute, authorizing issuance of tax anticipation notes for money borrowed to pay obligations of school district, *held* not so ambiguous that it cannot be determined therefrom whether county supervisors, authorized thereby to order issuance of notes on district governing board's request, or district is borrower; county board being merely instrumentality through which notes are issued for money borrowed by district, not for district on county's credit (Pol.Code, § 3719, as added by St.1935, p. 1600; Const. art. 4, § 31).

10. Statutes ☞49

Statute, authorizing issuance of school district tax anticipation notes in amount not exceeding half of estimated revenue provided for current fiscal year, *held* not so ambiguous as to be unenforceable because of inability to ascertain therefrom whether such limitation is confined to half year or entire fiscal year; loans being limited to half of anticipated revenue for remainder of year, as estimated at time of borrowing (Pol.Code, § 3719, as added by St.1935, p. 1600).

11. Statutes ☞49

Statute, authorizing issuance of school district tax anticipation notes, *held* not ambiguous and unenforceable as not permitting district to borrow money on such notes until after taxes are levied, in view of provision for repayment of loans out of taxes and all other district revenues, which include amounts granted by state under School Code (Pol.Code, § 3719, as added by St.1935, p. 1600; School Code, §§ 4.790 to 4.950, as added and amended).

12. Schools and school districts ☞95(2)

County board's resolution, ordering issuance of school district tax anticipation notes, *held* not contrary to statute so far as providing for application of any available funds received by district during current fiscal year to payment of notes if available funds at their due date are insufficient to pay them in full (Pol.Code, § 3719, as added by St.1935, p. 1600).

In Bank.

Proceeding by the Berkeley High School District of Alameda County for a peremptory writ of mandate to compel Roger E. Coit, as Treasurer of Alameda County and

Horace P. Ross, as Auditor thereof, to countersign tax anticipation notes.

Writ granted.

Earl Warren, Dist. Atty., Ralph E. Hoyt, Chief Asst. Dist. Atty., and Agnes R. Polsdorfer, T. A. Westphal, Jr., and Cecil Mosbacher, Deputy Dist. Attys., all of Oakland, for petitioner.

John R. Ober, of Oakland, for respondents.

CONREY, Justice.

In this proceeding the petitioner asks for a peremptory writ of mandate to compel respondents, the treasurer and auditor, respectively, of Alameda county, to countersign tax anticipation notes in the sum of \$210,000. On September 24, 1935, following the procedure outlined in section 3719, Political Code (Stats.1935, p. 1600, c. 523), petitioner, by its governing board, voted a request for the issuance of said notes, respondents approved the request, and the board of supervisors, by a four-fifths vote, ordered the notes to issue. Respondents thereupon refused to countersign them, questioning, upon various grounds, the validity of said section 3719, and of the proceedings thereunder.

[1,2] Respondents contend that the petition seeks to compel them to sign tax anticipation notes issued to provide funds for the payment of obligations to be incurred during the current fiscal year, whereas section 3719 only authorizes the issuance of such notes for the payment of obligations already incurred during the current fiscal year. This contention is discussed at length in the case of *County of Los Angeles v. Legg* (Cal.Sup.) 55 P.(2d) 206 to-day decided, and it is there held that the point must be overruled. The same decision may also be referred to as authority for the statement that issuance of the notes pursuant to said statute does not constitute the incurring of an indebtedness in violation of section 18, article 11, of the Constitution.

[3,4] The first objection of respondents, presented under subdivisions A, B, C, and D of their brief, rests upon the conditions prescribed for the authority to issue tax anticipation notes, as set out in said section 3719. Because the statute does not expressly base the authorization upon a declaration of necessity by the legislative

body charged with that duty, but requires that such notes may issue only when in fact the described funds "shall be needed," respondents argue that the declaration of such necessity, when made, is not conclusive, but remains a subject for judicial inquiry. Respondents do not deny that the funds are needed, as the official declarations have stated. The resolutions and requests shown in the petition herein, and which it is admitted were duly adopted and made, are presumptive evidence of the facts therein declared. It is presumed that official duty has been regularly performed. We might close the argument here, and say that respondents are not justified in refusing to comply with the demand made upon them, merely because they fear that some one may at some time challenge the validity of the notes and offer to prove that the required conditions for their issuance did not exist. But, since there seems to be an element of public welfare involved in having the question settled, we now carry the inquiry one step further.

[5-7] The statute provides that such notes shall be issued only after the adoption by the board of supervisors of "a resolution setting forth the necessity for such borrowing and stating the amount of income and revenue provided * * * for such school district for such current fiscal year." But precedent to this resolution of the board of supervisors of the county there must be a request of two-thirds of the governing board of the school district, approved by the auditor and treasurer of the county. It is conceded that the board of education, on behalf of the school district, made the request by resolution setting forth the necessity for such borrowing and reciting therein the facts showing the need therefor. And this request was duly approved by the county treasurer and by the county auditor. The gist of the objection made by respondents is that the board of supervisors accepted the foregoing proceedings of the board of education, the treasurer, and the auditor as sufficient proof of the facts, and did not make a separate and independent investigation into the records and affairs of the school district, before adopting its resolution of approval.

Respondents admit that in proceedings of this nature, where a court finds that a thorough investigation of the necessary antecedent jurisdictional facts has been

made by a board of supervisors, or other inferior legislative body, the court will not disturb the findings made pursuant to such investigation. *Spring Valley Water-Works v. City and County of San Francisco*, 82 Cal. 286, 305, 22 P. 910, 1046, 6 L.R.A. 756, 16 Am.St.Rep. 116. The stressed point here is that the necessary thorough investigation was not made.

As outstanding authority for the proposition that the finding of a fact by an inferior legislative body is not conclusive as to the existence of the fact so found, we are referred to *San Christina Inv. Co. v. City and County of San Francisco*, 167 Cal. 762, 141 P. 384, 52 L.R.A. (N.S.) 676. The fact in issue there was the existence of a "great necessity or emergency," sufficient to authorize a tax levy in excess of the "dollar limit" prescribed by the city charter. It was held that the principle which accords the great dignity of conclusiveness to determinations of the general legislature is not applicable to the proceedings of inferior legislative bodies. We have no hesitation about approval of the ruling thus stated. Its application, however, must depend upon the difference which exists between extraordinary powers to be exercised and the common power to exercise discretion in business administration. It is to this latter class that the present case should be referred. The borrowing of money by a county, or city, or school district, under the plan provided for by section 3719 of the Political Code, whereby the loan is to be repaid out of the tax collections already provided for, does not impose additional tax burdens or increase the burden of public debt. The choice is between the issuance of interest-bearing treasury warrants or the saving of interest charges by making these short-time loans. The decision thereon is a matter of discretion in the administration of ordinary public business. Primarily that decision is made, as it should be, by the governing body of the school district, with approval of the county treasurer and county auditor, subject to additional approval by the board of supervisors. The presentation to the board of supervisors of the prior proceedings and the consideration thereof by the board of supervisors in itself constitutes, in the ordinary course of things, a sufficient investigation. In the absence of fraud or other official misconduct, the record thus made should be accepted as conclusive of the recited facts, and it is so accepted by

this court for all purposes of this proceeding. Where the act of a local or subordinate legislative body is not only legislative but also is discretionary in the required exercise of judgment, concerning a matter committed to its care, the courts "cannot enter the board room * * * nor interfere at all with its action unless the board is exceeding its legislative powers, or its judgment or discretion is being fraudulently or corruptly exercised." *Nickerson v. San Bernardino County*, 179 Cal. 518, 177 P. 465, 467.

[8] There is no merit in the contention that the petition for the writ is insufficient because it does not allege that petitioner has included in its budget a separately stated amount of anticipated disbursements to meet the interest on these tax anticipation notes. The argument is based upon an imagined state of facts not existing in the present case. The proposed borrowing is limited to \$210,000, which is less than 25 per cent. of the estimated revenue and income of the district for the current fiscal year. The suggestion that there might not be funds available to meet the interest on the notes is foreign to the actual facts of the case.

[9] Respondents next contend that said section 3719 is so ambiguous that it cannot be determined therefrom whether the county or the school district is the borrower. We hold that as applied to the facts presented in this case the borrower is the school district. The board of supervisors is the selected instrumentality through which the notes of the district are issued. There is no borrowing for the school district on the credit of the county, and there is no violation of article 4, § 31, of the State Constitution.

[10] Next it is suggested that said section 3719 is so ambiguous that it is unenforceable, in that it cannot be ascertained whether the 50 per cent. limitation on the borrowing is limited to a one-half year or is limited to an entire fiscal year. This point is without merit. The section provides that the notes may be issued "in an aggregate amount not to exceed fifty per cent of the estimated income and revenue provided for such current fiscal year." But also it provides that "it is the intention of this section that such loan shall be made solely for the purpose of anticipating receipt of income and shall be made solely upon the credit of income and revenue pro-

vided for the fiscal year in which said loans are made." We agree with the reply made by petitioner that the authorization of loans under this section is limited to 50 per cent. of the anticipated income and revenue for the remainder of the fiscal year, as estimated at the time of borrowing.

[11] Under point VII, respondents contend that section 3719 is ambiguous and unenforceable, in that it does not permit cities, counties, and school districts to borrow money on tax anticipation notes until after taxes are levied, thereby presumably limiting the payment of such notes to income received from taxes; but nevertheless it provides that such moneys are to be repaid, not only out of taxes, but also out of all other income and revenues of such public corporations. We think that the alleged ambiguity does not exist. The section does not require that the repayment of tax anticipation notes shall be made exclusively from taxes. It does require that they be repaid from the entire income and revenue provided for school purposes. This income and revenue in fact includes grants from the state made in definite amounts in accordance with sections 4.790 to 4.950 of the School Code (as added and amended). This last-mentioned provision of section 3719 is not in conflict with the prior provision of the section. Said point VII is without merit.

[12] Finally, it is contended (point VIII) that the resolution adopted by the board of supervisors is illegal and in violation of said section 3719, in so far as it provides that, in the event that available funds are insufficient for the payment in full of all of the tax anticipation notes outstanding at the time of their due date, then any available funds of the high school district received at any time during the current fiscal year shall be applied pro rata to the payment of the principal and interest of the said outstanding notes. In support of the foregoing objection respondents say: "The section provides however that notes issued prior to December 31 in any fiscal year shall be repaid not later than said December 31. Therefore, if the notes are not paid on their due date or at least on or before December 31, they become void and cease to constitute enforceable obligations of the district and the board of supervisors has no authority to provide that such notes shall be paid out of any moneys received subse-

quent to December 31 if for any reason the income and revenue received prior to December 31 by the high school district are insufficient to discharge all of the notes issued prior to that date."

In answer to the foregoing objection, we think that the reply made by counsel for petitioner in their brief is complete and satisfactory. It reads as follows: "An examination of said section 3719 relative to the provisions relating to the payment of notes issued under the section reveals that it provides that 'the repayment of any sums so borrowed pursuant to the authority of this section shall constitute a first lien against the taxes, revenue and other income collected *during the fiscal year* in which said money was borrowed, and shall be repaid from the first moneys received from said taxes, revenue and income.' It is clear from the above quotation that the notes are a first lien against not merely the taxes, revenue and other income collected during the first half of the fiscal year, but that the notes are a first lien against all such income collected during the entire fiscal year. In addition the notes are to be repaid not out of moneys received during any part of the year, but 'from the first moneys received from said taxes, revenue and income.' All provisions of the statute should be construed together, and when this is done the intent of the legislature is clear. It is submitted that the intention of the legislature in enacting said section 3719 was that the notes should be paid not later than December 31 if sufficient moneys are received from taxes, revenue and income to meet the same, but that if said sources of revenue are not sufficient in amount, then in any event 'the repayment of any sums so borrowed pursuant to the authority of this section shall constitute a first lien and charge against the taxes, revenue and other income collected *during the fiscal year* in which said money was borrowed, and shall be repaid from the first moneys received from said taxes, rev-

enue and income.' (Italics ours.) In other words, if the notes are not paid on or before December 31 because the revenues of the school district are insufficient, then the notes are to be repaid from the first moneys received any time during the fiscal year. It is clear furthermore that there is no language in the said statute that would prohibit the payment of a note in default on or before December 31 at some future date during the fiscal year provided that additional moneys were received by the school district. The said provisions in the statute were unquestionably placed in the statute by the legislature so that all sums borrowed by the cities, counties and school districts during the first half of the fiscal year would first be met before the respective public corporations appropriated or spent such moneys for other purposes. These provisions of the statute providing for the repayment of the evidences of indebtedness in no way limit the funds that shall be used for this purpose to funds collected in the first half of the school year. Resolution No. 29200, therefore, is strictly in accordance with the provisions of section 3719 of the Political Code."

Having thus reviewed, with perhaps unnecessary detail, the objections offered by respondents, first to the validity of the statute, and then to the validity of the proceedings thereunder, we have found no good reason for sustaining those objections or any of them. We think that it is the plain and clear duty of respondents to comply with the demand made by petitioner that respondents, as treasurer and auditor respectively of the county of Alameda, countersign said tax anticipation notes as directed in said resolution of the board of supervisors.

Let the preemptory writ issue.

We concur: WASTE, C. J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.; LANGDON, J.; CURTIS, J.

5 Cal.2d 520

TATLOW v. STATE BAR OF CALIFORNIA.

L. A. 15437.

Supreme Court of California.

Feb. 29, 1936.

Rehearing Denied March 30, 1936.

Attorney and client §58

Attorney who commingled ward's funds with his own funds and loaned whole to a concern in which attorney directly or indirectly had personal interest, and who avoided hearing of his accounts when he was unable to realize on such investment, was suspended for three years.

In Bank.

Petition by Joseph B. Tatlow to review disciplinary action taken by the State Bar of California.

Petitioner suspended from the practice of the law for three years.

Philbrick McCoy, of Los Angeles, for petitioner.

L. V. Meloy, of Los Angeles, for respondent.

THOMPSON, Justice.

The petitioner was required by a notice dated August 7, 1934, to show cause why he should not be disciplined for unprofessional conduct. Two charges were contained in the notice. The first related to certain transactions between petitioner and a client with respect to protecting the interests of the latter in real property subject to a deed of trust given by the client to assure the support of her grandchild by her son. For reasons to be now stated, it is unnecessary for us to detail the facts or the evidence bearing upon this count. The Board of Governors at its hearing, after recommendation by the local administrative committee, advised petitioner that, so far as it was concerned, he could confine himself to the second charge. And respondent's brief concedes, in effect, that its recommendation must stand or fall on the second charge. We have read the transcript, and are inclined to the same view.

We may therefore turn to the charges contained in paragraph II of the notice. It is there stated, in effect, that petitioner was appointed guardian of the estate of Josef St. Clair Houston, an incompetent person, on August 15, 1927; that there came into his hands as such guardian certain

sums of money which he had commingled with his own; that without any order of court therefor he had invested it, along with his own funds, with the Utah National Land Company in Utah, which concern was affiliated with the Pacific Investment Company, in which latter concern the petitioner was financially interested; that the investment was not profitable; and that upon the final accounting, after removal of petitioner from the guardianship, the petitioner was found to be owing the estate \$876, which has never been paid. It was also alleged that petitioner did not report the truth in the accounts prepared and submitted by him as guardian to the court for its approval. The local committee found the charges to be true, and recommended that petitioner be suspended for a period of three years, which findings and recommendation were adopted by the Board of Bar Governors. In response to a writ of review, we have the record before us for the purpose of determining the sufficiency of the evidence to warrant disciplinary action.

The testimony reveals a most unusual manner of dealing with the funds of the ward. Shortly after appointment, and about November, 1927, the sum of \$1,252, was received by the guardian from the Veterans' Bureau, as accrued compensation, which petitioner deposited in a bank in the name of the incompetent by himself as guardian. Thereafter he received \$80 per month, most of which he used to pay the ward's expenses. At this time petitioner had some government bonds of about the value of \$1,200 which he put into a manila envelope marked "Property of the estate of Josef St. Clair Houston," and then put the envelope into the estate's folio. In 1930 the petitioner says he made his first report, and simply declared that the funds were "held in cash and/or government bonds." Also about the same time he noticed that the bonds theretofore put into the envelope were to mature shortly, for which reason he substituted for them Liberty bonds with an accrued value of approximately \$1,234. And now we quote the exact language of petitioner: "That brought about a condition where I felt that I might deal with the money that was in the bank as I pleased, the same as if it was my own money, and to some extent I did that during that time. If I needed \$500 or \$100, whatever it was, in actual cash, I took it, because I had the Liberty bonds to that extent." Some time

in 1930 or 1931 (the exact date is immaterial) he loaned the Utah National Land Company somewhere between \$1,000 and \$2,600. According to his testimony, he was not certain any of it was estate money, and that he first loaned nearly \$1,000. According to the testimony of another witness, the petitioner said that in 1930 he sold \$1,400 worth of bonds and had taken \$200 out of the guardianship account and \$1,000 of his own money and loaned it all to the Pacific Investment Company, taking as security an assignment of a mortgage held by a Japanese, of whose name he was uncertain. This witness further testified that petitioner further admitted he had secured no title search and had not recorded the assignment of the mortgage. The petitioner testified that he definitely loaned some of the estate money in 1932, and took the assignment of the mortgage from the Pacific Investment Company, which mortgage had been assigned to it by the Utah Land Security Company. It is difficult to tell from the testimony whether there were one or two companies in the names of which were employed the words "Utah" and "land," but it does appear that the Pacific Investment Company was affiliated in some way with it or them, that petitioner had been interested in the land company as a stockholder, and that he was president of the Utah National Land Company. When petitioner attempted to collect the sums he had thus loaned, he was unsuccessful, whereupon he took an assignment from the investment company to the Utah National Land Company of a contract for \$32,000 with a payment of \$7,300 falling due March 10, 1932, "thinking that it could not be taken out without" his "signature and that" he "would have the present protection of that." However, the payment was not made, and up to the time of the hearing petitioner had taken no action to enforce collection of the sum he had loaned, because he thought it would be of no avail, nor had he at the time undertaken to foreclose the mortgage because of his belief that the property had no market value during that period of time. It further appeared from petitioner's testimony that all of the records with respect to the Utah transaction were in Utah, as well as the file of the estate, at the time of the hearing. They were not produced. Nor were any of the dealings thus related reported to, or approved by, the superior court. In fact, as already indicated, petitioner filed his second annual account on October 26, 1931, in which he reported he had on hand in cash

or Liberty bonds \$1,158.05. On August 19, 1932, he filed a "second annual amended and supplemental accounting" covering the receipts and disbursements to February 1, 1932, in which he showed a balance on hand of \$1,417.63. Objections were filed by the Administrator of Veterans' Affairs to this account on the grounds that petitioner had collected the sum of \$480 prior to the filing of the account and subsequent to February 1, 1932, for which he had failed to account, and the report failed to show the manner in which the assets were distributed. By consent of the petitioner by letter, these objections were sustained. The hearing of the account was continued at least five times by the court because of petitioner's failure to appear, and finally on March 7, 1933, a petition for his removal was filed. He was removed, and by a supplemental accounting he was found to owe the estate \$1,676.17 after an allowance to him of fees, of which sum he has only paid \$800, leaving an indebtedness of \$876.17 still due from him to his former ward's estate.

We ought also to note that petitioner's accounting for the \$80 a month is unsatisfactory. Apparently the ward was allowed to do very much as he pleased with this sum, which was remitted to him whenever petitioner knew his location. It ought also to be said that petitioner has been engaged in the practice of the law, here and elsewhere, since 1898, so that he should be thoroughly familiar with its high standards of honesty and integrity.

As already stated, it has been recommended that petitioner be suspended for the period of three years, and we are of the opinion that the testimony is sufficient to warrant this recommendation. Money was intrusted to his care for an incompetent person. It was his duty to use every reasonable precaution for the preservation of the estate. Instead, he commingled it with his own funds and loaned the whole to a concern in which, directly or indirectly, he had a personal interest. Unable to realize on the sums thus put into a form in which they were not recoverable, he very obviously avoided a hearing of his accounts. We cannot draw an inference other than the one that, like others who make use of funds not belonging to them without authority, expecting to be able to make the fund whole when called upon, petitioner here was conscious of his own dereliction. The conduct of petitioner violates the fundamental rule of ethics—that of common honesty—without

which the profession is worse than valueless in the place it holds in the administration of justice. The least discipline we can impose under the circumstances is to follow the recommendation.

It is ordered that petitioner be suspended from the practice of the law in this state for a period of three years, to commence thirty days after the filing of this order.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.



5 Cal.2d 411

GIOMETTI et al. v. ETIENNE.

L. A. 15409.

Supreme Court of California.

Feb. 27, 1936.

1. Appeal and error ☞ 161

Litigant cannot accept benefits of judgment and appeal from it.

2. Appeal and error ☞ 162(1)

Plaintiffs who accepted alternative portion of judgment allowing plaintiffs to pay certain amount and receive conveyance of property in controversy, receiving from defendant satisfaction of judgment which plaintiffs promptly filed, and who almost immediately encumbered property with a deed of trust, *held* not entitled to appeal from judgment.

In Bank.

Appeal from Superior Court, Fresno County; K. Van Zante, Judge.

Action by E. Giometti and others against Victor Etienne, Jr., wherein the defendant filed a cross-complaint. From an adverse judgment, the plaintiffs appeal. On motion to dismiss plaintiffs' appeal.

Appeal dismissed.

Carl E. Lindsay and Lindsay & Gearhart, all of Fresno, for appellants.

Richard tum Suden and Peter tum Suden, both of San Francisco, for respondent.

WASTE, Chief Justice.

Motion to dismiss upon the ground that the judgment appealed from has been satisfied and the issues have become moot.

It appears that the parties hereto entered into a contract by the terms of which the defendant and respondent undertook to construct an ice plant on certain real property, the record title to which stood in respondent's name. Respondent erected the building and installed the necessary machinery and equipment, and appellants went into possession. Subsequently respondent gave notice to the appellants that they had defaulted in their payments and had breached the contract. Based on this notice, respondent declared the contract terminated and demanded possession of the property. Thereafter this action was instituted by the appellants to have the contract declared usurious. Respondent answered and cross-complained, alleging that the contract was one of purchase and sale and that the interest and bonus therein provided for constituted a part of the purchase price. Because of appellants' default, respondent prayed that he be given the property free and clear of any claims of appellants. Upon the trial, the contract was held to be usurious and judgment entered for appellants. This judgment was reversed on appeal. *Giometti v. Etienne*, 132 Cal.App. 602, 23 P.(2d) 52. At the conclusion of the second trial of the cause, it was found in conformity with the allegations of respondent's cross-complaint that the appellants had defaulted in their payments under the contract. An alternative judgment was thereupon entered on January 7, 1935, that quieted respondent's title to the property and directed appellants to deliver up possession thereof and to pay \$40,000 as damages for its detention, unless they (appellants) paid to the respondent on or before February 15, 1935, the balance due him under the contract (\$46,015.02), together with interest, attorneys' fees and costs. The judgment then went on to provide that, upon payment by appellants of the balance due under the contract, the respondent should execute and deliver to the appellants an instrument transferring and conveying the property to them, but, should such balance be not paid as therein provided, then respondent's title was quieted. Appellants' motion for a new trial was denied.

On February 11, 1935, and within the time prescribed in the judgment, the appellants paid to the respondent the full amount required under the alternative portion thereof, whereupon the respondent executed and delivered to the appellants a satisfaction of judgment and a deed transferring the property to them. The satisfaction of judgment

was filed in the court below and recorded in the office of the county recorder by the appellants. They also recorded the deed that conveyed the property from respondent to them. Almost immediately the appellants encumbered the property with a deed of trust executed by them to secure a promissory note in the sum of \$47,000. Thereafter they noticed this appeal from the judgment.

[1] As stated above, the respondent has moved to dismiss upon the ground that the judgment has been fully paid, satisfied, and discharged and the issues thereby rendered moot. In support of his motion respondent relies on the general rule stated in *Turner v. Markham*, 152 Cal. 246, 247, 92 P. 485, 486, in the following language: "A party litigant cannot accept the benefits of a judgment and appeal from it. He has his option to proceed with his appeal or to accept what the judgment may award him and to forego his appeal. If he does accept the fruits of the judgment, his election so to do estops him from further prosecution of the appeal. It is, in effect, his affirmation of the validity of the judgment against him." In other words, as stated in *Re Estate of Ayers*, 175 Cal. 187, 190, 165 P. 528, 529, "the right to accept the fruits of a judgment and the right of appeal therefrom are not concurrent. On the contrary, they are totally inconsistent. An election to take one of these courses is therefore a renunciation of the other." The rule also finds expression in *Walnut Irr. Dist. v. Burke*, 158 Cal. 165, 166, 110 P. 517; *San Bernardino County v. Riverside County*, 135 Cal. 618, 620, 67 P. 1047, and *Pickens v. Coffey*, 136 Cal.App. 105, 106, 27 P.(2d) 914.

Appellants urge that this rule is inapplicable to the facts of this case. They refer us to that line of cases wherein it is recognized that the satisfaction of a judgment, unless by way of compromise or with an agreement not to take or pursue an appeal, does not operate to terminate the right to an appeal, particularly when, as is said to be the situation here, such satisfaction is involuntary and the result of legal compulsion. *Warner Bros. Co. v. Freud*, 131 Cal. 639, 63 P. 1017, 82 Am.St.Rep. 400; *Alamitos L. Co. v. Shell Oil Co.*, 217 Cal. 213, 17 P.(2d) 998; *Burgess v. California Mutual Building & Loan Association*, 210 Cal. 180, 184, 185, 290 P. 1029; *Preluzsky v. Pacific Co-op. Co.*, 195 Cal. 290, 292, 232 P. 970; *Patterson v. Keeney*, 165 Cal. 465, 466, 132 P. 1043, Ann.Cas.1914D, 232;

Buckeye Refining Co. v. Kelly, 163 Cal. 8, 12, 124 P. 536, Ann.Cas.1913E, 840; *Hartke v. Abbott*, 106 Cal.App. 388, 391, 392, 289 P. 206.

Appellants urge, in effect, that by reason of the form of the judgment they were compelled to satisfy the alternative portion thereof in an effort to protect their interest in the property. This asserted involuntary satisfaction of the judgment should not, they contend, work a dismissal of their appeal subsequently taken. We recognize the rule contended for by the appellants and enunciated in the several cases last above cited. However, such cases should not be confused with those which deny to a party who has availed himself of the part of a judgment which is beneficial to him the right to prosecute an appeal from dependent parts thereof which are against him. *Patterson v. Keeney*, supra, 165 Cal. 465, 467, 132 P. 1043, Ann.Cas.1914D, 232; *Preluzsky v. Pacific Co-op. Co.*, supra, 195 Cal. 290, 293, 232 P. 970; *Union Lithograph Co. v. Bacon*, 179 Cal. 53, 57, 175 P. 464; *Hartke v. Abbott*, supra, 106 Cal.App. 388, 392, 393, 289 P. 206.

[2] In the instant case, the appellants, subsequent to their payment under the judgment and prior to their noticing of this appeal therefrom, accepted from the respondent, and filed and recorded in the appropriate places, a satisfaction of judgment which, after reciting payment by the appellants and transfer of the property by respondent, declared that said acts were "in full compliance with the terms of said judgment and in full settlement and satisfaction of said judgment and the whole thereof," and which certified that "said judgment has been, and the same is, fully paid, satisfied and discharged." The broad language of this instrument, which, as stated, appellants accepted and filed, can only be construed to show a compromise and settlement of the judgment within the meaning of the authorities. Nowhere is there any indication that payment by the appellants was made under compulsion of the judgment and solely to protect their interest in the property. Moreover, as intimated above, the appellants almost immediately upon acquiring the property from respondent under the terms of the judgment encumbered the same with a deed of trust. They have been in possession of the property, have operated the ice plant thereon for their benefit, and have comport themselves as owners of the property. If this appeal should be permitted and a reversal on the merits should hereafter result,

it may well be that upon the next trial the respondent may be again awarded the property, with compensation for its detention, without any alternative being afforded the appellants to pay the balance due under the contract. In such event, it is obvious that appellants, by reason of their dealing with the property as above indicated, would not be able to place respondent in the position theretofore occupied by him. In other words, the appellants, by accepting and availing themselves of the benefits of that portion of the judgment in their favor, must be held to have foreclosed their right to assail upon appeal other dependent portions thereof detrimental to them. Their conduct prior to noticing the appeal was wholly inconsistent with the right to appeal.

The motion is granted and the appeal dismissed.

We concur: SEAWELL, J.; SHENK, J.; LANGDON, J.; THOMPSON, J.



5 Cal.2d 368

KNAPP v. BERGMAN.

Sac. 4931.

Supreme Court of California.

Feb. 21, 1936.

1. Appeal and error ⇨996, 1011(1)

Conclusion of trial court based upon conflicting evidence or upon inferences which may seem to support either of two divergent conclusions cannot be disturbed.

2. Deeds ⇨208(1)

Evidence justified finding that title under deed vested in grantee when such deed was delivered to bank by grantor and grantee with letter of instructions that deed was not to be delivered until after death of grantor, precluding grantor from subsequently dealing with land.

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Waity Knapp against Ethel R. Bergman. Judgment for plaintiff, and defendant appeals.

Affirmed.

Henry & Bedeau, of Sacramento, for appellant.

John M. Welsh and Butler, Van Dyke & Harris, all of Sacramento, for respondent.

SEAWELL, Justice.

This appeal is from a judgment in an action quieting plaintiff's title to five acres of land situate in the "Carmichael Colony," county of Sacramento. Both parties claim title from a common source. The disputed question is whether a deed prior in time and executed by the common grantor, John C. Scroggs, to the plaintiff was actually delivered. If so, a subsequent deed describing the same lands executed by him to defendant must fail.

John C. Scroggs was a man well advanced in life, and for several years preceding his death, which occurred August 9, 1933, was in ill health and required the services of a nurse. In addition to the common ills which usually accompany advanced years, such as arterial hardening and diabetes, he sustained a broken leg from which he never fully recovered, and he was compelled to resort to the aid of crutches to assist his impaired powers of locomotion.

His wife predeceased him by 7 or 8 years. He left no issue. Among his collateral kindred is the defendant, a niece. The plaintiff was a stranger to his blood, and was not related to him by consanguinity. She is a practical nurse, and had nursed his wife during her last sickness and had served him continuously from September, 1931, to March, 1932. At times she resided in one of his houses while nursing him. She and her sisters and other members of her family had known him and his wife quite intimately for approximately 33 years. He had sent for her upon several occasions to nurse either his wife or himself. She drove him about in his automobile on missions of business or mere pleasure rides.

Mr. Scroggs was a nurseryman by occupation, and apparently had acquired real estate of some considerable value.

It may be stated here by way of explanation of testimony which will be considered later that he was not unkind, but was much given to the use of profane language. In fact, it is in evidence that oaths or profane words constituted the larger part of his vocabulary.

It does not appear in the record that his niece was in any way attentive to his wants or interested herself in his welfare, or that any of his other collateral kindred, if he had others, ever ministered to his comfort. The plaintiff nursed him through other sicknesses, for which she received full compensation.

[1] The case is one of the many which present exceedingly vexatious questions which trial courts are called upon to decide upon conflicting evidence or upon inferences which may seem to support either of two divergent conclusions. In such cases the conclusion of the trial court cannot be disturbed.

[2] The question before us is one of fact as to whether the learned trial court, upon a consideration of the relations of the parties to Scroggs and his acts in relation to both or either of them, correctly interpreted his intentions as to the final disposition of the five-acre tract of land in suit. Its value was not proved, but from the meager references made to it by counsel the presumption is that it was not exceptionally valuable.

According to the testimony of plaintiff, the decedent, Scroggs, had on several occasions prior to January 5, 1932, told her that it was his intention to so arrange by deed that she would come into the ownership and possession of said land when his tenure ended; that he did not wish to part with the possession during his lifetime for several reasons, one of which was that an old-time friend whom he referred to as John had made his home on the ranch for many years, and he wanted to be assured that the friend would not be sent away during his lifetime. Another reason was that his visits to the ranch afforded him the greatest of the few pleasures remaining to him in his declining years. Plaintiff's testimony is to the effect that he said to her that, but for the above considerations and for fear of the discord it would probably engender in the minds of some of his collateral kin, he would deliver her an absolute deed in fee instead of the deed which is the center of this controversy, and which we will now discuss. Said deed was executed on January 5, 1932, by John C. Scroggs to plaintiff, Waity Knapp. The consideration recited therein was love and affection and in consideration of past services rendered by her to the grantor. No suggestion was made as to the competency

of the grantor by the defendant. Of course, the defendant would have been hoist by her own petard had incompetency been shown, inasmuch as her deed was executed several months after plaintiff's deed was made. The deed in question was drawn by Jay L. Henry, Esq., attorney for Mr. Scroggs, and Grove Bedeau, Esq., took Mr. Scroggs' acknowledgment. Mr. Henry's testimony bearing upon the execution of the deed was that a day or two before it was executed Mr. Scroggs sent for him and he visited him in his room in the building which he owned and occupied. He told him that plaintiff was constantly haggling him for a deed to the said property. He said the effect of Mr. Scroggs' language was that he proposed to have him (Henry) draw a deed conveying said property to plaintiff, and that he wanted to retain absolute control over it and the right to recall it at any time, whether it was placed in his (Henry's) hands or with the Capitol National Bank. He asked Mr. Henry's advice in the matter. Mr. Henry advised him that to constitute an absolute conveyance the deed must be so drawn and delivered, but that he could execute the deed and place it with some third party or a bank and reserve unto himself the right to recall it at any time. The latter plan seemed to fit his case, and Mr. Henry said Scroggs instructed him to draw the deed. The plaintiff was not present at this meeting. The next day he returned with the deed and Scroggs signed it and Mr. Bedeau took his acknowledgment. The deed was absolute in form. Mr. Henry asked Mr. Scroggs what he wanted him to do with the deed—if he wanted him to hold it subject to his right to withdraw it, and if he died without withdrawing it was he to deliver it to Waity Knapp and Mr. Scroggs said "Yes"; that he returned to his office with the deed, placed it in an envelope, and wrote upon the envelope, "Contains a deed from J. C. Scroggs to Waity Knapp," and that he was told to hold it and deliver it to Waity Knapp upon his (Scroggs') death if he did not recall it. Two weeks later, January 19, Mrs. Knapp called at his office and told him Mr. Scroggs desired him to deliver the deed to him; he took the deed to Mr. Scroggs' room in the envelope upon which he had written the instructions as above set forth and informed Mr. Scroggs that he had brought the deed in response to his request and asked him what he wanted to do with the deed; Mr. Scroggs replied, "Yes, that is correct; I want you to return the deed

to me"; he further said that Waity Knapp was "dissatisfied or a little uneasy about me holding the deed and it had been suggested to him that the deed was to be placed in the Capitol National Bank." Mr. Henry delivered the deed to Mr. Scroggs and left. Mr. Henry did not again see the deed until September 24, 1932, some eight months thereafter, when he received word that Mr. Scroggs wished to see him. He visited him at his room, and Scroggs requested him to go to the Capitol National Bank and get the "deed that had been placed down there sometime previously." He went to the bank and saw Mr. George W. Spillman, trust officer of the Capitol National Bank, and communicated to him Mr. Scroggs' request. Mr. Spillman took the deed from the vault, and both he and Spillman proceeded to Mr. Scroggs' room, and the deed was delivered to Scroggs, who receipted for it and destroyed it. The envelope upon which Henry had written certain data contained the following letter of instructions which were in the envelope when originally delivered to the bank: "This deed from J. C. Scroggs to Waity Knapp is not to be delivered until after the death of said J. C. Scroggs."

The body of the instructions was apparently written in the hand of Waity Knapp, although she first denied the writing, but finally admitted that the writing resembled her penmanship, and she finally said that she might have written it, but she had no recollection of having done so. There was no question as to the signature of Mr. Scroggs being genuine. Mr. Spillman's attention was called to the deed and the instructions signed by Mr. Scroggs soon after said papers had been delivered to the bank by Mr. Johns, assistant cashier. The written instructions and the deed were in the envelope as prepared by Mr. Henry. They were placed by Mr. Spillman with Mr. Scroggs' will and some papers belonging to him. He was a customer of the bank, and was apparently well known to its officers and employees. Two days after receiving the deed and written instructions signed by Mr. Scroggs, Mr. Spillman, without request made by any disclosed person, proceeded to Mr. Scroggs' room and asked him if it was his intention to make "absolute delivery of the deed so that he could not withdraw it or have control of the property, and he said no, just place it with his will." Mr. Spillman told him, if the bank accepted it and wrote it up in escrow, he would

never be able to withdraw it except upon the joint signature of the grantor and grantee. Mr. Scroggs instructed him to "just leave it with his will and that he may want to withdraw it at some future date. So I told him that was perfectly all right if he just left it there for safe keeping." The deed and instructions were placed in the vault with Scroggs' other papers. On September 24, 1932, Mr. Spillman accompanied Mr. Henry to Scroggs' room, carrying with him the deed, which was destroyed, as already related. Notwithstanding the full and specific directions accompanying the deed, Mr. Spillman personally visited the grantor for instructions as to how he should regard the transaction. He said it was usual, when the bank accepted a deed to be delivered to the grantee upon the death of the grantor, to write out its own instructions. There was nothing ambiguous about the directions. They are brief but specific. After listening to Mr. Spillman's explanations as to the effect of a legal delivery, the grantor, Mr. Scroggs, told him to leave the deed with the will, as he might wish to withdraw it. Mr. Spillman, acting upon the oral statements of the grantor, concluded that there had been no delivery with intent to pass title and he wrote out no instructions whatsoever. The statement made to Mr. Scroggs to the effect that Mr. Scroggs would lose all control of the real property if he parted with control of the deed was inaccurate. According to the testimony of the plaintiff, control of the real property was the thing he did not purpose to part with. The immediate vesting of title in plaintiff was not a matter of great concern to him, except to the extent that it might deprive him of the right of possession and control during his lifetime. This he did not purpose to lose. It may not be beyond probability that the fear of losing absolute control of the property, as the matter was erroneously put to him by Mr. Spillman, influenced him to repudiate the written instructions inclosed in the envelope with the deed.

We now turn to the testimony of Waity Knapp, the plaintiff. She testified that she and members of her family had known Mr. Scroggs and his wife for more than 30 years, and the families had always remained very friendly during that time; she had nursed both; during the last 7 or 8 years she had intermittently nursed him and had lived on his property; that Mr. Henry and Bedeau called at the Scroggs home with the

deed and it was read aloud, and Mr. Scroggs read it for himself; Mr. Henry asked him what he wanted him to do with it, and Mr. Scroggs said he might as well put it with the rest of his papers, and Mr. Henry said all right and took possession of the deed and left. Two days afterwards Mr. Scroggs sent word to Mr. Henry to return the deed and he did so; as plaintiff entered the room some time thereafter, Mr. Scroggs handed her the deed and said, "Waity, here is your God damn deed, what are you going to do with it?" While his language was profane, as it was his habit to speak, he did not speak in anger and his manner was exceedingly friendly; she took the deed and kept it in her possession until the following day, January 21, whereupon, at the suggestion of Mr. Scroggs, it was delivered to the Capitol National Bank. She had told him that she was going to rent a safe deposit box, but he said that it was unnecessary to do so, as she could leave it with the trust department. As they stopped in front of the bank, he instructed her to go in the bank and tell Mr. Holmes or Mr. Zoller, officers or employees, to come to the automobile, as he wished to speak to one of them. She did so, and a gentleman came to the car door whose name she did not know. Mr. Scroggs greeted him by his given name and he called Mr. Scroggs "Jack," a name by which he was commonly known. He said that both Mr. Holmes and Mr. Zoller were very busy. Mr. Scroggs said to him, "This is Mrs. Knapp, and I have just given her a deed to my ranch and she wants to place it in your bank for safe keeping." The gentleman said, "All right, Jack, we will take care of it." She handed him the envelope containing the deed and he left. She asked Mr. Scroggs if she should take a receipt for it and he said it was not necessary, as the bank officer would put it away and no one could touch it. She never saw the deed again. She felt secure in its delivery, as Mr. Scroggs had been a customer of the bank for many years and had done a large volume of business with it. Plaintiff had written many checks for him and had transacted much of his business during the last several years of his life. She had visited the property in suit with him many times, and he always said it was hers. Mr. Scroggs frequently told her the unkind things Mrs. Bergman and her mother were saying to him about plaintiff, and she did not record the deed because of the trouble that it would have created, and for the further reason

that he did not want Mrs. Bergman and her mother to know that he had made the deed.

On the day following Mr. Scroggs' death, plaintiff went to the bank and asked for the deed, and was informed that it was withdrawn September 24, 1932. She saw at about the same time in the printed list of real estate recordations that the defendant had recorded a deed from John C. Scroggs to Ethel Bergman, describing the same real property described in her deed. Henry Dixon McGuire, an employee of the Capitol National Bank, testified he recollected that some two years prior to his appearance as a witness he had given some of Scroggs' papers, inclosed in an envelope, to Mr. Johns. He was unable to describe them further, and was not positive as to seeing any writing on the envelope. Mrs. Bergman was called as a witness by the plaintiff under the provisions of section 2055, Code of Civil Procedure, and admitted that she knew of the destruction of the Waity Knapp deed at the time she received her deed from Scroggs, dated November 25, 1932, and which was recorded August 10, 1933. Defendant went into possession under said deed upon the death of Scroggs.

The history of the Knapp deed may be thus summarized: It was executed January 5, 1932, and taken in charge by Mr. Henry; two weeks later, January 19, it was redelivered to Mr. Scroggs at his request by Mr. Henry, and on the same day delivered by Scroggs to Mrs. Knapp; on January 21 it was delivered by Mrs. Knapp, in company with Mr. Scroggs, to the Capitol National Bank; on September 24, 1932, said deed was delivered to Mr. Scroggs at his home by the voluntary act of W. G. Spillman, trust officer, accompanied by Mr. Henry, and destroyed by Mr. Scroggs by tearing in the presence of Mr. Spillman and Mr. Henry.

Upon the foregoing facts the court found that the deed was executed January 5, 1932, as herein related, and that said Scroggs, on January 21, 1932, delivered the same to said bank, as depositary, together with said written instructions, to be by said bank delivered to Mrs. Knapp upon his death, with the intention thereby of vesting absolute title in said Mrs. Knapp and divesting himself of all of his right, title, and interest in said real property, saving only to himself a life interest therein, and that title did vest in said Mrs. Knapp upon the delivery of the deed to said bank on January 21, 1932, and

that plaintiff, as owner, has been entitled to possession ever since the death of Mr. Scroggs, to wit, August 9, 1933. It was further found that defendant was aware of and had full knowledge of the execution and delivery of the deed under which title was conveyed to plaintiff, and that while in possession of said knowledge she wrongfully and without right accepted said deed executed by Scroggs to her, and caused the same to be recorded after the death of said Scroggs, August 10, 1933. Full findings are made to the effect that Scroggs' right to pass title after the bank transaction of January 21, 1932, failed, and his subsequent attempts to deal with the title were futile.

It is clear that the formality of a delivery such as would vest title in Mrs. Knapp was not complied with at the time the deed was executed, January 5. Mr. Henry testified that he advised Mr. Scroggs there were two ways of accomplishing his desire that Mrs. Knapp should enjoy ownership upon his death. The first was to place the deed, which was absolute in form, in her possession; second, he could deliver the deed to him or the bank, to be held at his will, and, if not recalled before his death, to be delivered to her upon the happening of that event. The latter method constituted but a conditional delivery, and no title would pass to the grantee under such an understanding. Mr. Henry said that this arrangement seemed to be what the grantor wished, and he complied with his requests. When the deed was recalled by Mr. Scroggs, however, he had complete control over it, and he could have made an absolute delivery to Mrs. Knapp, which, according to her testimony, he actually made. If her testimony was given credit by the trial court, it would have been justified in so finding, and a judgment, on conflicting evidence, could have been properly entered in her favor, and all that occurred thereafter would not have changed the result. The court did not decide the case on that ground, but preferred to decide it on the ground that the delivery made on January 21 to the bank, inclosing the letter of instructions as to its delivery to Mrs. Knapp, signed by him, completed a legal delivery and placed the deed beyond

his control thereafter. It is the contention of appellant that the bank was but the grantor's agent and its possession was the grantor's possession. We cannot agree with this contention. The evidence certainly justifies the conclusion that it was his desire that Mrs. Knapp should come into the enjoyment of the real property in issue at his death. Mr. Henry, a very reputable attorney, was the personal attorney of Mr. Scroggs, whom he had intrusted to hold the deed himself or deposit it at the bank. Scroggs evidently became dissatisfied with the transaction as it stood, and recalled the deed and made delivery first to Mrs. Knapp, who under his direction deposited it with the bank, and not with any officer or employee of the bank. The instructions written on the envelope by Mr. Henry to the effect that the deed might be recalled at the will of the grantor were but the memoranda of the attorney written at his office, and, when the deed was delivered to the grantor, they dropped out of the transaction. The delivery of the deed to Mr. Henry was an idle act so far as conveying anything to Mrs. Knapp was concerned, and that transaction, so far as delivery was involved, ended with the delivery being made to the grantor. From that point forward the evidence fully supports the finding that the deed was deposited by Mr. Scroggs with the intention of conveying title to the plaintiff. He told the plaintiff where and how to deposit the deed, accompanied her to the bank, and told the gentleman who came to the automobile at his request to place the deed in a secure place. But, beyond all this, the deed was received by the bank containing instructions from the grantor that could not have been misunderstood. Mrs. Knapp was but obeying the instructions of Mr. Scroggs when she handed the deed to the bank clerk. If indeed Scroggs had not parted with all control of it when he delivered it to her on January 19.

There is ample evidence in the record to support the findings.

The judgment is affirmed.

We concur: WASTE, C. J.; THOMPSON, J.; CURTIS, J.; LANGDON, J.

12 Cal.App.2d 183

EVERTS v. McFATE et al.
Civ. 9782.

District Court of Appeal, Second District,
Division 1, California.
Feb. 28, 1936.

Mortgages Ⓒ559(2)

Statute precluding deficiency judgment on mortgage or trust deed obligation unless notice of breach and election to sell was recorded one year before sale *held* not to apply retroactively to instruments executed before effective date of statute (Civ.Code, § 2924 and § 2924½, as added by St.1933, p. 1674).

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by H. W. Everts against C. J. McFate and another. From a judgment for defendants after sustaining their general demurrer without leave to amend, plaintiff appeals.

Reversed.

Louis Ferrari, of San Francisco, and Edmund Nelson, Howard Waterman, Freston & Files, and Ralph E. Lewis, all of Los Angeles, for appellants.

Henry G. Bodkin, of Los Angeles, for respondents.

EDMONDS, Justice pro tem.

This action was brought to recover the deficiency remaining unpaid upon a note originally secured by a deed of trust after sale of the property. The trial court sustained a general demurrer without leave to amend. The appeal is from the judgment subsequently entered.

The note and deed of trust were executed in 1929. The note matured three years thereafter. The sale was made October 17, 1933.

The point presented by the respondents by their demurrer and upon appeal is the application of section 2924½, Civil Code, enacted in 1933 (St. 1933, p. 1674), to the note executed by them. However, in the case of *Brown v. Ferdon* (Cal.Sup.) 54 P.(2d) 712, it was held that the provisions of that section cannot apply retroactively to instruments executed before its effective date.

Respondents also urge that the complaint does not sufficiently allege that the requirements of section 2924, Civil Code, and sec-

tion 692, Code of Civil Procedure, were complied with. We find the pleading sufficient in this regard. *Ley v. Babcock*, 118 Cal.App. 525, 5 P.(2d) 620.

The judgment is reversed.

We concur: HOUSER, P. J.; YORK, J.



12 Cal.App.2d 207

PEOPLE v. WILLIAMS.
Cr. 2792.

District Court of Appeal, Second District,
Division 1, California.
Feb. 29, 1936.

Rehearing Denied March 13, 1936.

1. Criminal law Ⓒ507½

To justify legal conclusion that child was accomplice of defendant accused of committing an immoral act against such child, proof must have been clear not only that child understood nature and effect of act, that act was forbidden, and, if he were to commit it, he would be punished, but also that he was conscious at time that he was committing a wrongful act (Pen.Code, § 26, subd. 1; § 288a).

2. Criminal law Ⓒ507½

Testimony of 12½ year old boy against whom defendant was accused of having committed immoral act *held* to establish that boy was "capable of committing crime" and was an accomplice of defendant, requiring reversal of conviction, where child's testimony was uncorroborated (Pen.Code, § 26, subd. 1; §§ 288a, 1111).

3. Criminal law Ⓒ1130(2)

Where appellant complaining of refusal to give requested instructions failed to print in his brief instructions given bearing upon same subjects or to clearly state substance thereof with citation to line and page of transcript where such instructions might be found, Supreme Court was not required to consider alleged error (Rules of Supreme Court and of District Courts of Appeal, rule 8).

4. Criminal law Ⓒ1037(1)

Remarks of district attorney in argument to jury warning jury regarding probable consequences of its failure to convict defendant accused of committing immoral act upon 12½ year old boy *held*, though improper, not to require reversal, where defend-

ant failed to object at time and remarks were such that their effect upon jury could have been minimized or eradicated had attention of trial court been directed to them (Pen.Code, § 288a).

5. Criminal law §722(3)

Remark of district attorney in argument to jury in prosecution for commission of immoral act against 12½ year old boy that best evidence of defendant's reputation was testimony of his own character witnesses who knew his work consisted of drawing nude and lascivious pictures of naked children held not to require reversal, in view of evidence that defendant was an artist and drew pictures of nude children.

YORK, J., dissenting.

Appeal from Superior Court, Los Angeles County; J. J. Trabucco, Judge.

Otis Williams was convicted of violation of statute relative to crimes against children, and he appeals.

Reversed as to two counts of information, and affirmed as to a third count.

Torrance C. Welch and Peter J. Youngdahl, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

HOUSER, Presiding Justice.

From a judgment of conviction on each of three counts of an information, which contained an accusation of the commission by him of the offense defined in section 288a of the Penal Code, as well as from an order by which his motion for a new trial was denied, defendant has appealed to this court.

[1,2] With reference to counts 1 and 3 of the information, the prosecuting witness was a boy of the age of about 12½ years; and it is urged by appellant that, if the crime of which defendant was accused in said counts was actually committed, the boy was an accomplice of defendant, and that, since the testimony that was given by the boy was not corroborated as is required by section 1111 of the Penal Code, it should follow that the evidence adduced on the trial of the action did not support the judgment as to either of said counts.

Whether the boy was legally capable of being an accomplice in the commission of the crime depends principally upon the provisions of subdivision 1 of section 26 of

the Penal Code, which is to the effect that "in the absence of clear proof that at the time of committing the act * * * [he] knew its wrongfulness," he was incapable of committing the offense.

In cases that have been decided by the appellate tribunals of this state, the language employed in the respective opinions therein with reference particularly to the state of mind of a child of tender years who has been either the victim, or a consenting participant, in a crime of the nature of that denounced by the provisions of the instant pertinent statute, indicates that, to justify the legal conclusion that the child was an accomplice of the defendant in the action, the "proof" must have been "clear" not only that the child understood the "nature and effect" of the act that constituted the offense; that the act was "forbidden"; that, if he were to commit it, he would be punished; but intimates also that, if he committed the offense, he must have been conscious at that time that "within the meaning obviously intended by the code", he was committing a "wrongful" act. *People v. Becker*, 140 Cal.App. 162, 35 P.(2d) 196. It also has been held that, for the purpose of adjudging a child an accomplice in the commission of the offense, it will not suffice that the child "was ignorantly indifferent and passive in the hands of the defendant, even to the point of submission"; but it must be affirmatively established that the "boy actually and knowingly consented to be the victim of the alleged assault." *People v. Dong Pok Yip*, 164 Cal. 143, 127 P. 1031, 1032. Furthermore, in order to constitute the child an accomplice in the perpetration of the crime, it must appear by "clear proof" that he was possessed of "knowledge of good and evil" and had sufficient mental "capacity to discern the moral quality of defendant's said conduct." *People v. Camp*, 26 Cal.App. 385, 147 P. 95, 96.

In the case of *People v. Conklin*, 122 Cal.App. 83, 92, 10 P.(2d) 98, 102, it was ruled that, although it was true that the boy in that case said that he "knew it was wrong, nevertheless bearing in mind that he was not yet twelve years old and of course had not arrived at the age of puberty, together with his remaining testimony, * * * there was sufficient testimony * * * to justify the jury in concluding that his was an 'assent' and not a 'consent.'"

In the instant case, the following excerpts of the testimony that was given by the boy illustrate not only his general knowledge, but particularly his appreciation of the "wrongfulness" of what he and the defendant had been doing at the time or times in question, to wit:

"Q. He [defendant] did not say anything to you at that time, or do anything out of the way? A. Yes.

"Q. You know what I mean by 'out of the way?' A. Yes, sir.

"Q. What do I mean? * * * A. Well it means like saying bad things.

"Q. * * * And this thing you called funny stuff? A. Yes.

"Q. You know that when I say 'out of the way' don't you? A. Yes, sir.

"Q. By the way, son, do you know that the thing that Otis [defendant] did there is a very wicked thing? A. Yes.

"Q. And a very wrong thing? A. Yes, sir.

"Q. You knew that when he did that to you, didn't you? A. Yes, sir.

"Q. Had your mother ever taught anything about anything of that kind being wrong and wicked? A. Yes.

"Q. Had you been taught in Sunday school that it was wrong and wicked to do things like that? A. Yes.

"Q. When was the first time that Mr. Williams did something that was wrong? A. Around June the 12th. * * *

"Q. What was the first thing that he said to you that you thought was improper? A. Well, he told me 'How about some funny stuff?' I don't know.

"Q. When he said that, you knew what he meant? A. Yes, sir. * * *

"Q. What led you to know then what he meant when he said 'How about some funny stuff?' A. I don't know, but I just knew what he meant. * * *

"Q. Or was it the morning when you went to Sunday school? A. I don't think we talked; I think it was another morning that we talked about it.

"Q. Then you boys decided you going over to Mr. Williams' house? A. Mr. Williams saw this [other boy], and he told me to bring him over.

"Q. You went over there for that purpose, didn't you, son? A. Yes. * * *

"Q. Charlie, isn't it a fact that you said to Mr. Williams, 'Why don't you do the

same thing to [the other boy] that you did to me?' A. Yes. * * *

"Q. And you told me yesterday that when these things happened, you knew they were very wrong? A. Yes, sir. * * *

"Q. By Mr. McCormick: Now, Charles, at the time that this terrible thing happened first, you have told us that you knew it was wrong? A. Yes.

"Q. Did you know you were committing a crime at that time? A. Yes.

"Q. You did? A. Yes.

"Q. Where had you heard that? A. I go to picture shows, and I see how they are at times. * * *

"Q. By Mr. McCormick: What did you think was wrong about it, Charles? A. I just thought it was dirty.

"Q. You just felt that it was a dirty thing to do? A. Yes.

"Q. It sort of was out of the ordinary for you, wasn't it? A. Yes.

"Q. And you just naturally revolted at it? Do you know what that means? A. Yes, but I don't know how to explain it.

"Q. You know what it is not to like something? A. Yes.

"Q. Did you like that? A. No, sir.

"Q. You didn't, did you? A. No, sir.

"Q. And it was not not liking that made you think it was wrong? A. No, sir.

"Q. What was it that made you think it was wrong? A. I think it was bad to do that.

"Q. Did you think you were doing something bad? A. Yes.

"Q. Why did you do it, Charles? A. Because he paid me.

"Q. Because he paid you for it? A. Yes, sir."

It may thus be noted that the "proof" with respect to the knowledge of the boy regarding the "wrongfulness" of the act discloses the general fact that considering his age the boy was more than ordinarily advanced. His apparent understanding of the general situation and his replies to questions that were propounded to him, in point of mental ability would reveal the existence of an intellect that would be not of discredit to an average person of mature years. Indeed, his directness and clarity of expression might be regarded as extraordinary. If not an "infant prodigy," he well might be regarded as a "precocious youngster." In particular, from his testi-

mony it appears that at the outset, and before anything in the nature of a direct criminal act had occurred between the boy and defendant, the former had a clear understanding of the significance of the expression "funny stuff," which was included within the language employed by defendant in his overture to the boy; that both at that time and at all times thereafter the boy knew that the act that was contemplated by defendant was "a very wicked thing; * * * a very wrong thing"; that theretofore he had been told, both by his mother and "in Sunday school, that it was wrong and wicked to do things like that"; that he thought "it was bad to do that"; that "it was dirty"; and that he "just naturally revolted at it"; that thereafter Mr. Williams (defendant) saw the (other boy); and "he (defendant) told me to bring him (the other boy over); that thereafter the prosecuting witness and the other boy went "over" for "that" purpose; that it was at the suggestion of the prosecuting witness that the other boy was procured. In that connection, it appears that the prosecuting witness said to defendant, "Why don't you do the same thing to (the other boy) that you did to me?" And finally, that although the prosecuting witness knew that he was "committing a crime at that time", the reason he participated in the act was "because he (defendant) paid me."

In the absence of that part of the record hereinbefore set forth, it would be extremely difficult for the respective members of this court to believe that a boy of the age of 12½ years could have more than a hazy conception of a situation that not only included actual commission of the act that is the subject of the present inquiry, but as well could recognize the fact that such an act was such a radical departure from moral rectitude that its commission had been denounced by statute as constituting a criminal offense; and yet, measured by the substance of the excerpts of the testimony to which reference hereinbefore has been had, no conclusion may be reached other than that "at the time of committing the act charged * * * [the boy] knew its wrongfulness" (subdivision 1, § 26, Pen. Code); and was thoroughly acquainted with the criminal consequences that would or might result from the commission of such an act. Since by his own testimony, or, as required by the provisions of the statute, by "clear proof," he established the ultimate fact that he was "capable of committing crimes" (subdivision 1, § 26, Pen.Code), and especially the criminal of-

fense which forms the basis for the prosecution of defendant herein, it should follow that the boy was an accomplice of defendant, and hence that, in the absence of evidence by which the testimony given by the accomplice was corroborated (section 1111, Pen.Code), in the contemplation of the law applicable to such a situation, defendant did not have a fair trial as to counts 1 and 3 of the information.

[3] With reference more particularly to the judgment of conviction of defendant on count 2 of the information, it is contended by appellant that the trial court committed prejudicial error that affected the substantial rights of defendant, in that it refused his request to give to the jury each of two specified instructions. In that connection, since appellant has ignored the requirements specified in rule VIII of the Supreme Court and of the District Courts of Appeal, in that he has neither printed in his brief "all instructions given bearing upon the subjects covered by the refused instructions," nor "clearly stated the substance thereof, with citation to the line and page of the transcript where such instructions may be found," this court is under no obligation to devote attention to the alleged error of which appellant complains. However, from an examination of such refused instructions, it appears that one of them contained an erroneous declaration of the law and that the other was at least argumentative. Hence, even waiving the rule, no error was committed by the trial court in refusing to give to the jury either of the criticized instructions.

[4,5] Finally, appellant complains of certain specified misconduct by the deputy district attorney who was in charge of the prosecution of the action. Considering the argument made by the deputy district attorney to the jury, it may not be denied that the remarks to which appellant has directed attention are justly subject to adverse criticism. For the greater part, they were in the nature of a warning to the jury regarding the probable consequences of its failure to convict the defendant. Time and again the Supreme Court and appellate courts of this state have ordered the reversal of judgments in criminal cases because of similar misconduct on the part of district attorneys on the trials of such actions. However, generally, where such misconduct has resulted in a mistrial, it may be noted that at the very time when the misconduct occurred the attention of the trial court was specifically directed to

it, and that thereby it was given an opportunity to correct the error or at least to reduce its adverse effect. But in the instant case it is noted that, as to remarks of a different nature, on two occasions only were objections interposed by defendant thereto, and that with reference to one of such remarks the jury was then and there properly instructed to disregard it in its deliberations. The other remark to which defendant objected was as follows: "I think that the best possible evidence of this defendant's reputation is the testimony of his own character witnesses. Two or three of them had heard that he had been arrested and charged with similar conduct in 1926; they knew that this lofty work of his consisted of drawing nude and lascivious pictures of naked children—"

Following defendant's objection to the effect that there was no evidence in the record that there were any lascivious pictures, the judge of the trial court stated that if the district attorney in his argument went beyond the evidence or the reasonable deductions to be drawn therefrom, the jury "are instructed to disregard that."

In view of the evidence that defendant was an artist, and that in the pursuit of his profession he did draw pictures of nude children, it is apparent that, in characterizing the work of defendant as "lascivious," the deputy district attorney was not guilty of such misconduct that properly it could be said to seriously prejudice the substantial rights of defendant on the trial of the action. Nor were any of the other remarks of the deputy district attorney of the character that had the attention of the trial court been directed to them at the time of their utterance their effect, if any, upon the jury could not have been minimized, if not entirely eradicated. In the circumstances, it follows that on account of the alleged misconduct of the deputy district attorney the judgment cannot be reversed.

It is ordered that, as far as the judgment and the order by which defendant's motion for a new trial was denied affect counts 1 and 3 of the information, they be, and they are, reversed. It is further ordered that, as far as the judgment and the order by which defendant's motion for a new trial was denied affect count 2 of the information, they be, and they are, affirmed.

I concur: DORAN, J.

YORK, Justice (dissenting).

Because of the misconduct of the district attorney, as specified by appellant, and because of the court's attitude towards such misconduct, I believe that a new trial should have been granted as to all counts.



12 Cal.App.2d 255

GROSS v. FOX RITZ THEATRE CORPORATION.
Civ. 10631.

District Court of Appeal, Second District,
Division 1, California.
March 3, 1936.

Hearing Denied by Supreme Court
April 30, 1936.

Theaters and shows ☞6

Res ipsa loquitur doctrine held applicable where patron of motion picture theater was ushered to vacant chair which collapsed after patron had sat in it for 20 minutes, notwithstanding that chair had been borrowed by theater owner.

Appeal from Superior Court, Los Angeles County; Parker Wood, Judge.

Action by Mitzi Gross against the Fox Ritz Theatre Corporation. From a judgment for the plaintiff, the defendant appeals.

Affirmed.

Lasher B. Gallagher, of Los Angeles, for appellant.

Hunsaker, Moote & Longcroft, of Los Angeles, for respondent.

HOUSER, Presiding Justice.

From the record herein, it appears that on a date specified in a complaint in an action that was brought by the plaintiff against the defendant, it was alleged that the defendant was the owner and the operator of a motion picture theater "open to the public and charging admission from its patrons"; that after paying the admission charged to such theater, plaintiff was admitted therein, and thereupon "was ushered by the employees and/or agents of said defendants to a seat in the balcony of said theater," which "was in a darkened condition, and that the only available seat was a vacant chair in the left aisle; * * *

that said plaintiff sat in said chair, viewing the performance for a period of approximately twenty (20) minutes, and without warning, the said chair collapsed, injuring plaintiff."

The action resulted in a judgment being rendered in favor of plaintiff. From that judgment the defendant appealed to this court. Thereupon respondent gave notice of her motion to dismiss the appeal or affirm the judgment, on the ground that the "question on which the decision of this cause depends is so unsubstantial as not to need further argument."

At the outset, in compliance with the rule of the Supreme Court and of the District Court of Appeal, in its opening brief the appellant made its "Statement of Question Involved." As therein set forth, the question that is submitted to this court for its determination is as follows: "Where a theater owner borrows several chairs from a nearby business neighbor and has borrowed similar chairs on other occasions and there is no patent defect about such chairs and a patron of the theater is directed to one of such chairs and sits therein for a length of time variously estimated of from twenty minutes to a half hour and the chair collapses, does the doctrine *res ipsa loquitur* apply to such situation?"

On the hearing of respondent's motion to affirm the judgment, the appellant urged the point that for the reason that it was not the owner of the chair that collapsed, the doctrine of *res ipsa loquitur* had no application; hence that the appeal was well taken and that the motion of respondent should be denied.

Without the citation of authority, this court will assume the law to be that if, on the occasion in question, plaintiff had been regularly ushered to a chair or seat that ordinarily was provided for and used by the patrons of the theater, and that in circumstances such as existed in the instant case the said chair or seat collapsed, and thus caused the injuries of which plaintiff has complained, there could be no doubt regarding the application to the situation of the doctrine of *res ipsa loquitur*. Nor would the added fact that the chair that collapsed with plaintiff was a borrowed article affect the application of the principle. *McNamara v. Boston & M. R. Co.*, 202 Mass. 491, 89 N.E. 131; *Beattie v. Boston Elevated Ry. Co.*, 201 Mass. 3, 86 N.E. 920; *Ladd v. N. Y., N. H. & Hartford R.*

Co., 193 Mass. 359, 361, 362, 79 N.E. 742, 9 L.R.A.(N.S.) 874, 9 Ann.Cas. 988; *Foster v. N. Y., N. H. & Hartford R. Co.*, 187 Mass. 21, 72 N.E. 331; *Hale v. N. Y., N. H. & Hartford R. Co.*, 190 Mass. 84, 76 N.E. 656; *Spaulding v. W. N. Flynt Granite Co.*, 159 Mass. 587, 34 N.E. 1134; *Larrabee v. Des Moines Tent & Awning Co.*, 189 Iowa, 319, 178 N.W. 373. See, also, *O'Connor v. Mennie*, 169 Cal. 217, 146 P. 674.

It is ordered that the judgment be, and it is, affirmed.

We concur: YORK, J.; DORAN, J.



12 Cal.App.2d 357

PALEN v. PALEN.

Civ. 9871.

District Court of Appeal, Second District,
Division 2, California.

March 10, 1936.

1. Divorce ☞331

Judgment for alimony obtained in another state can be established in California to be enforced as continuing judgment in California for payment of alimony.

2. Divorce ☞331

Judgment awarding plaintiff alimony due her under Missouri divorce decree at date of trial and providing that provisions of Missouri decree for future alimony payments be established as decree of California court, with same force and effect as if Missouri divorce decree had been rendered in California, *held proper*.

3. Pleading ☞276

Filing of additional pleadings to bring entire subject-matter in controversy before court for adjudication rests in discretion of trial court.

4. Divorce ☞277

In action to recover money due under divorce decree and property settlement, filing of supplemental complaint for recovery of life policy loans repaid by plaintiff after defendant's failure to repay them as agreed in property settlement *held proper*.

5. Husband and wife ☞39

Obligations arising out of marriage relationship and existing at time of agreement

settling varied property rights of husband and wife constituted consideration for provision in agreement that husband should repay life policy loans, notwithstanding that \$1 consideration recited in agreement was not actually paid.

ments than is authorized by the foregoing decisions. Respondent was given a money judgment for the alimony due at the date of trial, and it was further provided that the provisions of the Missouri decree for future payments be established as the decree of the California court with the same force and effect as if said Missouri judgment had been rendered in this state.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by Charlotte B. Palen against Matthew A. Palen. From the judgment, the defendant appeals.

Affirmed.

Andrew J. Copp, Jr., of Los Angeles, for appellant.

William Ellis Lady, of Los Angeles, for respondent.

GOULD, Justice pro tem.

In an action in the state of Missouri, plaintiff herein was awarded a decree of divorce from defendant and was granted an alimony allowance. Alleging failure on the part of defendant to make certain alimony payments and to observe the terms of a property agreement, plaintiff brought this suit in California. Originally the action was simply to recover for certain sums of money due from defendant under the Missouri decree and the property agreement, but by a supplemental complaint plaintiff also asked in effect that the decree of the Missouri court be established as a continuing judgment in this jurisdiction. Also involved herein is the right of plaintiff to judgment against defendant for an additional sum of money which had been borrowed upon certain life insurance policies, which money defendant had agreed in the property settlement between the parties to repay but which plaintiff herself had paid because of defendant's failure and refusal to do so.

[1,2] It is settled that a judgment for alimony obtained in another state may be established in this state for the purpose of enforcing it as a continuing judgment in this jurisdiction for the payment of alimony. *Creager v. Superior Court*, 126 Cal.App. 280, 14 P.(2d) 552; *Straus v. Straus*, 4 Cal.App.(2d) 461, 41 P.(2d) 218, 42 P.(2d) 378. By its judgment in favor of plaintiff herein the trial court did nothing more with respect to the alimony pay-

[3-5] By his property agreement with respondent, appellant had obligated himself to pay off certain loans on life insurance policies, which policies became respondent's property. In the within action respondent originally asked judgment for damages against appellant for the amount of the unpaid insurance policy loans. After the trial of the case, but before decision, the court permitted the filing of a supplemental complaint in which respondent alleged that she herself had paid the loans, and the court gave judgment against appellant for the amount so paid. Appellant objects to this portion of the judgment, but we see no force in his contention. Filing of additional pleadings to bring the entire subject-matter in controversy before the court for adjudication is a matter committed to the discretion of the trial court; and in this case it was eminently proper to permit the supplemental complaint to be filed. By his agreement with respondent, appellant had undertaken to repay the loans, and his claim that such agreement was without consideration is untenable, in view of the fact that the payment of the policy loans was but one item in a settlement between husband and wife of their varied property rights. It is immaterial whether or not the \$1 consideration recited in the covenant was actually paid. The obligations arising out of the marriage relation and existing at the time of the property settlement, as well as the mutual obligations of the agreement itself, constitute sufficient consideration. The judgment rendered by the court imposes upon appellant exactly the burden which he assumed when he voluntarily entered into the written covenant with his wife, and he can point to no detriment imposed which warrants a reversal of the lower court's adjudication.

Judgment affirmed.

We concur: CRAIL, P. J.; WOOD, J.

12 Cal.App.2d 245

PEOPLE v. HEDDENS et al.
Cr. 2816.

District Court of Appeal, Second District,
Division 1, California.

March 2, 1936.

1. Indictment and information ☞110(5)

Indictment which charged, in language of statute, offense of administering drugs to female with intent to produce miscarriage, *held* sufficient (Pen.Code, § 274).

2. Criminal law ☞824(1)

Generally, trial court is not under duty to give instructions upon specific points developed through evidence introduced at trial unless such instructions are requested.

3. Criminal law ☞824(1)

Trial court in criminal cases must of its own motion give instructions on general principles of law pertinent to case, even though instructions are not proposed or presented in writing by parties.

4. Criminal law ☞824(7)

Where principal witnesses against defendant were accomplices and only evidence offered by prosecution tending to corroborate accomplices was defendant's declarations, which included denial of guilt, and evidence against codefendant was overwhelming, failure to instruct without request on subject of accomplices and weight to be given to their testimony *held* reversible error.

5. Criminal law ☞1023(5)

Order denying motion to vacate and set aside verdict in criminal case *held* not appealable order.

[Ed. Note.—For other definitions of "Appealable Order," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Joseph Vickers, Judge.

Harley Heddens and W. G. Brown were convicted of administering drugs to a female with intent to produce miscarriage in violation of Pen.Code, § 274, and defendant Brown appeals.

Reversed and remanded.

Kirtland I. Perky and James E. Fenton, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

DORAN, Justice.

[1] Defendant W. G. Brown and his co-defendant, Harley Heddens, were convicted by a jury of the offense designated by section 274 of the Penal Code. Defendant W. G. Brown appeals, contending that the facts alleged in the indictment do not constitute a public offense. The indictment is in the words of the statute, substantially conforming to the requirements of the law, and is therefore sufficient.

The criticism of the instruction complained of in the appeal is without merit.

[2] The failure of the court to give any instructions on the subject of accomplices or the testimony of accomplices is also urged as one of the grounds of appeal. Appellant and defendant had asked for no instructions on this subject. It is the law that it is not the duty of the court to give instructions upon specific points developed through the evidence introduced at the trial, unless such instructions are requested by the party desiring them, and such is the argument presented by respondent in reply to appellant's contention. This rule does not apply to the case at bar. The record reveals that the principal witnesses, if not the only witnesses, involving the defendant Brown in the offense, were accomplices, and the only evidence offered by the prosecution tending to corroborate the accomplices was the evidence of defendant Brown's declarations, which declarations included a denial of guilt. The evidence against the codefendant Heddens was overwhelming and the jury, in ignorance of the law with respect to the necessity of corroborating accomplices and the manner in which such accomplices must be corroborated, might easily have been led astray, and therefore, to insure a fair trial under the law, should have been instructed on this subject.

So far as the defendant Brown was concerned, this question was vital, and was of the gist of the action.

[3] It is the duty of the court in criminal cases to give of its own motion instructions on the general principles of law pertinent to such cases, even though they are not proposed or presented in writing by the parties themselves. *People v. Scofield*, 203 Cal. 703, 265 P. 914; *People v. Bill*, 140 Cal. App. 389, 35 P.(2d) 645; *People v. Peck*, 43 Cal.App. 638, 185 P. 881; *People v. Wagner*, 65 Cal.App. 704, 225 P. 464.

[4] Under the circumstances presented in the instant case, failure of the trial court to so instruct the jury was prejudicial error.

[5] The judgment and the order denying the motion for a new trial are reversed, and cause remanded. The appeal from the order denying the motion to vacate and set aside the verdict of the jury is not appealable, and is therefore dismissed.

I concur: YORK, J.

HOUSER, Presiding Justice (concurring).

I concur. As is stressed in the main opinion herein, although generally speaking, on the trial of an action, in the absence of a request so to do by a party thereto, a failure upon the part of the trial court to give to the jury a proper instruction upon some pertinent, but not necessarily a determinative legal principle, will not in itself constitute a reversible error, when from the nature of a criminal action and in consideration of the evidence adduced on its hearing the particular and controlling circumstances that surround the commission of the alleged offense clearly and unmistakably indicate that a given instruction is not only proper and essential, but as well that it is vital in its effect, it is the bounden duty of the trial court of its own motion to thoroughly instruct the jury with reference to such point of law.

It is true that, as disclosed by certain legal precedents to which respondent herein has directed the attention of this court, a view of the law obtains that would appear to be at variance with the rule that is so uniformly declared in the authorities to which attention has been directed in the main opinion herein. Particularly is that situation apparent on an examination of the opinion in the case of *People v. Olds*, 86 Cal.App. 130, 260 P. 321. But, as this court now understands the law, the declaration in that case of the legal principle that, because the defendant in that action did not request that

an instruction be given to the jury respecting the necessity of corroboration of testimony that was given by an accomplice, on appeal from the judgment the appellant was in no position to complain, was too broad, if not inaccurate. An inspection of the appellant's brief in the cited case shows that the point was neither thoroughly nor even seriously presented; less than one page in the printed brief and but one authority (that was not particularly pertinent to the inquiry) having been devoted to a consideration of the subject. But, in addition to that situation, as is shown not only by the record therein, but as well as appears in the body of the opinion, the testimony that was given by the accomplice of the defendant was fully corroborated by three independent eyewitnesses to the commission of the offense. It is obvious that, assuming the reliability of the testimony that was given by such witnesses, as far as concerned the defendant in the cited case, no miscarriage of justice could have resulted from the failure of the trial court of its own motion to give to the jury an instruction regarding the necessity of corroborating the testimony that was given by the accomplice. Nor is it improbable that the lack of a serious presentation of the point involved, coupled with a consideration of the corroboratory evidence, and the conviction in the "mind" of the appellate court that the defendant had been given a fair trial and that justice had been done in the premises, constituted the incentive for the too broad declaration of the law to which reference has been had.

As is stated in the main opinion herein, "Under the circumstances presented in the instant case, failure of the trial court to so instruct the jury was prejudicial error." Such a situation did not obtain in the *Olds* Case and, in the light of the record in that case, no prejudice resulted of the nature that would have warranted a reversal. The judgment therein, in any event, should, and probably would, have been affirmed by virtue of the mandate of section 4½ of article 6, of the Constitution.

12 Cal.App.2d 298

**FRANKINI v. BANK OF AMERICA NAT.
TRUST & SAVINGS ASS'N.**

Civ. 5297.

District Court of Appeal, Third District,
California.

March 6, 1936.

Hearing Denied by Supreme Court
May 4, 1936.**1. Banks and banking** *§*154(9)

Whether a bank is negligent in paying a forged check drawn upon account of a depositor is usually one for determination of jury after actual payment of forged check has been established.

2. Banks and banking *§*154(9)

Whether depositor has exercised due care in promptly examining his passbook, paid checks, or statement of account is for jury after payment of forged check has been established.

3. Banks and banking *§*148(1)

A bank is only warranted in paying out money of depositor on his genuine order and in accordance therewith, and if payment be made on a forged check with no attendant circumstances sufficient to create an equitable estoppel as against depositor, or there has been no prior negligence by depositor, contributory to payment of check, no degree of care on part of bank will excuse it from liability.

4. Banks and banking *§*154(9)

Whether depositor suing bank for amount paid by bank in cashing forged checks from depositor's account was contributorily negligent merely because he left blank checks, green ink, and protectograph on desk in private office in home held for jury.

5. Banks and banking *§*148(3)

When by the exercise of proper care a bank could have discovered alterations or forgeries of checks, it must bear the loss, notwithstanding depositor failed in his duty to examine the account.

6. Banks and banking *§*154(6)

Bank sued for amount paid by it from depositor's account in cashing forged checks had burden of establishing defense that depositor was estopped by own failure to claim credit or object to bank's statement within agreed ten days after expiration of time covered by statement.

7. Banks and banking *§*154(9)

Whether depositor suing bank for amount paid by bank from depositor's account in cashing forged checks had notified bank of error within agreed ten days after expiration of time covered by statement held

for jury as respects January statement, under evidence that on February 9th or 10th depositor had told bank's president that certain February checks were not his.

8. Banks and banking *§*154(3)

Act of depositor in telling bank president on February 9th or 10th that certain February checks were not his and in making demand on March 5th for reimbursement of money paid on forged checks held sufficient compliance with written requirement that he make claim for credit within ten days after expiration of time covered by statement to authorize maintenance of action on February checks.

Appeal from Superior Court, Sacramento County; Henry B. Neville, Judge.

Action by Louis Frankini against the Bank of America National Trust & Savings Association. Judgment for defendant, and plaintiff appeals.

Reversed.

Frank L. Murphy, of Sacramento (Ralph Thomas Lui, of Sacramento, of counsel), for appellant.

McLaughlin & McLaughlin, of Sacramento, S. J. Tosi, of San Francisco, and Devlin & Devlin & Diepenbrock, of Sacramento, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiff has appealed from a judgment which was rendered against him pursuant to an instructed verdict of a jury. The suit was brought to recover \$1,345 which was paid by the bank in cashing forty-nine forged checks from the plaintiff's account therein. In support of the judgment, it is contended the plaintiff waived his right to maintain this action by failing to claim credit for the amount thus wrongfully paid within ten days from the time covered by the bank's statements as required by the terms of a written agreement to that effect.

The plaintiff is a truckman in Sacramento who employs several drivers, among whom was William Rose. For a number of years prior to the time which is involved in this litigation, Mr. Frankini maintained an active checking account in the Bank of America and its predecessor, the Bank of Italy, in the city of Sacramento. During all that time the plaintiff used a room at his home as a business office. In that office

he kept a roll-top desk in which there was always a supply of blank checks on which there was printed his name, occupation, and residence. In this desk he also kept a mechanical "protectograph" with which he was accustomed to impress or perforate in the issued checks the amounts for which they were drawn. He filled out the checks in green ink.

Mr. Rose was in the habit of calling at the plaintiff's house for his wages and knew where the blank checks, the ink, and protectograph were kept. In November, 1931, his employment with the plaintiff was terminated. Thereafter he procured a skeleton key to fit the door of plaintiff's house, and in his absence, on numerous occasions, entered the home during the months of November and December, 1931, and in January and February, 1932, during which period of time he drew forty-nine checks ranging in amounts from \$20 to \$40, in the aggregate sum of \$1,345, payable to himself or other employees of the plaintiff. In drawing these checks the plaintiff's printed check forms were used, together with his green ink and the protectograph. The name of the plaintiff was forged by Rose thereon and the checks were then promptly cashed through the medium of a bootlegger with whom he dealt. After the forgeries were discovered, Rose was promptly apprehended, confessed the crimes and was convicted and imprisoned therefor. He was a witness at the trial of this case and testified to the preceding facts. There is no question regarding the forgeries or the payment of these checks by the bank.

Before the defendant Bank of America succeeded the Bank of Italy in Sacramento the plaintiff signed a printed form designated an "Authorization to Mail Statement and Vouchers." After requesting that the bank send to him periodically his bank statements with canceled checks listed during such period, that document recited that: "In consideration of the compliance with this request the undersigned promises to notify you [the bank] of any error and to make any claim for credit or refund within ten days after the expiration of the time covered by the statement."

The instrument then provides that "This request and authorization is to remain in force and effect until revoked in writing." Pursuant to this request, monthly statements of the plaintiff's bank account were prepared and forwarded to him by mail,

together with all canceled checks listed therein, on the first day of each following month. These statements for the months of November and December, 1931, and January, 1932, were received by the plaintiff in due time and left on his desk unopened until the early part of February, when he delivered the three packages to an accountant to check over the various statements. On the 9th or 10th of February this accountant informed the plaintiff that twenty-one canceled checks were missing from the January statement. These missing checks had evidently been stolen by Mr. Rose. On that same day the plaintiff went to the bank and told Mr. Vandenberg, the vice president, of the missing checks. Mr. Vandenberg testified in that regard: "I immediately proceeded to investigate." He took the February checks which the bank then held to the plaintiff and they examined them together. The witness further said: "There was an extraordinarily large number of checks drawn to a man by the name of John Perry. * * * It gave him [Mr. Frankini] concern, and he says 'I didn't write those checks, those aren't my checks.'"

Following the plaintiff's personal notice to the bank and the discovery of the forgeries, the February statement of his bank account was transmitted to him about March 1st. This statement included thirteen forged checks paid in that month for the aggregate sum of \$365. On March 5th the plaintiff demanded of the bank the repayment of the aggregate sum of \$1,345 which was charged against his account for cashing the forty-nine forged checks, which was refused. This suit was commenced September 12, 1932. The cause was tried with a jury. At the close of the evidence the court instructed the jury to render a verdict in favor of the defendant. This was done. A judgment was accordingly entered against the plaintiff. From that judgment, this appeal was perfected.

Assuming, without so deciding, that the plaintiff was bound under the authorities of *Kimmell v. Skelly*, 130 Cal. 555, 561, 62 P. 1067; *Hawkins v. Hawkins*, 50 Cal. 558, and 13 Corpus Juris, page 370, § 249, by the terms of his signed request for monthly statements of his account, to notify the bank of any errors therein contained "within ten days after the expiration of the time covered by the statement" on penalty of forfeiture of a right to claim credit therefor, we are of the opinion the

court erred in directing a verdict in favor of the defendant under the circumstances of this case.

[1-3] The question as to whether a bank is guilty of negligence in paying a forged check drawn upon the account of a depositor therein is usually one for the determination of the jury after the actual payment of a forged check has been established. So, also, the question as to whether a depositor has exercised due care in promptly examining his passbook, paid checks, or a statement of his account is for the decision of the jury. *Leather Manufacturers' Nat. Bank v. Morgan*, 117 U.S. 96, 6 S.Ct. 657, 29 L.Ed. 811. It is error to withdraw the case from the jury if there is any substantial evidence to support the liability of the bank therefor. The well-established rule with respect to the liability of a bank for the payment of a forged check from the account of a depositor therein is expressed in the case of *Union Tool Co. v. Farmers' & Mechanics' Nat. Bank of Los Angeles*, 192 Cal. 40, at page 46, 218 P. 424, 426, 28 A.L.R. 1417, as follows: "It is a well-settled general rule that as between a bank and its depositor the bank is only warranted in paying out the money of the depositor on his genuine order and in accordance therewith. If payments be made on a forged check, with no attendant circumstances sufficient to create an equitable estoppel as against the depositor, or there has been no prior negligence by the depositor contributory to the payment of the check, no degree of care on the part of the bank will excuse it from liability."

[4] We may not say as a matter of law that the plaintiff was guilty of negligence which contributed to a justifiable payment of the forged checks by the bank merely because he left his blank checks, green ink, and protectograph on his desk in his private office in his home. He may not be deemed to have reasonably anticipated that some thief and forger would procure a skeleton key and unlawfully enter his home in his absence to obtain these means of forging the checks. At least that question of negligence was for the determination of the jury.

[5] The authorities appear to hold that when the bank is guilty of negligence in the payment of a forged check, in the absence of an agreement to the contrary, it may be liable for the payment of a forged check even though the depositor has neg-

lected to promptly examine his passbook or statement of account so as to discover the error. It is said in that regard in the case of *Glassell Dev. Co. v. Citizens' Nat. Bank of Los Angeles*, 191 Cal. 375, at page 380, 216 P. 1012, 1014, 28 A.L.R. 1427:

"The weight of authority, and perhaps of reason, supports the view that when a depositor's passbook has been written up and returned to him with canceled checks which have been charged to his account, it is his duty to examine such checks within a reasonable time, and if they disclose forgeries or alterations to report them to the bank, failing in which he cannot, if his failure results in detriment to the bank, dispute the correctness of payments thereafter made by it on similar checks. * * *

"This rule, however, assumes that the bank itself has not been guilty of negligence in making the payment, for when by the exercise of proper care it could have discovered the alteration or forgery, it must bear the loss notwithstanding that the depositor failed in his duty to examine the accounts."

[6] In the present case the defendant pleaded that the plaintiff was estopped from maintaining this action for failure to claim credit or to object to the several bank statements within ten days of the receipt thereof, by virtue of his written agreement to that effect. The burden was on the bank to establish that defense. It does appear that the plaintiff signed an "Authorization to Mail Statements and Vouchers" to him, which did contain the statement that "the undersigned promises to notify you [the bank] of any error and to make any claim for credit or refund within ten days after the expiration of the time covered by the statement." The plaintiff testified that he did not know the document contained that limitation of time within which to object to the accuracy of the statements. This provision was not called to his attention. Under the authorities heretofore cited, he may be charged with knowledge of the contents of a document which he signed, in the absence of deceit or constructive fraud in procuring his signature. The record contains no evidence of fraud in that regard. But the instrument was presented to him as a mere written request for monthly statements. This instrument was retained by the bank. Section 340, subdivision 3, of the Code of Civil Procedure allows one year in which to commence an action against a bank for the

payment of a forged check, and yet this written document limits the time for challenging the wrongful payment to ten days "after the expiration of the time covered by the statement." It will be observed the depositor is not even allowed ten days from the time of receiving the statement from the bank. Under a strict construction of that language, the transmission of the statement might be delayed by the bank until the depositor would have no time or opportunity to challenge its accuracy. It seems like a harsh rule. In the case of *Los Angeles Inv. Co. v. Home Savings Bank of Los Angeles*, 180 Cal. 601, at page 613, 182 P. 293, 298, 5 A.L.R. 1193, regarding a similar provision printed in a depositor's passbook, the court says: "There is no reason, so far as we know, why a depositor may not make such an agreement if he deliberately chooses to do so, unreasonable as it is. * * * It must appear affirmatively that he consented and agreed to it either by being required to sign it or by having his attention particularly called to it."

Assuming for the purpose of this appeal without so deciding that the plaintiff was presumed to know that he was limited to ten days "after the expiration of the time covered by the statement" within which to notify the bank of a claim for reimbursement for the payment of forged checks, and that the statements covered the entire month, it may be true that he waived his right to object to the November and December statements for failure to notify the bank within the time prescribed. The burden was on the defendant to establish that waiver.

[7] Regarding the January statement, the record shows that notice of the twenty-one missing checks was called to the attention of the bank on the "9th or 10th of February" and that Mr. Vandenberg, the vice president, took the February checks to the plaintiff at that time when they examined them together. At that time Mr. Frankini said regarding the forged checks "those aren't my checks." That repudiation of the February statement was definite and should have placed the bank on notice that the January statement was also erroneous so as to require an investigation with respect to it. It is a significant fact tending to show negligence on the part of the bank that it had passed and paid forty-nine different forged checks within a period

of three and a half or four months. That repudiation of the February checks was within ten days "after the expiration" of the 31st day of January, which we assume was the last day covered by that statement. At least there is some evidence that this notice was within the time prescribed by the written agreement, which would require that matter to be submitted to the jury.

[8] With respect to the February statement which was received by the plaintiff March 1st, the previous notice to the bank which was made February 9th or 10th was sufficient to comply with the written requirement and entitled him to maintain the action with respect to the thirteen forged checks aggregating the sum of \$365, at least. Moreover, demand was made on the bank March 5th for reimbursement for the money paid on all of the forged checks. That feature of the case, at least, rendered it erroneous for the court to direct the jury to render a verdict in favor of the defendant on all of the issues of the case. After the bank had specific notice of the repudiation of the February forged checks, it could not bind the plaintiff by afterwards rendering a statement which included these very checks which had been previously denounced as false.

For the reason that the court erroneously directed the jury to return a verdict in the defendant's favor on all the issues of the case, the judgment is reversed.

We concur: PULLEN, P. J.; LEMON, Justice pro tem.



ENGLISH v. ENGLISH. *

Civ. 5529.

District Court of Appeal, Third District,
California.

March 11, 1936.

Rehearing Denied April 10, 1936.

Hearing Granted by Supreme Court
May 7, 1936.

I. Husband and wife 629(1)

Separation contract settling property rights between parties, whereunder plaintiff agreed to pay specified sum per month until designated aggregate amount had been paid, held severable, so that each installment provided for therein constituted separate obligation payable at different date.

2. Judgment ¶540

Doctrine of "res judicata" is that final judgment rendered upon merits by court of competent jurisdiction upon matter within its jurisdiction is conclusive of rights of parties or their privies in all other actions in same or any other tribunal of concurrent jurisdiction on points and matters in issue and adjudicated in first suit.

[Ed. Note.—For other definitions of "Res Judicata," see Words & Phrases.]

3. Judgment ¶652

Doctrine of conclusiveness of judgments applies to default judgment, where such judgment is regular and valid and shows distinctly on what count or cause of action it was rested, but confession implied from default is limited to material issuable facts which are well pleaded, and does not apply to issues which were not raised in pleadings.

4. Judgment ¶585(4)

Subject to rule that judgment is conclusive as to every fact necessary to uphold it, default judgment is not conclusive in subsequent suit on different cause of action against any defenses which might have defeated plaintiff's recovery in former action.

5. Judgment ¶593

Where contract is severable and creates separate obligations arising at different times or under different circumstances, suit upon certain matured obligations does not estop parties from raising other issues in another suit between same parties involving different obligation, where such issues were neither pleaded nor directly determined by former judgment.

6. Judgment ¶593

Generally, contract to do several things at different times is divisible so as to authorize successive actions thereon, and judgment recovered for single breach of continuing contract or covenant is no bar to suit for subsequent breach thereof.

7. Judgment ¶596

Rule that judgment on issue which is directly raised in former suit between same parties, based upon severable matured installments of same contract, will estop parties from again raising same issue in subsequent suit on subsequently matured installments, does not apply to issue of fraud in action on severable contract which was neither pleaded nor determined in first action.

8. Judgment ¶715(3)

Prior judgments for matured installments of severable contract held not res judicata of issue of fraud, coercion, and duress in procuring contract in subsequent suit to rescind contract, where in one of prior suits

defendant suffered default judgment and in the other defendant declined to plead further after demurrer raising issue of fraud was sustained.

9. Husband and wife ¶281

Evidence held to support judgment rescinding separation contract and awarding reimbursement of money paid thereunder on ground of fraud, coercion, and duress in its procurement.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Revel L. English against Mary W. English, also known as Mary W. Vance, wherein the defendant filed a cross-complaint. Judgment for plaintiff, and defendant appeals.

Affirmed.

William Ellis Lady, of Los Angeles, for appellant.

John Perry Wood, of Los Angeles, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

This is a suit to rescind a separation contract settling property rights between the parties to this action on the ground that the agreement was procured by means of duress rendering it void. The complaint also asks for reimbursement of the sum of \$2,450 which was previously paid by the plaintiff under the terms of the contract, a part of which was voluntarily paid, and the balance was in satisfaction of a judgment. The material allegations of the complaint are denied. The defendant filed a cross-complaint demanding payment of other installments amounting to the sum of \$1,800, which matured subsequent to those above referred to. It is contended by the appellant that a former judgment which was previously rendered by the municipal court of Los Angeles directing the payment of certain installments of that contract necessarily determined the validity of that instrument, and therefore constitutes res judicata of the issues which are presented in this proceeding so as to estop the plaintiff from now asserting the invalidity of the agreement.

The court adopted findings in this case holding that the former judgment does not constitute res judicata, that the contract was procured by means of coercion and duress, and that it is therefore void. Judg-

ment was rendered accordingly canceling the contract and denying the defendant the right to recover her claim under the cross-complaint for unpaid installments which accrued later. The plaintiff's claim for reimbursement for money paid in satisfaction of previously matured installments was also refused. The defendant's motion for a new trial was denied. From that judgment the defendant has appealed.

The plaintiff was previously married to another woman. February 14, 1926, a decree was rendered in the jurisdiction of the Republic of Mexico purporting to divorce the plaintiff from his first wife. Assuming that this decree was valid, the parties to the present action were married February 16, 1926. In an action prosecuted in the superior court of Los Angeles county by the first wife against this plaintiff, a decree of divorce was rendered in her favor March 23, 1927, on the theory that the Mexican divorce was void for lack of jurisdiction. Subsequently this plaintiff brought suit in the superior court of San Bernardino county in which a decree was rendered September 21, 1928, annulling the purported marriage between the parties to this suit on the ground that the plaintiff was not an unmarried man when the marriage ceremony was performed between these parties. On numerous occasions, prior to June 14, 1928, this defendant threatened the plaintiff with criminal prosecution for bigamy and violation of the "Mann Act" as defined by a federal statute. These threats were prompted by the relationship which existed between them pending the determination that their marriage was void. In fear of this threatened prosecution and because of the duress thus exercised, the plaintiff executed an agreement with the defendant on the last-mentioned date purporting to settle their property rights, by the terms of which he promised to pay her \$200 a month until the aggregate sum of \$10,000 had been paid in full satisfaction of all claims on her part. March 29, 1930, this defendant was married to another man, with whom she now resides as his wife.

April 30, 1930, this defendant brought suit in the municipal court of Los Angeles based on the separation contract which is involved in this action to recover \$1,750, which was then due and unpaid according to the terms of that instrument. The contract was referred to as Exhibit A and made a part of the complaint. This plain-

tiff was duly served with process in that action, and failed to appear or answer therein. His default was duly entered, and judgment was rendered against him in that suit May 3, 1930, for the sum of \$1,750 and costs of suit. That judgment was received in evidence on the trial of this case in support of the defense of *res judicata*. The validity of the contract was not an issue in the municipal court case. That suit was based on obligations created by a severable contract which were separate and distinct from those which are involved in this action.

Another suit was commenced by this defendant in the municipal court of Los Angeles July 11, 1930, to recover subsequent installments alleged to be due and unpaid. To that complaint this plaintiff filed a cross-complaint setting up the invalidity of the contract. Upon demurrer, however, that cross-complaint and answer were held to be defective. For failure to amend his pleading, the cross-complaint was dismissed, and judgment was rendered against Mr. English. The issue regarding the invalidity of the contract was thus eliminated from that suit. Neither the pleadings nor the judgment in that case were offered in evidence upon this trial. It does not appear that the validity of the contract was ever determined by the court in any previous suit.

The only question which is raised by the appellant in this action is whether the plaintiff is estopped from challenging the validity of the separation contract after voluntarily paying certain installments thereof and after satisfying the municipal court judgment for certain other installments amounting to \$1,750 which was rendered against him by default on May 3, 1930. It is asserted the last-mentioned judgment is *res judicata*, estopping the plaintiff from now challenging the validity of the contract, for the reason that he had the opportunity of setting up that defense in the former action and failed to do so.

[1] We are of the opinion the municipal court judgment is not *res judicata* upon the issue of the validity of the contract, and that it does not estop the plaintiff from asserting in this action, which is founded on a different obligation under a severable contract, that the agreement was procured by means of duress and threats of criminal prosecution which renders it void. The contract is severable in character. Each

installment provided for therein constitutes a separate obligation payable at different designated dates.

Regarding the application of the principle of *res judicata*, it is said in 2 Freeman on Judgments (5th Ed.) p. 1318, §§ 626, 627:

"The doctrine of estoppel is not strictly applicable to a judgment. A judgment is not the act of a party; an estoppel is. * * * Like the statute of limitations it is a rule of rest. * * *

[2] "Briefly stated, this doctrine is that an existing final judgment or decree rendered upon the merits by a court of competent jurisdiction upon a matter within its jurisdiction is conclusive of the rights of the parties or their privies in all other actions in the same or any other judicial tribunal of concurrent jurisdiction, on the points and matters in issue and adjudicated in the first suit. Where a right, question or fact is distinctly put in issue and directly determined by a court of competent jurisdiction in a former suit between the same parties or their privies, the former adjudication of that fact, right or question is binding on the parties or their privies in a subsequent suit, irrespective of whether the causes of action are the same."

Applying the text above quoted, it is apparent that, since the validity of the contract which is involved in this suit was not a direct issue in the former action and was not adjudicated therein, that judgment is not binding on the parties with respect to that issue in this suit which is founded entirely on different obligations arising under a severable contract.

The appellant relies on the frequently announced principle declared in the case of *Elm v. Sacramento Suburban Fruit Lands Co.*, 217 Cal. 223, 17 P.(2d) 1003, that "judgment between the same parties is conclusive not only as to the subject-matter in controversy in the actions upon which it is based, but also in all other actions involving the same question, and upon all matters involved in the issues which might have been litigated and decided in the case." These cases, however, are readily distinguishable from the present cause. The cases in which that doctrine is announced were either based on contracts which are not severable or the issues which were deemed to have been determined were dependent on counterclaims or rights so closely related to the original cause of action that it was contrary to public policy

to permit the causes to be severed and the parties embarrassed by repeated and endless litigation. In the *Elm Case*, for instance, the plaintiff brought an action for specific performance of a contract, to convey real property, alleging that he had fully paid the contract price therefor and demanding a deed of conveyance. The defendant admitted the contract, but denied that the purchase price had been fully paid, alleging that \$640 still remained unpaid thereon. On the trial of that case, the plaintiff offered in evidence the entire record of a former cause between the same parties regarding the same purchase price of the property pursuant to the contract. In the former case the plaintiff sought to rescind the contract for fraud, and the defendant failed to set up his counterclaim for the unpaid balance of the purchase price. In that former case the jury returned a verdict and a judgment was rendered in favor of the plaintiff for damages for fraud in the sum of \$1,940. In the subsequent case the defendant contended that he did not waive his right to recover the unpaid balance of the purchase price of the land. The trial court properly held that defendant's claim for the unpaid balance of the purchase price should have been set up in the former case as an offset to diminish the actual damages suffered by the plaintiff on account of the fraud which was held to have affected and reduced the actual consideration for which the land was purchased. On appeal from the last-mentioned judgment, the Supreme Court properly held that the unpaid portion of the purchase price was a necessary part of the consideration for which the land was purchased, and that the defendant was estopped from subsequently reviving that claim in another suit on the doctrine of *res judicata*. It will be observed that both of those cases involved the real value or consideration for the purchase of real property; the real issue in the case which was based on fraud being the actual market value of the land independently of the inflated value represented by the fraud and misrepresentations which induced the promise to pay the purchase price specified in the contract. Of course, the unpaid portion of the purchase price of the land was an inseparable issue in the original case as to the actual value of the land and should have been pleaded as an offset in that case.

[3,4] In the present case the contract which is involved in this suit is severable. Each installment represents a different ob-

ligation. The validity of the contract was not raised by the pleadings nor was it a direct issue in the former case. Judgment was rendered in the first case by default. Under such circumstances, the parties are not estopped from raising the issue of fraud, coercion, or duress in a subsequent suit upon a different obligation. It is said in 34 Corpus Juris, p. 891, § 1299, in that regard: "The doctrine of conclusiveness of judgments applies to a judgment by default with the same validity and force as to a judgment rendered upon a trial of issues, provided such judgment is regular and valid, and shows distinctly on what count or cause of action it was rested. But the confession implied from the default is limited to the material issuable facts which are well pleaded in the declaration or complaint, and does not apply to issues which were not raised in the pleadings. Nor, subject to the rule that the judgment is conclusive as to every fact necessary to uphold it, is a default judgment conclusive, in a subsequent suit on a different cause of action, against any defenses defendant may have, although the same defenses, if pleaded and proved in the former action, would have defeated plaintiff's recovery, because in the absence of a trial and hearing in the first suit, it cannot be said that such matters were adjudicated therein."

[5] When a contract is severable and creates separate obligations arising at different times or under different circumstances, a suit upon certain matured obligations does not estop the parties from raising other issues in another suit between the same parties involving a different obligation when such issues were neither pleaded nor directly determined by the former judgment. *Freeman v. Barnum*, 131 Cal. 386, 63 P. 691, 82 Am.St.Rep. 355; *Blumenthal v. Maryland Casualty Co.*, 119 Cal. App. 563, 6 P.(2d) 965; *Nielsen v. Emerson*, 121 Cal.App. 415, 9 P.(2d) 260. It is said in that regard in 34 Corpus Juris, p. 839, §§ 1248, 1249:

[6] "As a general rule a contract to do several things at different times is divisible in its nature, so as to authorize successive actions; and a judgment recovered for a single breach of a continuing contract or covenant is no bar to a suit for a subsequent breach thereof. * * *

"Where money is payable by instalments, a distinct cause of action arises upon the falling due of each instalment, and they may be recovered in successive actions, no

judgment in the series of actions operating as a bar to the recovery of any instalment not due at its rendition."

[7] It should be recalled that, when an issue is actually and directly raised and determined in a former suit between the same parties based upon severable matured instalments of the same contract, the judgment will estop them from again raising that same issue in another suit, even though it is based on instalments which have subsequently matured. It is said in 2 *Freeman on Judgments* (2d Ed.) p. 1649, § 774: "Where the validity of a contract is in issue, all possible defenses then existing must be interposed or they will become res judicata by a judgment enforcing the contract and cannot be interposed in a subsequent action based on the same contract. An adjudication of the defense of fraud, made in an action on one instalment of a contract, is conclusive in another action on a second instalment of the same contract."

But the learned author of that text, in the volume last cited, at page 1687, section 795, makes it very clear that this rule does not apply to such severable contracts when the issue of fraud was neither pleaded nor determined in the first action. He says: "The recovery of the purchase price by the seller, either of goods or land, does not bar a subsequent action by the purchaser for damages from fraud in making the sale unless in the former action the fraud was actually put in issue and adjudicated. And a decree foreclosing a mortgage securing a purchase money note, does not prevent the maintenance of an action for damages for fraud in the sale. A default judgment on a contract to pay royalties does not adjudicate fraud in inducing the contracts, which may therefore be urged as a defense in a subsequent action on the same contract for additional royalties."

Likewise it is said in 2 *Black on Judgments* (2d Ed.) p. 941, § 617: "So a judgment by default upon one of several notes founded upon one and the same illegal consideration, no issue upon the fact of consideration being tendered by the complaint, does not estop the defendant from setting up in a second action, upon another of such notes, the defense of illegality of consideration."

In the same section last cited it is further said: "So again, a judgment in a suit for interest (as on a bond), particularly when evidenced by a distinct obliga-

tion (as a coupon), is not res judicata as to the principal contract, unless, in such suit, the validity of the original contract itself was adjudicated upon. * * * And the recovery of judgment for taxes provided for by an unconstitutional act, in an action in which the validity of the statute is not questioned, does not estop the successful party from alleging, in a subsequent suit between the same parties upon a different cause of action, that the act is unconstitutional."

[8, 9] Based on the preceding authorities and on principle, we conclude that the default judgment which was rendered in the municipal court action based upon certain matured installments of the separation contract, wherein the issue of fraud, coercion, and duress in procuring the execution of the agreement were neither pleaded nor determined, is not res judicata in this proceeding and does not estop the plaintiff from maintaining this suit to cancel the contract as to all installments which accrued subsequently thereto. The findings and judgment canceling the contract for fraud, coercion, and duress, and denying the defendant the right to recover upon her cross-complaint the unpaid installments, are adequately supported by the evidence and the law.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.



12 Cal.App.2d 185

BROWN v. WALDO.

Civ. 9783.

District Court of Appeal, Second District,
Division 1, California.

Feb. 28, 1936.

Mortgages Ⓒ559(2)

Statute precluding deficiency judgment on mortgage or trust deed obligation unless notice of breach and election to sell was recorded one year before sale cannot apply retroactively to instruments executed before effective date thereof (Civ.Code, § 2924½, as added by St.1933, p. 1674).

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by A. G. Brown against Rollin F. Waldo. Judgment for defendant, and plaintiff appeals.

Reversed.

Louis Ferrari, of San Francisco, and Edmund Nelson, Howard Waterman, Freston & Files, and Ralph E. Lewis, all of Los Angeles, for appellant.

Donald M. Keith, of Los Angeles, for respondent.

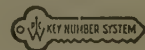
EDMONDS, Justice pro tem.

This action was brought to recover the deficiency remaining unpaid upon a note originally secured by a deed of trust after sale of the property. The defendant interposed a general demurrer upon the ground that the complaint failed to state a cause of action because of the provisions of section 2924½, Civil Code, enacted in 1933 (St.1933, p. 1674). The demurrer was sustained without leave to amend, and the appeal is from the judgment subsequently entered.

The note and deed of trust were executed October 24, 1929. The note became due three years thereafter.

In the case of Brown v. Ferdon (Cal. Sup.) 54 P.(2d) 712, it was held that the Code section mentioned cannot apply retroactively to instruments executed before its effective date. The judgment is therefore reversed.

We concur: HOUSER, P. J.; YORK, J.



PEOPLE v. CHAMBERLAIN. *

Cr. 1479.

District Court of Appeal, Third District,
California.

Feb. 28, 1936.

Hearing Granted by Supreme Court
March 20, 1936.

1. Criminal law Ⓒ872½

Jury must unanimously determine merits of defense of insanity like any other defense to alleged crime before defendant may be found guilty of offense with which he is charged (Pen.Code, §§ 1016, 1026, 1367, 1369).

2. Criminal law Ⓒ623

Proceeding prescribed by statute requiring separate hearings before jury upon

crime with which defendant is charged and upon special defense of insanity is in effect one and the same trial (Pen.Code, §§ 1016, 1026, 1367, 1369).

3. Criminal law Ⓒ1122(2)

Instruction to jury trying issue of sanity that unanimous verdict as regards such issue was unnecessary *held* not reversible error, in absence of showing that verdict was not unanimous (Pen.Code, §§ 1016, 1026, 1367, 1369).

4. Criminal law Ⓒ874

Defendant waived right to challenge sufficiency of verdict by failing to request polling of jury (Pen.Code, § 1163).

5. Criminal law Ⓒ1144(16)

Court of Appeal must assume that verdict was unanimous, where no dissenting vote was announced when verdict was formally assented to and declared in open court, in absence of showing that verdict was not unanimous.

6. Criminal law Ⓒ957(2)

Affidavit of foreman of jury that verdict that defendant was sane at time of commission of homicide was not unanimous, which was offered in support of motion for new trial on issue of insanity, *held* properly excluded, since juror may not impeach verdict except to prove that verdict was reached by lot or chance (Code Civ.Proc. § 657).

7. Criminal law Ⓒ494

In homicide prosecution wherein defendant pleaded not guilty by reason of insanity and in support thereof at trial of issues offered undisputed testimony of medical witnesses, evidence *held* insufficient to support verdict that defendant was sane at time of commission of crime (Pen.Code, §§ 1016, 1026, 1367, 1369).

8. Criminal law Ⓒ324

Disputable inferences or presumptions are weakest and least satisfactory form of evidence and are allowed to stand only in lieu of proof thereof, and, where fact contrary to presumption is proved, no conflict arises.

9. Homicide Ⓒ237

In homicide prosecution wherein defendant pleaded not guilty by reason of insanity, defendant had burden to prove insanity by mere preponderance of evidence (Pen.Code, §§ 1016, 1026, 1367, 1369).

10. Criminal law Ⓒ494

In trial of defendant's sanity at time of commission of crime, jury *held* not warranted in rejecting medical evidence that defendant was insane at time of crime and arbi-

trarily finding verdict in conflict therewith (Pen.Code, §§ 1016, 1026, 1127b, 1367, 1369).

11. Homicide Ⓒ345

Where evidence was sufficient to support conviction of murder, but insufficient to support verdict finding defendant sane at time of commission of crime, judgment would be affirmed on issue of murder, and cause remanded for new trial on sole issue of insanity (Pen.Code, §§ 1016, 1026, 1127b, 1260, 1367, 1369).

Appeal from Superior Court, Sonoma County; Donald Geary, Judge.

Albert Chamberlain was convicted of murder in prosecution wherein he interposed plea of not guilty by reason of insanity, and on subsequent trial of issue of sanity was found sane. From an order denying his motion for a new trial on the issue of insanity, and from that portion of the judgment of conviction which determined that he was sane at the time of the commission of the homicide, the defendant appeals.

Order denying motion for new trial on issue of insanity reversed and judgment modified, and as modified affirmed, and remanded for new trial with directions.

L. R. Lambert and C. W. Anderson, both of Santa Rosa, for appellant.

U. S. Webb, Atty. Gen., Ralph H. Cowing, Deputy Atty. Gen., and Wm. F. Cowan, Dist. Atty., and Toland C. McGettigan, Deputy Dist. Atty., both of Santa Rosa, for the People.

PER CURIAM.

The defendant was charged with murder. Under the provisions of section 1016 of the Penal Code he pleaded not guilty of the offense charged and also not guilty by reason of insanity. The jury rendered a verdict of guilty of murder of the first degree with a recommendation of imprisonment in the state prison for the remainder of his life. A subsequent trial on the issue of his sanity at the time of the commission of the offense resulted in a verdict that he was then sane. A motion for new trial on the issue of insanity alone was then presented and denied. Judgment was accordingly pronounced imprisoning him in the state prison at San Quentin for the balance of his lifetime. This appeal is from the order denying defendant's motion for a new trial and from that portion of the judgment of

conviction which determines that the defendant was sane at the time of the commission of the homicide with which he was charged.

The question as to whether a defendant may appeal from a portion only of the judgment of conviction rendered against him which determines the one issue of insanity is not raised by this record, and we therefore refrain from expressing an opinion regarding that subject. For the purpose of this appeal we shall assume the notice of appeal which was given in this case was sufficient to authorize this court to consider the sufficiency of the evidence and the regularity of proceedings upon both the charge of murder and the issue of insanity which were separately presented to the jury.

The evidence abundantly supports the verdict and judgment to the effect that the defendant is guilty of murder of the first degree, except for the issue of insanity which will be hereafter considered. The defendant concedes this is true. The appeal is taken "from that portion of the verdict (and judgment) on the plea of not guilty by reason of insanity alone," and from the order denying the motion for new trial on the grounds that the evidence fails to support the verdict that the defendant was sane at the time of the commission of the homicide, and that the court erred in instructing the jury on the trial of the issue of sanity that the concurrence of nine of its members was sufficient to render a verdict that the defendant was then sane.

The judgment in so far as it finds the defendant guilty of murder of the first degree with a recommendation for life imprisonment is fully justified by the evidence.

[1,2] The court erred in instructing the jury, which tried the issue of the defendant's sanity at the time of the commission of the homicide, that "it is not necessary that your verdict be a unanimous one as regards this particular issue. That issue is to be decided not by a unanimous opinion but according to the law by three-fourths of your number, or when nine of you have agreed upon a verdict you can return the same to the court." Insanity is merely a separate defense to the charge of a crime. It is therefore necessary that the jury shall unanimously determine the merit of a defense of insanity like any other defense to an alleged crime before the accused person may be found guilty of the offense with

which he is charged. *People v. Bradshaw*, 5 Cal.App.(2d) 528, 43 P.(2d) 317, 318; *People v. Garcia*, 98 Cal.App. 702, 277 P. 747. In both of these cases hearings were denied by the Supreme Court. The *Bradshaw* Case, above cited, was reversed by the Appellate Court on the sole ground that the trial court erred in giving to the jury which tried that case on the issue of insanity almost the identical instruction which is challenged in this case to the effect that the concurrence of nine jurors was sufficient to render a valid verdict on that issue. The Appellate Court held that that charge constituted reversible error. The clear inference from the language employed in that opinion is that it requires an unanimous verdict of a jury to determine the issue of insanity imposed as a defense to a criminal charge. The Supreme Court approved that declaration of the law by denying a hearing upon petition therefor. The fact that the Appellate Court there said: "The people admit that the last instruction [authorizing the jury to determine the issue of insanity by the concurrence of only nine of its members] was erroneous" does not detract from the binding force of that decision which clearly holds that the verdict of a jury on the issue of insanity imposed as a defense to a criminal charge, must be unanimous.

In support of the rule requiring an unanimous verdict on the issue of insanity imposed in a criminal action, it has been frequently held that the procedure prescribed by section 1026 of the Penal Code requiring separate hearings before the same or different juries upon the crime with which the defendant is charged and upon the special defense of insanity are, in effect, but one and the same trial. *People v. Troche*, 206 Cal. 35, 48, 273 P. 767; *People v. Leong Fook*, 206 Cal. 64, 70, 273 P. 779.

It is inconsistent to hold that an unanimous verdict is required on certain issues of a criminal case, and that a valid verdict affecting another issue of the same case may be rendered by the concurrence of a less number of the jurors.

[3-6] That erroneous instruction is, however, not reversible error under the circumstances of this case for the reason that it is not shown to have been prejudicial. The record on appeal indicates that the verdict of the jury on the issue of insanity was unanimous. The verdict was signed by the foreman, received, recorded and declared by the jury in open court in the usu-

al manner. After the verdict was recorded by the clerk the judge of the court inquired of the jury: "Ladies and gentlemen of the jury, is that your verdict as declared by the Clerk?" To which inquiry the record shows: "(The jury answers in the affirmative.)" The jury was not polled. The defendant waived his right to challenge the sufficiency of the verdict by failing to request the polling of the jury under the provisions of section 1163 of the Penal Code. That was the opportunity furnished by law for him to ascertain the exact position of each juror with relation to the verdict. If the verdict was assented to by all of the members of the jury, the challenged instruction was harmless although it was erroneous. We must assume the verdict was returned by unanimous vote of the jury since no dissenting vote was announced when it was formally assented to and declared in open court. There is nothing in the record indicating that the verdict was not unanimous. The defendant did move for a new trial on the issue of insanity on the ground that the verdict was not unanimous. This motion was supported by an offer to introduce an affidavit of the foreman of the jury. Upon objection, this affidavit was rejected. The affidavit is not contained in the record on appeal. We can only speculate as to the averments of the affiant which are contained in that affidavit. The court properly excluded that affidavit. No rule of evidence is better established than that which declares that a juror may not impeach a verdict returned in a trial in which he participated by evidence subsequently supplied either orally or by affidavit, except to prove that the verdict was reached by lot or chance. Section 657, Code Civ.Proc.; *People v. Kromphold*, 172 Cal. 512, 524, 157 P. 599. This case does not come within that exception. We are therefore bound to assume that the challenged instruction was harmless and that the verdict is valid on the assumption that it was concurred in by each of the members of the jury.

[7-10] We are, however, impelled to hold that the verdict on the issue of insanity is not supported by the evidence. There is no substantial evidence to indicate that the defendant was sane at the time he perpetrated the homicide in question. Upon the trial of the issue of insanity, pursuant to the provisions of section 1369 of the Penal Code, the defendant called ten nonexpert witnesses who related incidents

strongly indicating that Mr. Chamberlain was insane at the time of the commission of the offense with which he was charged. There was evidence of insanity in his family supporting the theory that he probably inherited insane tendencies. Several of these witnesses testified that he was irrational or insane, giving their reasons therefor. None of them thought he was sane. The evidence of a deranged state of mind on his part is very convincing. The defendant was called and examined at great length as a witness in his own behalf. He seemed to resent the inference that he was insane. We are convinced no unbiased person can read the record of his testimony without absolute conviction that his mind is radically and hopelessly deranged. Dr. Thurlow, a reputable physician, and graduate of the Medical School of the University of Michigan, with twenty-five years of active practice in his profession, was called as an expert witness. He had carefully examined the defendant including his family history with the express purpose of ascertaining the state of his mind. He had also listened to the examination of the defendant as a witness in the trial of this case. He positively asserted that the defendant was insane at the time of the commission of the homicide, and that his mental disease had existed for a period of at least ten years. He classified his mental disorder as paranoia which is indicated by fixed delusions of persecution, egotism and homicidal or suicidal tendencies, all of which symptoms the defendant had displayed. He was certain that the state of the defendant's mind precluded him from distinguishing between right and wrong and from realizing that it was wrong for him to have killed his victim and to have attempted to kill another individual. The doctor was very fair, positive of his opinions, clear and explicit in applying the facts and history of the case in support of his belief that the defendant was a chronic paranoiac. In a thorough and able cross-examination the evidence of Dr. Thurlow to the effect that the defendant was insane when he committed the homicide was strengthened rather than weakened.

In addition to the testimony of Dr. Thurlow, the court appointed and summoned two other alienists pursuant to the provisions of section 1027 of the Penal Code. Dr. Johnson, superintendent of the Napa State Hospital, and Dr. Cushman, superintendent of the Mendocino State

Hospital, were examined as medical experts regarding the state of the defendant's mind. Both of these medical experts carefully examined the defendant before the trial, including his family history, and both of them heard the defendant's evidence adduced in court. Each of these doctors positively pronounced the defendant insane at the time of the commission of the homicide, giving his reasons therefor. They also classified him as a chronic paranoiac and asserted that he did not realize the difference between right and wrong or that the homicide which he committed was wrong. There is no substantial evidence in the record to the contrary. When the defendant closed his affirmative showing on the issue of insanity and rested his case, the prosecution also rested without adducing any evidence to rebut the case of the defendant. The prosecution rested solely on the presumption of law that all men are presumed to be sane. Upon that evidence the jury returned a verdict of sanity.

The mere disputable presumption that all men are deemed to be sane until the contrary appears from competent proof is of slight value in support of the verdict of sanity in this case, if, indeed, it is not entirely dissipated by the convincing proof of insanity which was adduced by the defendant without any attempt on the part of the prosecution to rebut that evidence by expert or nonexpert testimony. It is said in that regard in the case of *Savings & Loan Society v. Burnett*, 106 Cal. 514, at page 529, 39 P. 922, 925: "Disputable inferences or presumptions, while evidence, are evidence the weakest and least satisfactory. They are allowed to stand, not against the facts they represent, but in lieu of proof of them. The fact being proven contrary to the presumption, no conflict arises."

In the present case the evidence of insanity is so convincing that the mere presumption of sanity is scarcely worthy of consideration. The prosecution appears to have conceded that fact by failing to offer any evidence to rebut the showing made by the defendant on that issue. The burden was on the defense to prove insanity by a mere preponderance of the evidence. It may not reasonably be said this presumption warranted the jury in finding the defendant to be sane, in view of the persuasive character of the evidence of his insanity. Reputable, experienced expert wit-

nesses should be of great value in determining the sanity of a defendant under the circumstances of this case. All of the expert witnesses agree that he was insane. There appears to be nothing unreasonable in their testimony. In the absence of evidence to the contrary, the jury was not warranted in rejecting all of the evidence and arbitrarily finding a verdict in conflict therewith. We are of the opinion the motion for a new trial on the ground that this verdict was not supported by the evidence was erroneously denied. We are unable to find any substantial evidence to support this verdict. The presumption of the sanity of the defendant was completely and effectually dispelled by uncontradicted evidence to the contrary.

It is true that the jurors are the sole judges of the credibility of witnesses and of the weight of evidence. It is also true, as it is expressed in section 1127b of the Penal Code, that the opinions of expert witnesses may be disregarded by the jurors *if the conclusions of such witnesses appear to be unreasonable*. That section provides: "Duly qualified experts may give their opinions on questions in controversy at a trial. To assist the jury in deciding such questions, the jury may consider the opinion with the reasons stated therefor, if any, by the expert who gives the opinion. The jury is not bound to accept the opinion of any expert as conclusive, but should give to it the weight to which they shall find it to be entitled. The jury may, however, disregard any such opinion, if it shall be found by them to be unreasonable."

This section does not authorize a jury to arbitrarily disregard or reject the testimony of an expert witness without cause. It should be fairly and impartially considered and given such weight as it is reasonably entitled to, reconciling it if possible with all of the other credible evidence in the case. But in the present case all of the evidence, including that of expert and non-expert witnesses, points to the inevitable conclusion that the defendant was insane. We are aware of the fact that miscarriages of justice have occurred and that many guilty persons have escaped the penalties for their crime through fraudulent simulation of insanity. But the law is unalterably opposed to the punishment of individuals who are insane, for the humane reason that they are deemed to be irresponsible for their acts and conduct while mentally deranged. In accord with that policy section 1367 of the Penal Code provides

that: "A person cannot be tried, adjudged to punishment, or punished for a public offense, while he is insane."

Appalling as the tragedy of this case is, it would be a grave injustice to permit a verdict of sanity to stand with such convincing evidence of insanity as this record discloses without the evidence of a single expert or nonexpert witness to refute the issue. This is especially true since the law requires the defendant to establish his defense of insanity by a mere preponderance of the evidence.

[11] Under the provisions of section 1260 of the Penal Code the judgment of conviction may be modified by reversing that portion relating to the special issue of insanity and remanding the cause for retrial of that issue alone. The nature of this case is such that the prosecution should be given the opportunity to retry the issue of insanity if it elects to do so. The judgment may be affirmed on the issue of murder and the cause remanded for a new trial on the sole issue of insanity. *People v. Marshall*, 209 Cal. 540, 547, 289 P. 629; *People v. Marshall*, 99 Cal.App. 224, 278 P. 258; section 1260, Pen.Code.

The order denying the motion for a new trial on the issue of insanity is reversed. The judgment is modified in so far as it determines that the defendant was sane at the time of the commission of the homicide in question, and as so modified the judgment is affirmed. The cause is remanded for a new trial on the sole issue of insanity at the time of the commission of the offense with which the defendant was charged.



KIDD v. STATE CIVIL SERVICE COMMISSION et al. *
Civ. 9927.

District Court of Appeal, First District,
Division 1, California.
Feb. 26, 1936.

Rehearing Granted March 27, 1936.

I. Officers ⇐62

Resignation of civil service employee as institutional storekeeper at state hospital, which was obtained by false representations of superintendent that resignation would protect employee's civil service standing and

that superintendent would support application for reinstatement, *held* void or voidable as obtained by coercion and duress (St.1929, p. 252, § 14).

2. Officers ⇐69

As respects dismissal of civil service employee, superintendent of state hospital had authority only to file charges as provided by statute, and could not threaten employee with immediate dismissal and loss of civil service rating unless he resigned (St.1929, p. 252, § 14).

3. Officers ⇐62

Appointment of successor to civil service employee's position as institutional storekeeper at state hospital *held* not to affect employee's right to position, where employee's resignation was void or voidable for coercion and duress, and especially where successor was appointed before effective date of resignation when no vacancy existed (St. 1929, p. 252, § 14).

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by John L. Kidd against the State Civil Service Commission of California and others. Judgment for defendants, and plaintiff appeals.

Reversed.

M. F. Ryan and James H. McKnight both of Oakland, for appellant.

U. S. Webb, Atty. Gen., and Darwin Bryan, Deputy Atty. Gen., for respondent.

TYLER, Presiding Justice.

This is an action brought for the purpose of obtaining a writ of mandamus directing and commanding defendants to reinstate plaintiff as institutional storekeeper at Agnew State Hospital, a position from which he was removed, and to recover damages for loss of wages from the 5th day of October, 1933, to such time as he may be reinstated. Plaintiff's salary was \$110 a month with maintenance. At the conclusion of the trial, the court found that plaintiff take nothing by his complaint; defendants to be dismissed with their costs.

The facts, which are practically without dispute, show that plaintiff and appellant was on September 18, 1933, a permanent civil service employee of the state of California, employed at Agnew State Hospital as institutional storekeeper. Respondent Dr. J. M. Scanland at such time was medical superintendent of said hospital

with full power of direction of appellant as said storekeeper. On said last-named day, the doctor summoned appellant to his office and there in the presence of a Mr. Titlow, the office manager, demanded appellant's written resignation as storekeeper, to take effect at once. Appellant asked concerning the nature of the charges against him, and was informed that he was inefficient in his duties. Appellant expressed his unwillingness to resign, whereupon the doctor informed him that, if he resigned, he might be reinstated, and that he would not stand in his way, but would join in his request for reinstatement. Appellant testified that Mr. Titlow, the office manager, gave him the same advice. Appellant then informed the doctor that he would think the matter over, whereupon he was informed that he would have to sign a resignation at once or he would be dismissed and out of civil service for all times. The resignation presented was dated September 18, 1933. Appellant claimed that he was entitled to a vacation, to which suggestion the doctor agreed, and requested his secretary to draw up a new resignation effective October 5, 1933. Appellant testified, and his testimony is not disputed, that he inquired of Dr. Scanland whether he would be permitted to withdraw his resignation during the interim if he so desired, and was informed by the doctor that he would have the right to reconsider it and might withdraw it up to the time it became effective. Appellant believing the statement of the doctor, that he could be immediately discharged and thereby lose his civil service standing unless he signed the resignation, complied with the demand. The resignation was immediately accepted by the doctor and forwarded by him to the department of institutions at Sacramento, and a successor was appointed to appellant's position prior to the time his resignation became effective. Within a few days after signing the resignation, appellant wrote to the civil service commission regarding his status in view of his resignation and was informed by that body that any employee who resigned could not have his name restored to the eligible list, but could be reinstated to the same or similar position on recommendation of the appointing officer. Upon receiving this information, appellant, on October 1, 1933, wrote to Dr. Scanland informing him that he could not be reinstated, without his recommendation, to the position from which he had resigned, and asked for such recom-

mendation. The doctor informed appellant in effect that he could not comply with the request as such act on his part would hardly be consistent with his action in removing appellant, and this notwithstanding his admitted promise to appellant that, if he applied for reinstatement, he would not stand in his way, but would ask for appellant's reinstatement on the civil service list. Appellant thereupon, on the afternoon of October 5, 1933, so the court found, prepared and left in the office of Dr. Scanland a withdrawal of his resignation. This was prior to the time the resignation was effective; the resignation reciting that appellant's services ended on October 5, 1933, at 5:30 p. m.

[1-3] Under all these circumstances we are of the opinion that appellant's resignation was obtained from him under coercion and duress, and that the same was not his free and voluntary act. State employees holding office under civil service rules and regulations are entitled as of right to have such rules and regulations relative to their removal from office fairly invoked and applied. *Garvin v. Chambers*, 195 Cal. 212, 232 P. 696. All charges against such an employee must be in writing and clearly state the specific act or acts complained of. A copy of the charges must in all cases be in writing and served upon the accused employee. Amended § 14, Stats. 1929, chap. 136, pp. 251, 252. The testimony of Dr. Scanland shows that he was familiar with these rules. His sole authority was to file charges as provided by statute, and he had no authority to threaten appellant with immediate dismissal and loss of his civil service rating unless he complied with the demand to resign. It clearly appears that appellant's signature to the resignation was obtained by false representations and that he signed the same to protect his civil service standing, believing the doctor's statements to be true. Nor does the fact that a successor was appointed to appellant's position in any manner affect his rights. The resignation, obtained as it was, if not void, was at least voidable and could be repudiated. *Throop on Public Officers*, § 415; *State ex rel. Ladeen*, 104 Minn. 252, 116 N.W. 486, 16 L.R.A.(N.S.) 1058. Moreover, the successor was appointed at a time when there was no vacancy, as the resignation was not effective when the appointment was made. If appellant's rights could be concluded in this manner, it would be

an easy matter to circumvent the rules and regulations governing civil service made to insure permanency of employment.

The judgment is reversed.

We concur: CASHIN, J.; KNIGHT, J.



section 2924½ of the Civil Code, as added by St. 1933, p. 1674, and since, as determined in *Brown v. Ferdon* (Cal.Sup.) 54 P.(2d) 712, said section cannot apply to instruments executed prior to its effective date, and since the record discloses no other ground upon which a general demurrer might properly be sustained to the complaint, the judgment must be, and it is, reversed.



12 Cal.App.2d 244

MORTGAGE GUARANTEE CO. et al. v.

MARGOLIN et al.

Civ. 9875.

District Court of Appeal, Second District,
Division 1, California.
March 2, 1936.

Constitutional law ☞ 168

Mortgages ☞ 559(2)

Statute precluding entry of deficiency judgment on trust deed obligation unless one year, as distinguished from former period of three months, has elapsed between recordation of notice of breach and election to sell and date of sale *held* inapplicable to instrument executed prior to effective date of statute (Civ.Code, § 2924½, as added by St.1933, p. 1674).

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by the Mortgage Guarantee Company and another against Joe Margolin and another. From a judgment of dismissal, plaintiffs appeal.

Judgment reversed.

Woodruff, Burr & Smith, of Los Angeles, for appellants.

George I. Devor, of Los Angeles, for respondents.

PER CURIAM.

From the record herein, it appears that in an action brought to recover the amount of a deficiency in the proceeds of a trustee's sale under a deed of trust securing a promissory note, a general demurrer was sustained to the amended complaint, and it is from the ensuing judgment of dismissal of the action that the instant appeal has been taken.

The note and deed of trust were executed and delivered prior to the enactment of

12 Cal.App.2d 290

BECK v. ARNOLD et al.

Civ. 10521.

District Court of Appeal, Second District,
Division 1, California.
March 6, 1936.

Appeal and error ☞ 635(2)

Where record was before reviewing court on bill of exceptions and judgment roll only, failure of appellant to disclose allegedly prejudicial questions addressed to jurors on their *voir dire* *held* to require dismissal of appeal (Rules of the Supreme Court and District Courts of Appeal, rule V, § 3).

Appeal from Superior Court, Los Angeles County; Neal Chalmers, Judge.

Suit by A. H. Beck against Roy Arnold and another. From the judgment, plaintiff appealed. On defendant's motion to dismiss the appeal.

Appeal dismissed.

C. V. Eberhard, Thomas Higgins, Jr., and J. M. Clements, all of Los Angeles, for appellant.

Hugh B. Rotchford, of Los Angeles, for respondent.

YORK, Justice.

This matter comes before this court on a motion to dismiss appeal or affirm the judgment of the trial court, on the grounds that the appeal is taken for delay, and that the questions presented, upon which the decision of the cause here depends, are so unsubstantial as not to require further extended argument.

The record in this case is somewhat different from any of the cases cited, as it comes before us upon a bill of exceptions

and the judgment roll, no attempt being made to inform us just what evidence was introduced before the jury at the time of the trial. The only question involved, as stated in appellant's brief, is as follows: "Is it prejudicial error for defendant's counsel to ask prospective jurors on their Voir Dire examinations questions tending to prejudice their minds against plaintiff?"

It is impossible for this court upon the record before it to determine whether or not the asking of the questions objected to would constitute prejudicial error. It is true that the appellant's brief states that there was a sharp conflict in the evidence introduced before the jury, but there is nothing in the record to justify any such statement, as the evidence which was introduced is not shown in the record before us. We cannot tell but that the evidence, referred to in general terms as having been introduced, was conclusive in favor of the respondent.

This being true, the motion to dismiss is granted, and the appeal is dismissed on the authority of rule V, section 3, of the Rules of the Supreme Court and the District Courts of Appeal.

We concur: HOUSER, P. J.; DORAN, J.



12 Cal.App.2d 164

WHITE v. BARKER BROS. et al.

Civ. 10721.

District Court of Appeal, Second District,
Division 2, California.

Feb. 27, 1936.

As Modified on Denial of Rehearing
March 20, 1936.

Hearing Denied by Supreme Court
April 27, 1936.

1. Automobiles ⇨171(12)

Truck driver turning into intersection before automobile with which it collided *held* negligent where truck driver "cut the corner" in making turn, entered intersection in face of rapidly approaching traffic, and was on wrong side of road.

2. Appeal and error ⇨1001(1)

In action by guest for injuries sustained in automobile collision, jury's finding in favor of guest on substantial evidence was not disturbed on appeal.

3. Automobiles ⇨246(57)

In action by guest for injuries sustained in collision, instruction on doctrine of sud-

den peril *held* not error where the two vehicles were involved in a confusion of traffic and threatened with collision and jury was informed doctrine was to be applied only if they found driver of guest's automobile was confronted with imminent danger.

4. Automobiles ⇨246(60)

Instruction that injured automobile guest was entitled to presumption that she did everything a reasonably prudent person would have done under the circumstances for her own safety *held* not error, since such a presumption is itself a species of evidence.

5. Trial ⇨296(11)

Instruction that jury could consider in assessing damages for injuries loss of earning power, in absence of any evidence that plaintiff had any occupation, *held* not error in view of other instructions.

6. Damages ⇨132(1)

\$5,000 for injuries *held* not excessive where as a direct result of the shock of accident an old abdominal surgical wound was rendered active, and severe headaches and impaired muscular activity persisted six months after accident.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by Mabel V. White against Barker Brothers, a corporation, and Peter Anderson. Judgment for plaintiff, and defendants appeal.

Affirmed.

Joe Crider, Jr., of Los Angeles (Horace W. Danforth, of Los Angeles, of counsel), for appellants.

Joseph Anderson, of San Francisco, for respondent.

GOULD, Justice pro tem.

Plaintiff, a guest passenger in an automobile driven by her daughter, was awarded damages of \$5,000 by a jury for injuries suffered when the vehicle in which she was riding collided at a street intersection with a truck owned by defendant corporation and operated by defendant Anderson. The verdict ran against both defendants, and both appeal.

[1] Appellants contend that as a matter of law they must be absolved from culpability because the driver of the truck at the time of the accident, having entered the intersection first, had the right of way. But even conceding that the truck may

have been in the intersection before the car in which respondent was riding, nevertheless there was evidence that the truck driver "cut the corner" in making the turn, that he entered the boulevard in the face of rapidly approaching traffic, and that he was on the wrong side of the road. Testimony as to any of these matters is sufficient to uphold the jury's implied finding as to the negligence of such driver.

[2] Similarly, there is a sharp conflict of testimony as to the question of the negligence of the driver of the car in which respondent was seated; and appellants' contention that the collision was caused solely by her driving at an excessive rate of speed was resolved by the jury against them. Substantial evidence supports the jury's determination of this conflict, and it is not our province to interfere.

[3] The court gave an instruction upon the doctrine of sudden peril, which instruction appellants cite as error. The jurors were properly informed that the doctrine was only to be applied if they found that the driver of the passenger car was confronted with "imminent danger." We find no error in the form of the instruction as given; and that the doctrine may be properly invoked in a case such as this, where two cars in a confusion of traffic are threatened with collision is held in *McPhee v. Lavin*, 183 Cal. 264, 191 P. 23, and similar cases.

[4] Appellants complain of an instruction charging that plaintiff was entitled to the presumption that she did everything that a reasonably prudent person would have done under the circumstances for the protection of her own safety. But such an instruction, denominating the presumption in question as "itself a species of evidence," has been approved by our Supreme Court (*Olsen v. Standard Oil Co.*, 188 Cal. 20, 25, 204 P. 393), and we find no error in its application here.

[5] Upon the question of damages, the court advised the jurors that they might take into consideration the value of plaintiff's time while disabled, her changed ability to maintain herself and the effect of her injuries upon her occupation. Such an instruction was error, appellants maintain, because there was no evidence that respondent lost any time by reason of disability, or that she had any occupation, or that she maintained herself by any means

whatever. Considered alone, the instruction might be objectionable; but if read with the other instructions upon the subject, in which the jurors were warned that they could not guess or speculate as to any injuries claimed, but that all injuries must be proved by a preponderance of the testimony, and that no damages could be allowed for anything not proximately caused by the accident, we feel that no detriment was suffered by appellants and that the jurors were fairly advised by the instructions as a whole. *Hughes v. Duncan*, 114 Cal.App. 576, 300 P. 147.

[6] Passion and prejudice "in the form of misplaced sympathy" must have influenced the jury in its award of damages, appellants argue, asserting that the sum of \$5,000 is so disproportionate to any proved damage that the verdict should be set aside on that account. We cannot subscribe to this contention. It is true that the immediate sequelæ of the accident were apparently trivial, but it was also testified that as a direct result of the shock an old abdominal surgical wound was rendered active, and that severe headaches and impaired muscular activity persisted at the time of the trial, six months after the accident. We cannot say that the damages were so excessive as to warrant interference by an appellate court.

Judgment affirmed.

We concur: CRAIL, P. J.; WOOD, J.



12 Cal.App.2d 84

PEOPLE v. MASON.

Cr. 1470.

District Court of Appeal, Third District,
California.

Feb. 21, 1936.

I. Criminal law §823(5)

Instruction that jury should find defendant guilty of petit theft if it believed from evidence beyond reasonable doubt and to moral certainty that defendant unlawfully took property as charged held not erroneous, where jury was further instructed that it must find criminal intent (Pen.Code, § 952).

2. Larceny ☞64(6)

Failure of a defendant to account for possession of stolen property is circumstance tending to show guilt, and defendant is bound to explain such possession to remove its effect as circumstance to be considered in connection with other evidence (Const. art. 1, § 13).

3. Criminal law ☞823(9)

Instruction referring to defendant's duty to introduce evidence to offset presumption of intent existing where act committed was of itself unlawful, which inaptly referred to defendant's duty as "burden of proof," *held* not erroneous, where other instructions clearly instructed that burden of proving every element of offense was upon prosecution (Const. art. 1, § 13).

4. Criminal law ☞772(5), 1172(1)

In prosecution for petit theft, instruction that specific intent was immaterial, it being sufficient to show offense was done "willfully," which defined "willfully" as implying willingness to commit acts referred to, and not requiring intent to violate law or injure another, *held* misleading, but not prejudicial.

5. Criminal law ☞1202(5)

Under information charging petit theft, a misdemeanor, with a prior conviction of felony, verdict finding accused guilty of "petit theft, a misdemeanor as charged in the information," *held* not to preclude imprisonment of accused for felony, where accused had admitted prior conviction (Pen.Code, § 667).

Appeal from Superior Court, Stanislaus County; Roy B. Maxey, Judge.

Walter Mason was convicted of petit theft, which constituted a felony in view of prior conviction for commission of a felony, and he appeals.

Affirmed.

Leslie A. Cleary and Robert R. Fowler, both of Modesto, for appellant.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for the People.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Appellant was charged by information with the crime of petit theft and with having theretofore been convicted of a felony, to wit, burglary, and having served a term therof in the state prison, which under the provisions of section 667 of the Penal Code constitutes a felony.

Upon arraignment, the defendant admitted the prior conviction and imprisonment therefor, but entered a plea of not guilty to the charge of petit theft. He was tried and found guilty. This appeal is from the judgment of conviction.

[1] No claim is made that the evidence was not sufficient to support the verdict. Appellant seeks reversal upon three instructions given the jury upon behalf of the people, and that the court exceeded its jurisdiction in sentencing appellant for a felony rather than a misdemeanor.

The first instruction complained of reads in part: "If you believe from the evidence beyond a reasonable doubt and to a moral certainty that the defendant * * * unlawfully took the property of Montgomery Ward & Company * * * then you should find said defendant guilty as charged in the information."

Appellant contends this instruction failed to contain the elements of theft. Section 952 of the Penal Code provides, however, that an offense may be averred in any words sufficient to give the accused notice of the offense of which he is accused, and provides further, "In charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another." The testimony clearly discloses the taking to be theft. That the allegation of the information was sufficient is held in *People v. Breyer*, 139 Cal.App. 547, 34 P.(2d) 1065, 1067; *People v. Campbell*, 89 Cal.App. 646, 265 P. 364; *People v. Plum*, 88 Cal.App. 575, 263 P. 862, 265 P. 322. The jury were further instructed that they must find a criminal intent before the defendant could be convicted of the offense charged.

The next instruction complained of reads: "In every crime or public offense there must exist a union or joint operation of act and intent or criminal negligence, but where the act committed by the accused is of itself an unlawful act, the law in the first instance presumes the criminal intent and the onus or burden of proof falls upon the defendant to show the absence of criminal intent."

[2] Appellant claims this instruction is erroneous in that it places upon him a burden not imposed by law. But first, under section 13 of article 1 of the State Constitution, the failure of the defendant to explain or deny by his testimony any evidence or facts in the case against him may be considered by the jury in determining his guilt, and also the failure of a defendant to ac-

count for the possession of stolen property is a circumstance tending to show his guilt, and he is bound to explain such possession in order to remove the effect of the same as a circumstance to be considered in connection with other suspicious facts, if any such are disclosed by the evidence. *People v. Brown*, 71 Cal.App. 181, 235 P. 72.

[3] The court on several occasions clearly instructed the jury that the burden of proving every element of the offense charged was on the prosecution, and therefore the giving of the instruction complained of was not error, although the words "burden of proof" were perhaps not the most apt. It was not the burden of proof that rested upon defendant, but the duty to introduce evidence sufficient to offset the presumption or to create a reasonable doubt.

[4] Complaint is made by appellant also of the following instruction:

"You are instructed that in this case, although there must exist a criminal intent in the defendant, the specific intent with which the alleged act was done is in this case immaterial, it being sufficient to show that the offense was done wilfully. It is presumed that a person intends the natural consequences of an unlawful act, and therefore, if the wilful commission of the act is shown, the criminal intent is necessarily established.

"The word 'wilfully' when applied to the intent with which an act is done, implies simply a purpose or willingness to commit the act referred to. It does not require any intent to violate the law, or to injure another, or to acquire any advantage."

It is true that a similar instruction was criticized in *People v. Stennett*, 51 Cal.App. 370, 197 P. 372, as misleading and should not be given, but the court there held, and we so hold here, that defendant suffered no prejudice therefrom.

[5] Appellant also objects to the form of the verdict returned by the jury. The information charges defendant with the crime of petit theft, a misdemeanor, with a prior conviction, a felony. The verdict of the jury recited: "We the jury in the above entitled cause, find the defendant Walter Mason guilty of petit theft, a misdemeanor as charged in the information."

Appellant contends he was convicted of petit theft, and the court therefore exceeded its jurisdiction in committing him to a state prison. At the time this verdict was

returned, there was no provision in the Code whereby the jury were authorized to impose or recommend the punishment. Therefore, having found the defendant guilty of the theft as charged and the defendant having admitted the prior conviction, section 667 of the Penal Code prescribed the penalty therefor. *People v. Williams*, 125 Cal.App. 387, 13 P.(2d) 841.

We have examined the instructions and the evidence introduced, and are satisfied that defendant was fairly tried and legally convicted, and the errors, if any, did not result in a miscarriage of justice.

The judgment is affirmed.

We concur: THOMPSON, J.; PLUMMER, J.



12 Cal.App.2d 222

NEVIN v. MERCER CASUALTY CO.

Civ. 1586.

District Court of Appeal, Fourth District,
California.

Feb. 29, 1936.

Rehearing Denied March 30, 1936.

1. Appeal and error ☞1051(3)

Admission in evidence of letter, which defendant admitted by its pleadings in action on automobile liability policy that it sent insured, to show existence of policy referred to therein, over objection that it was not shown to have been signed by officer of defendant company, held not harmful to defendant, though unnecessary; such admission by pleadings being admission of authority of person signing letter.

2. Insurance ☞645(2)

Insurance company, admitting existence of automobile liability policy, on which injured person sued, by sending letter, recognizing policy's existence, to insured after previous filing of personal injury suit against latter, was bound to sustain allegations in its answer that letter was sent through mistake and that no such policy existed.

3. Evidence ☞383(7)

Automobile liability insurer's letter to insured in regard to policy covering truck involved in accident held to constitute recognition of policy, sufficient to sustain finding in injured person's action against insurer that policy was duly issued, in absence of evidence supporting allegations of insurer's

answer that letter was sent through mistake and that no such policy existed.

4. Appeal and error ⇨920(1)

It must be presumed on appeal that facts were as alleged by party obtaining order compelling appellant to furnish copies of all papers and correspondence in its possession, relating to subject-matter of action, before trial (Code Civ.Proc. § 1000).

5. Appeal and error ⇨901

Appellant must furnish all of record that may be needed to show error on which he relies.

6. Appeal and error ⇨909(5)

Appellate court must assume in favor of judgment against automobile liability insurer for injuries caused by insured's negligent operation of truck that policy covering such truck was issued and in existence.

7. Appeal and error ⇨920(1)

Trial court's order before trial of action on insurance policy for inspection of papers and correspondence, relating to insurance, in defendant's possession, and moving papers on which order was based, created disputable presumption that policy was in defendant's possession.

8. Appeal and error ⇨655(1)

Certified copy of trial court's order, adding certain matters to reporter's transcript, must be stricken by appellate court on appellant's motion, where proper steps were not taken to make order part of record on appeal.

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action by Charley A. Nevin against the Mercer Casualty Company. Judgment for plaintiff, and defendant appeals and moves to strike the trial court's order adding certain matters to the reporter's transcript.

Motion granted, and judgment affirmed.

Elbert E. Hensley, of Los Angeles, for appellant.

Forgy, Reinhaus & Forgy and A. M. Bradley, all of Santa Ana, and Edward H. Marxen, of Los Angeles, for respondent.

BARNARD, Presiding Justice.

The plaintiff recovered judgment against one James J. Mallon in an action for personal injuries caused through the negligent operation of a truck driven by Mallon. Thereafter, the present action was filed based upon the contention that this defendant had insured the said Mallon against

any such claims arising from his operation of the truck. The court found for the plaintiff and entered a judgment from which the defendant has appealed.

The appellant contends that the evidence is not sufficient to sustain the judgment, in that it fails to show the existence of any policy of insurance covering the matter in question. Incidentally, it is argued that certain evidence tending to show the existence of a policy was erroneously received because of the failure to prove that the original policy was in the possession of the appellant. The appellant put in no evidence and relies entirely upon its contention that there is no competent evidence justifying the inference that such a policy was in existence.

[1] The complaint alleged that after the filing of the former action against James J. Mallon the said Mallon notified this appellant of the filing of said suit and furnished it with a copy of the summons and complaint therein, and that this appellant thereupon sent a letter to the said Mallon, reading as follows:

"The

"Mercer Casualty Company
"of Celina, Ohio

"Full Coverage Automobile Insurance
"Claim Department Celina, Ohio

"July 27, 1931

"Mr. James J. Mallon, and/or J. E. Kendrick

"817 Havana Avenue,

"Long Beach, California.

"Re: Policy No. 74366

"Dear Sir:

"As you are aware suit has been filed against you in the Superior Court of Orange County, California by Charley A. Nevin, being Cause No. 28538, by reason of alleged personal injuries sustained as the result of accident occurring May 19th last in which the Truck insured under the above Policy was involved, being in the amount of \$54,232.00

"The Public Liability limits of the above Policy are \$50,000 and \$100,000. You therefore have an uninsured interest over and above the limits of your Policy, and it is your privilege and duty to secure such legal counsel as you deem necessary to protect your rights in the matter.

"Our Attorney handling this matter is Mr. Elbert E. Hensley, 825 Insurance Exchange Building, Los Angeles, who has given the matter proper investigation, and

who no doubt would be pleased to protect your interests also if you so desire. Please advise as to your wishes, obliging.

"Very truly yours,

"The Mercer Casualty Co.

"C. L. Clark, Claim Department.

"C. L. Clark-M."

The complaint further alleged that Elbert E. Hensley, referred to in this letter, thereafter appeared on behalf of this appellant in all stages of the action between this respondent and the said Mallon.

In its answer, this appellant admitted that the said Hensley appeared in its behalf at all stages of the former action and admitted that it mailed this letter to the said Mallon. The answer then alleged that this letter was mailed only by reason of the mistaken belief of this appellant that the said Mallon had such a policy of insurance.

The letter referred to was admitted in evidence over the objection that no foundation had been laid and that no showing had been made that it was signed by an officer of the company. It is now claimed that the admission of the letter was error for these reasons. That the appellant had sent the letter to Mallon was admitted by the pleadings, and it necessarily follows that the authority of the person signing the letter was thus admitted. While this evidence was unnecessary, in view of the pleadings, no possible harm could come from its admission.

[2,3] Having thus admitted the existence of the policy it was incumbent upon the appellant to sustain its allegation that the letter had been sent through a mistake and that, in fact, no policy was in existence. No attempt was made to offer proof in support of these affirmative allegations. The letter, the sending of which was admitted, constitutes a recognition of the policy on the part of the appellant sufficient to sustain the finding that the policy was duly issued, in the absence of any evidence to support the allegations of the answer. Under these circumstances, we think the pleadings and the absence of evidence on the part of the appellant justified the inference drawn by the court that the policy was in existence, and support the judgment.

[4-6] Before this action came on for trial the respondent sought and obtained an order compelling the appellant to furnish copies of all papers and correspondence in its possession relating to any insurance on the truck in question. The papers in con-

nection with this motion were admitted in evidence and, after looking over the same, the court made a statement as to their contents, from which it sufficiently appears that it had been alleged therein that a policy had been issued by the appellant which covered this accident. This order was never appealed from, and it is stated in the briefs, and not denied, that it was made with the consent of the appellant. While it appears from the record that this order of inspection was not complied with by the appellant, we find nothing in the record to show that the order was not duly served upon the appellant. Under section 1000 of the Code of Civil Procedure it must be presumed that the facts are as alleged by the party who obtained the order. It is incumbent upon the appellant to furnish all of the record that may be needed to show the error he relies upon and, under the record before us, we must assume, in favor of the judgment, that a policy of a certain number and covering the truck involved in the former action, had been issued and was in existence.

[7] While the appellant contends that certain evidence was improperly received since there is no evidence to show that the policy was in the possession of the appellant, the order for an inspection issued, with the moving papers on which it was based, create a disputable presumption that this policy was in the possession of the appellant. Although subpoenaed by the respondent Elbert E. Hensley was not present at the trial. It was stipulated that, if present, he would testify that he investigated the accident in question and tried the former action as a representative of this appellant.

[8] There was filed in this court a certified copy of an order made by the trial court purporting to correct the reporter's transcript by adding thereto certain matters which are set forth in the order. The appellant moved to strike this purported addition on the ground that proper steps had not been taken to make the same a part of the record on this appeal. We think this contention must be sustained and, for that reason, have disregarded the matter thus sought to be added to the record.

The motion to strike is granted, and the judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

12 Cal.App.2d 193

ROBERTS v. BOMASH.

Civ. 10080.

District Court of Appeal, Second District,
Division 1, California.

Feb. 28, 1936.

1. Bankruptcy Ⓒ421(1)

Contract unconditionally guaranteeing bonds secured by trust deed constituted a separate obligation provable against guarantor in bankruptcy, notwithstanding property described in trust deed had not been sold, and hence guarantor's discharge in bankruptcy was complete defense to any claim on guaranty (Bankr.Act § 63 (4), 11 U.S.C.A. § 103 (a) (4)).

2. Appeal and error Ⓒ110

Order denying motion for new trial was not appealable.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by Jean Roberts against Louis Bomash. From a judgment for plaintiff, and an order denying defendant's motion for new trial, defendant appeals.

Judgment reversed, with directions, and appeal from order denying motion for new trial dismissed.

Dudley Robinson, of Los Angeles, for appellant.

Harry Rabwin, of Los Angeles, for respondent.

ROTH, Justice pro tem.

[1] Defendant and appellant, prior to the commencement of this action, had filed a petition in bankruptcy and received his discharge. One of the liabilities listed, from which he had been discharged in bankruptcy, was an unconditional contract of guaranty, which forms the basis of the present action. The guaranty in question was of certain bonds owned and held by plaintiff and respondent, which bonds were secured by a trust deed. The bonds were in default at the time of appellant's bankruptcy, and the holder of the bonds was sent a notice of the bankruptcy advising of her right and the time within which to file a claim against the bankrupt estate of the guarantor. No claim was filed, and the question of notice is not disputed.

In the present action respondent contended, in which contention she was sustained by the trial court, that, because the property described in the trust deed which was security for the bonds held by her had not been sold at the time of appellant's bankruptcy, it was impossible to ascertain the amount of her claim; that her claim against the guarantor was a contingent, unliquidated demand; and that it was not, therefore, a provable claim in bankruptcy, and would not be affected by the bankruptcy or appellant's discharge therefrom. In *re Hutchcraft* (D.C.) 247 F. 187, 41 A. B.R. 238; *Phenix National Bank v. Waterbury*, 123 App.Div. 453, 108 N.Y.S. 391, 20 A.B.R. 140; *Gilbert's Collier on Bankruptcy* [1935 Ed.] page 985.

The fallacy of respondent's contention is that a guaranty is a separate and distinct obligation not dependent in any manner upon the liquidation of the property described in the trust deed, unless it is so conditioned by its own terms. *Cooke v. Mesmer*, 164 Cal. 332, 340-342, 128 P. 917; *Pierce v. Merrill*, 128 Cal. 464, 61 P. 64, 79 Am.St.Rep. 56; *Kelley v. Goldschmidt*, 47 Cal.App. 38, 41, 190 P. 55. The guaranty in question was an unconditional one. It is specifically recited that " * * * the intent hereof that the undersigned shall remain liable as principal until the within Certificate with interest has been fully paid, notwithstanding any act or thing that might act as a legal or equitable discharge of a surety or guarantor. * * * (and) This guaranty shall be independent of and in addition to the rights and remedies under said Trust Indenture of the holder of the within Certificate."

There is no doubt that respondent's claim against appellant on the guaranty was a debt provable within the meaning of section 63 of the Bankruptcy Act, which provides in part: "Debts of the bankrupt may be proved and allowed against his estate which are * * * (4) founded upon an open account, or upon a contract express or implied." 11 U.S.C.A. § 103. (a)(4). Appellant's discharge in bankruptcy was a complete defense to respondent's claim on the guaranty.

[2] Judgment is reversed, and there being no dispute on the facts, the trial court is directed to enter judgment in favor of defendant and appellant. The appeal from

the order denying motion for new trial is dismissed, since there is no appeal from such an order.

We concur: YORK, Acting P. J.;
DORAN, J.



12 Cal.App.2d 88

PRATO v. SNYDER.

Civ. 1590.

District Court of Appeal, Fourth District,
California.

Feb. 21, 1936.

1. Automobiles ⇨246(10)

In action by motorcyclist for injuries allegedly received when struck by automobile after falling from motorcycle, instruction that motorist must exercise reasonable care to anticipate presence of others should have limited such duty to those using highway in lawful manner.

2. Automobiles ⇨246(10)

In action by motorcyclist for injuries allegedly received when struck by automobile after falling from motorcycle, instruction relating to lack of knowledge by motorist that motorcyclist was on highway should have been made applicable only to occurrences on motorcyclist's side of road.

3. Appeal and error ⇨1066

Trial ⇨253(4)

In action by motorcyclist for injuries alleged to have been received when struck by automobile coming from opposite direction after falling from motorcycle, instruction that failure of motorist to keep vigilant lookout ahead to avoid collision with any other vehicle lawfully upon highway would be negligence held prejudicial in omitting that other vehicle must be using highway in lawful manner.

4. Appeal and error ⇨1066

Trial ⇨253(4)

In action by motorcyclist for injuries allegedly received when struck by automobile coming from opposite direction after falling from motorcycle, instructions stating in effect that failure of motorist to see motorcyclist constituted negligence held prejudicial in not permitting consideration of whether motorcyclist suddenly appeared on wrong side of highway and whether motorist could have seen him in time to avoid accident.

5. Automobiles ⇨150, 245(39)

Failure of motorist to look at all generally constitutes negligence as matter of law, while question of whether motorist who looks sees all that he should is one of fact for jury.

6. Automobiles ⇨245(16)

Whether motorist was negligent in failing to see motorcyclist coming from opposite direction in time to avoid injury to motorcyclist, who alleged that he had been struck by automobile after falling from motorcycle, held for jury.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by John Prato, Jr., a minor, by his guardian ad litem, John Prato, and another against George G. Snyder. Judgment for plaintiffs, and defendant appeals.

Reversed and remanded, with directions.

Fred A. Wilson and Wilson & Coughlin, all of San Bernardino, for appellant.

Stephen Monteleone, of Los Angeles, and Harold King, of San Bernardino, for respondents.

BARNARD, Presiding Justice.

This is an appeal from a judgment for \$30,000 in favor of the plaintiffs based upon personal injuries received by the minor plaintiff, who will hereinafter be referred to as the respondent.

About 5 p. m. on April 19, 1934, the respondent was riding a motorcycle in a westerly direction on United States highway No. 99 between Beaumont and Redlands, and at the same time the appellant was driving an automobile easterly along the same road. In his complaint the respondent alleged that he was traveling on his right half of this highway, that he passed over an area covered with oil, which caused his motorcycle to slide and throw him to the pavement on that side of the road, and that as he lay there the appellant negligently drove on his left or wrong half of the highway and struck him with his automobile, inflicting the injuries complained of.

The respondent testified that the accident occurred on a hill at a point where the road curved to the north; that as he came down this hill at about 35 or 40 miles an hour, he was riding near his right-hand edge of the pavement; that as he came around the

curve his motorcycle turned sideways and slipped from under him, going straight ahead down the hill; that he fell to the pavement in a seated position and slid down hill, wearing off his pants; that when he stopped he was facing uphill; that he attempted to get up and got to his knees; that he tried to get up and was only able to lift his head; that he was then on his right half of the road near its north edge; that he looked over his shoulder and saw an automobile about 50 feet away coming at a high rate of speed; and that "when I saw the car coming I attempted to get to my knees, and all I can remember after that is getting to my knees. After that everything went black." He further testified that he did not see any truck and that he had not tried to pass a truck shortly before he fell. There is no direct evidence that he was struck by the appellant's car.

The appellant testified that just before he reached the point in question he saw a truck approaching from the east; that just as the truck was about to pass him the respondent, on his motorcycle, came around from behind the truck, and in attempting to pass the same came over to the south or the appellant's side of the highway; that he had no time to stop; that the respondent was 3 feet to the south of the center of the highway when the motorcycle slipped and he fell; that his left front wheel ran over the rear wheel of the motorcycle, cutting his left front tire and bending that wheel; that he was then unable to control his car; and that his car proceeded with locked brakes over to the north edge of the road where it collided with another car which is not involved in this action. The appellant's story is confirmed by his wife, who was riding with him at the time.

From the testimony of other witnesses, it appears that the motorcycle was first found after the accident on the center line of the highway some 60 or 70 feet westerly from the point where the appellant's car came to rest, and that the respondent was lying on the north edge of the pavement, a few feet westerly from the motorcycle. It also appears, without contradiction, that there were two skid marks on the pavement showing that the appellant's automobile had skidded with locked brakes for about 50 or 60 feet. These skid marks were parallel with each other the right distance apart for automobile wheels and began on the south half of the highway; the northerly one beginning at a point three feet south of the

center line of the highway. From that point they proceeded unbroken in a north-easterly direction to the place where the appellant's automobile stopped. There was evidence that most of the oil on the pavement at the point in question was on the south half of the highway, although there was some oil on the north half.

As appears from the pleadings as well as the evidence, the entire issue in this case was as to whether the respondent, in passing a truck, came over to the south or his wrong half of the highway and there slipped and fell, or whether he fell and was struck by the appellant's automobile on the north or his right side of the highway.

It is appellant's first contention that it conclusively appears from the physical facts that he could not have been on his wrong side of the road. The rear wheel of the motorcycle was crushed in a manner indicating that it was run over while it was lying on the pavement, which corresponds with respondent's testimony that it slipped from under him and went down the hill before he saw the car coming. It would also appear from the respondent's testimony and the other evidence that, if he was hit by the automobile at all, this occurred after the automobile had passed over the motorcycle. The motorcycle was found in the center of the highway, and the respondent was found at the north edge of the highway a few feet west of the motorcycle. When he fell, the respondent was coming down hill on a road curving to his right or to the north, at a speed of 35 or 40 miles an hour. It would be natural for him to roll or slide further down hill than would the motorcycle lying on its side, and he was found in that position. It would also be natural for him, under those circumstances, to slide toward the north with the curve and slope of the road. It appears without question that the skid marks left by appellant's automobile began about 3 feet south of the center of the highway and proceeded in a northeasterly direction for some 50 or 60 feet to the north edge of the road. While the physical facts would seem to indicate that the respondent slipped and fell from his motorcycle on the south or his wrong side of the road, he relies upon the appellant's testimony to the effect that he thought he traveled about 15 feet from the point where he struck the motorcycle to the point where he put on his brakes and began to skid. It is argued that it is possible to infer from this testimony that the appellant may have been on the north or his wrong side of the road,

and that, while he traveled these 15 feet, he pulled over to his own side of the road where the skid marks began.

The appellant further argues that the nature of the injuries received by the respondent conclusively shows that he was injured by his fall to the pavement and that he was not struck by the appellant's car. These injuries consisted of what is called a compression fracture of the twelfth dorsal and the first lumbar vertebra. While the ribs are attached to that dorsal vertebra, they were not injured. There was no external evidence of injury except a slight cut on the right hand and right forearm, and there was no outward abrasion or discoloration and nothing on the skin to show. Both of respondent's doctors testified that such an injury could have occurred from such a fall to a sitting position, although one of them testified that he considered it much more likely that it came from some sort of a lateral blow. He further testified that it would not be possible to thus fracture the twelfth dorsal vertebra without injuring the ribs attached thereto unless the blow hit below the ribs, and that, in order to do that, it would be necessary for the blow to come from something soft, otherwise it would make an abrasion or discoloration of the skin. It must be conceded that it is difficult to see how the respondent's injuries could have been caused by his being struck by an automobile, without leaving other effects or signs of injury.

While the most reasonable inference to be drawn from the evidence is that the appellant was not on his wrong side of the road and that the injuries to respondent were not caused by his being struck by appellant's automobile, a contrary inference might possibly be drawn from these portions of the evidence. That being the case, it may not be held that the physical facts conclusively demonstrate that respondent's injuries could not have been caused by anything done by the appellant. A reading of the record strongly indicates, however, that the verdict of the jury was based more upon sympathy for the respondent, whose injuries were serious, than upon any evidence justifying an inference that the appellant was guilty of negligence.

Under such circumstances, the appellant's attack upon the instructions given deserves the most careful consideration. The only negligence charged to the appellant, in the complaint or in the evidence, was that

he was on the wrong side of the road and that he ran over the respondent while lying on his own right side thereof. The only real issue was as to which of these parties was on the wrong side of the road at the time of the accident. While most of the instructions were correct in themselves, this issue was not squarely and clearly put to the jury, and we are left in a position where it cannot be told whether the jury believed that the appellant was on the wrong side of the road or believed that he negligently did something while on his own side of the road and at a time when the respondent had the legal right to be on that side.

The jury was instructed that every person has the right to presume that every other person will perform his duty and obey the law, and that, in the absence of reasonable ground to think otherwise, it is not negligence to assume that he is not exposed to a danger which comes to him only from a violation of law on the part of another. The giving of such an instruction has been questioned in a case where the lawfulness of the acts of both parties is directly in issue. *McPherson v. Walling*, 58 Cal.App. 563, 209 P. 209. A number of instructions were given to the effect that the driver of an automobile is bound to anticipate that he may meet persons or vehicles at any point of the street or highway, that, in order to avoid a charge of negligence, he must keep a proper lookout and keep his machine in such control as will enable him to avoid a collision, and that he must not proceed blindly or presume that the way is clear. While most of these instructions contain the clause "without any fault on the plaintiff's part," the jury had already been instructed that the plaintiff had the right to assume that the defendant would obey the law and to assume that he would drive with due care. The jury was then instructed that, if the defendant was not overtaking or passing another automobile and was not placing his vehicle in a position to make a left turn, it was his duty to drive as closely as practicable to the right-hand edge of the highway, and that, if they found that at the time and place involved he did not drive his automobile as closely to the right-hand edge of the highway as a person of ordinary prudence would have done, and that his failure to do so proximately caused the injuries to the plaintiff, without fault on the plaintiff's part, then their verdict must be in favor of the plaintiff. If, as the re-

spondent testified, he fell and was struck on his half of the highway and near the north edge thereof, the proximate cause of the accident was the fact that the appellant was driving on the wrong side of the road and not the fact that he was not driving as closely as possible to his right-hand edge of the highway. If, as the appellant testified, the respondent was passing the truck on his wrong side of the road, he would not be without fault, and the failure of appellant to keep to the right-hand edge of the highway would not have been the proximate cause. There was no evidence indicating that the respondent was rightfully on the south side of the road and that the accident happened merely because the appellant failed to keep as close as possible to his right edge of the pavement. Taking all of the instructions together, we cannot escape the conclusion that, under the peculiar circumstances here appearing, they may well have led the jury to believe that a higher duty rested upon the appellant than upon the respondent, that the appellant was bound to anticipate that he might meet the respondent at any point on the highway, that the respondent had a right to be upon his wrong side of the highway, and that the appellant was liable, in such an event, if he had failed to drive as closely as possible to his right-hand edge of the highway.

[1,2] In one instruction the jury was told "that the defendant George G. Snyder in this case had no right to assume that the road ahead of him was clear, but under all circumstances and at all times was required to exercise reasonable care to anticipate the presence of others, and operate his automobile in the manner required by the California Motor Vehicle Act. * * * " St. 1923, p. 517, as amended. The jury was thus instructed that the appellant was required under all circumstances and at all times to anticipate the presence of others, even though such others were on the wrong side of the road. Particularly under the circumstances of this case it should have included the limitation that this duty of anticipation applied in favor of those who were using the highway in a lawful manner at the time and who were lawfully upon that side of the road. This instruction continued: "If you believe that he did not know that plaintiff John Prato, Jr., was on the highway in such close proximity, if you shall find this to be a fact, considering all of the circumstances, as to occasion a situ-

ation of danger, if any, the fact of such lack of knowledge, if any, on his part, is not an excuse for conduct which would have amounted to recklessness if, in the exercise of reasonable care, defendant would have known that plaintiff John Prato, Jr., was on the highway in such situation, if at all." This virtually told the jury that the appellant's failure to see the respondent may have amounted to recklessness and omitted any question as to the sudden appearance of the respondent from behind the truck. If given at all, it should, under these circumstances, have been made applicable only to what occurred on the respondent's side of the road, in the event the jury accepted his testimony that the accident happened there. It certainly is not the law that the driver of an automobile must anticipate that any one will suddenly come from behind another vehicle and appear on the wrong side of the road, and that it amounts to recklessness to fail to see one who thus suddenly appears. It should be remembered in this connection that the jury was repeatedly instructed that the appellant was bound to anticipate that he might meet persons or vehicles at any point on the street or highway. While great emphasis was put in many of the instructions on the duty resting upon the appellant to anticipate other vehicles at any point on the street and to see all that might be seen, none of the instructions given adequately covered or clearly informed the jury of the fact that one is not bound to anticipate the sudden appearance of another on his wrong side of the road. Conceding that most of these instructions were correct in themselves, what we are here criticizing is the effect of giving them all, under the circumstances here appearing, without clearly pointing out their limitations and the corresponding duty resting upon the respondent.

Two instructions given were as follows:

"All drivers of vehicles on a public highway are required by law to keep a vigilant lookout ahead so as to avoid, if reasonably possible, a collision with any other vehicle or person lawfully upon such highway. Failure to keep such lookout, or failure to see that which may be readily seen, if a driver is looking, would constitute negligence as a matter of law."

"It is negligent to look and fail to see that which is in plain sight or to listen and fail to hear that which is plainly to be heard, and to look or listen and to fail to

see or hear that which is plainly to be seen or heard by the exercise of ordinary care is as negligent as not to look or listen at all."

[3-6] In instruction No. 26, the court instructed the jury: "If you shall find that the defendant failed to see or hear that which was plainly to be seen or heard by the exercise of ordinary care, such failure, if any, to see or hear, would be just as negligent as not to look or listen at all." The first of these, referring to any other vehicle or person lawfully upon the highway, omitted the element that such a person must also be using the highway in a lawful manner. The others in effect instructed the jury that, if this appellant did not see the respondent, it was negligence on his part, as a matter of law. They leave out of consideration the fact that the respondent may have suddenly appeared on the wrong side of the highway and the question whether it was possible for the appellant to have seen him in time to avoid the accident. We think these instructions should not have been given under the circumstances here appearing. In effect, they make it negligence, as a matter of law, to fail to see that which may be seen. Under the general rule, the failure to look at all constitutes negligence as a matter of law, while the question of whether one who looks sees all that he should is one of fact for the jury. The question as to whether the appellant was negligent in failing to see the respondent in time to avoid the accident was, under the circumstances of this case, peculiarly a question of fact which should have been left entirely to the jury.

The instructions as a whole not only presented the issue raised by the pleadings and the evidence as to whether the appellant was negligent in being on the wrong side of the road, but also permitted the jury to pass upon the question as to whether he had been guilty of some form of negligence even though he remained on his own side of the road, when there was no evidence to sustain any finding of this nature. While most of the instructions follow similar instructions which have been more or less approved in other cases, the question of their correctness depends, after all, upon the circumstances of the case in which they are used. We think a number of them should not have been given under the circumstances of this case and that sufficient error appears to be prejudicial, in view of

the nature of the evidence and the facts involved. The cause should be retried and submitted under instructions which clearly and squarely present to the jury the real and only issue as to which of these parties was on the wrong side of the road at the time of the accident and which inform the jury as to the respective rights and obligations of both parties under both sets of circumstances.

The judgment is reversed.

We concur: MARKS, J.; JENNINGS, J.



12 Cal.App.2d 282

JONES v. PIER et al. (two cases).

Civ. 10821, 10822.

District Court of Appeal, Second District,
Division 2, California.

March 4, 1936.

Rehearing Denied March 25, 1936.

Hearing Denied by Supreme Court
April 30, 1936.

Appeal and error ⇨ 1099(3)

Opinion on former appeal determining that lessors could not terminate vested interest of assignee of one per cent. of total production by cancellation of oil lease without assignee's consent *held* binding on subsequent appeal from judgment quieting assignee's title to one per cent. of total production.

Appeal from Superior Court, Los Angeles County; Wilber F. Downs, Judge.

Actions by C. A. Jones against W. F. Pier and others. Judgment for plaintiff, and named defendant and another and defendants W. F. Garrison and others appeal.

Affirmed.

Merriam, Rinehart & Merriam, of Pasadena, for appellants W. F. and Agnes Pier.

Hanna & Morton, of Los Angeles, for appellant W. F. Garrison.

L. F. Coburn, of Orange, and Clayton L. Howland, of Los Angeles, for respondent C. A. Jones.

WOOD, Justice.

A community oil lease was executed on October 10, 1922, by W. F. Garrison and his then wife and W. F. Pier and his wife, as lessors, and Cal-Mex Oil & Refining

Company, as lessees, covering twenty lots in the North Long Beach tract. The Garrisons were the owners of ten of the lots and the Piers were the owners of the other ten. By the terms of the lease, which was made for the term of twenty years, the lessors were to receive one-fourth of all oil, gas, and other hydrocarbon substances to be produced from the leased premises. The lease set forth certain conditions the failure to perform which would be grounds for forfeiture at the option of the lessors. After the execution of the lease, Mr. and Mrs. Pier assigned to C. A. Jones, the plaintiff, one per cent. of the total production extracted from the premises. The assignment is as follows: "Know all men by these presents: That we, W. F. Pier and Agnes Pier, his wife, owners by virtue of a community lease dated October 10, 1922, of twelve and one-half per cent ($12\frac{1}{2}\%$) of the total production of oil, gas and other hydrocarbon substances extracted and saved from (the lots above mentioned) * * * do hereby sell, assign, transfer and set over unto C. A. Jones, of Long Beach, California, one per cent (1%) of said total production; this assignment to remain effective so long as the assignee, or his successors in interest, contributes one per cent (1%) of the increase of taxes upon said land resulting from the discovery of oil or gas thereon; To have and to hold the same to the said assignee, his heirs and assigns forever."

The present action was commenced on May 31, 1928, to quiet plaintiff's title as against the Piers and Garrisons to "one per cent (1%) of the total production of oil, gas and other hydrocarbon substances extracted and saved," from the twenty lots referred to in the lease. Judgment was rendered in favor of the defendants and on appeal the judgment was reversed. *Jones v. Pier*, 124 Cal.App. 444, 12 P.(2d) 646. The reversal was necessary for the reason that the trial court had based its judgment upon a decree in another action in which the Garrisons as owners of ten of the lots covered by the lease had recovered judgment by default against the Cal-Mex Oil & Refining Company and in which the court found that the said company was guilty of breaching the covenants of the oil lease and decreed the cancellation of the lease. The Piers had not been made parties to that litigation, and therefore the decree referred to did not terminate the lease. Upon the second trial of the action the trial court permitted defendants to file a supplemental answer in which allegations were made, and found by the

court to be true, that with regard to all but four of the lots covered by the lease the assignees of the original lessees had forfeited the lease and with the consent of the Piers and Garrisons had surrendered the premises to the original lessors.

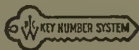
The trial court rendered judgment in favor of plaintiff quieting his title to one per cent. of the production during the term of the lease and appeals are prosecuted by defendant W. F. Garrison and by defendants W. F. Pier and Agnes Pier. The briefs contain much discussion on the questions whether the defendants could terminate the lease without the consent of plaintiff and whether plaintiff has a vested right in the oil produced. It is manifest that the issues now before the court were determined by the opinion filed upon the former appeal, which is binding upon us in the present proceeding. We quote: "Mr. and Mrs. Pier could not thus terminate the vested interest of the plaintiff which they conveyed to him for the consideration of \$6,000, without his knowledge or consent. * * * By the terms of his assignment of April 3, 1923, the plaintiff acquired an undivided one per cent interest in common with the lessors in all oil, gas or other hydrocarbon substances produced from the land therein described, for the term of twenty years from the date of the original lease, regardless of who produced the same. The lease created a vested right in property even though it was not accompanied by actual physical possession of the subterranean deposit of gas or oil. In the case of *Merrill v. California Petroleum Corp.*, 105 Cal.App. 737, 288 P. 721, 723, it is said: 'It appears that the deposit of oil involved was a part of the land in which it was found; that Lake's right to extract the oil was "private property," a "claim to land, although not accompanied by actual physical possession of the subterranean deposit"; that such claim was "founded on a right" vested in him by the terms of the lease, a right "coupled with an interest." While the oil in its natural deposit was a part of the land, it was in actual existence as part of the land, and was potentially personal property under the terms of the lease, a right "coupled with sonal property to the extent of the amount thereof involved in this action when the lessee exercised his right to extract it.' The plaintiff is therefore entitled to have quieted in him his undivided one per cent of all oil, gas and other hydrocarbon substances which may be developed or produced from the property during the terms prescribed in the

original lease or until that instrument is lawfully terminated. Any oil leases with relation to the land described in the Cal-Mex Oil & Refining Company lease of October 10, 1922, which may have been subsequently executed by the lessors, are subject to the plaintiff's prior vested right which was acquired by means of his assignment of interest as above related."

Defendants argue that the language used in the opinion on the former appeal, "or until that instrument is lawfully terminated," coupled with the findings of the trial court on the subject of forfeiture, should be construed to mean that the lease is now lawfully terminated and that plaintiff's rights were extinguished by the termination of the lease as to most of the lots. This contention cannot be upheld. The opinion upon the former appeal must be considered in its entirety. The language just quoted must be construed in the light of the statement contained in the opinion that the Piers could not terminate the vested interest of plaintiff without his consent. It was also held in the former opinion that any oil leases with relation to the twenty lots "which may have been subsequently executed by the lessors are subject to the plaintiff's prior vested right." By the judgment from which the appeals are taken the trial court correctly adjudicated plaintiff's rights in accordance with the opinion upon the first appeal.

The judgment is affirmed.

We concur: CRAIN, P. J.; McCOMB, Justice pro tem.



12 Cal.App.2d 355

SUTTON v. SUTTON.

Civ. 10853.

District Court of Appeal, Second District,
Division 2, California.

March 10, 1936.

1. Marriage ⚡58(1)

Matters occurring after marriage cannot be basis of annulment suit.

2. Marriage ⚡58(7)

Judgment annulling marriage cannot be sustained upon ground that wife prior to marriage represented herself to be of chaste and moral character.

3. Marriage ⚡60(7)

Evidence held insufficient to support judgment annulling marriage on ground of wife's fraud in obtaining husband's consent to marry, or unchastity of wife.

Appeal from Superior Court, Los Angeles County; Joseph L. Call, Judge.

Suit by Rosa Sutton against Chester M. Sutton, wherein defendant filed a cross-complaint. Judgment for defendant, and plaintiff appeals.

Reversed.

Sigmund S'Renco, of Los Angeles, for appellant.

S. S. Hahn and W. O. Graf, both of Los Angeles, for respondent.

GOULD, Justice pro tem.

To plaintiff's suit for separate maintenance her husband filed a cross-complaint for annulment of their marriage and was successful in the trial court. Plaintiff appeals.

The judgment annulling the marriage must be reversed. Evidently the action for annulment was predicated upon the ground that the consent of the husband was obtained by fraud. In this regard it is alleged that plaintiff, "in order to induce defendant to marry her, represented and promised defendant that she loved him and him alone; that she had never loved any other man until she met defendant; that she had an exemplary character and associated with the best class of people; that she had never had any illicit relations with any man; that she cared nothing for wealth but desired to marry defendant only to have a moderate home and surroundings, and a companion whom she could love and who would love her; that she was in perfect physical condition and never had been ill, and that when they were married she would always love him, be kind and considerate of his happiness and desires, and a companion to him at all times." These promises and representations were false and untrue, it is further alleged, and the court found in conformity therewith; also to the effect that the wife's "character is questionable; that she had illicit relations with many men."

[1-3] The husband was the only witness in support of the allegations of his cross-complaint. His testimony related largely

to matters occurring after the marriage, consisting of complaints that his wife paid attention to other men, did not exhibit affection for him, and made unreasonable money demands upon him. Matters occurring after marriage cannot be the basis of an annulment suit. The only evidence even hinting at the alleged unchastity of appellant is the surmise, inference, and speculation of her husband based upon his presumptions as to her physical condition. There is no evidence to support the finding of "illicit relations with many men." A judgment annulling a marriage cannot be sustained upon the ground that the wife prior to marriage represented herself to be of chaste and moral character (*Wilcox v. Wilcox*, 171 Cal. 770, 155 P. 95; *Barnes v. Barnes*, 110 Cal. 418, 42 P. 904); and, even if such were a sufficient cause for annulment, there is no evidence in this case to support the allegations and findings of unchastity.

Judgment reversed.

We concur: CRAIN, P. J.; WOOD, J.



12 Cal.App.2d 124

GONZALES v. ITO et al.

Civ. 10820.

District Court of Appeal, Second District,
Division 2, California.

Feb. 25, 1936.

Hearing Denied by Supreme Court
April 23, 1936.

1. Aliens ☞13

Rights guaranteed to subjects of Japan in treaty between United States and Japan concerning rights of their respective nationals in country of the other cannot be abrogated by Alien Land Law.

2. Aliens ☞12

Japanese alien engaged in general garage business was engaged in "trade" and authorized to lease commercial property for conduct of such business under treaty between United States and Japan permitting nationals of the respective nations to lease commercial property in country of the other (St.1923, p. 1021, § 2).

[Ed. Note.—For other definitions of "Trade," see Words & Phrases.]

3. Aliens ☞13

Japanese alien who was wrongfully ejected by landlord from leased commercial property on which alien conducted a general garage business held entitled to protect his lease in court, including right to execution upon a judgment for damages for breach of lease, and title to leased property acquired by alien in satisfaction of such judgment gave alien a valid, transferable title (St.1923, p. 1021, § 2).

4. Aliens ☞12(4)

Statute under which aliens ineligible for citizenship were forbidden to hold agricultural land more than two years after purchase on foreclosure held not to prohibit by implication the holding possession of commercial land acquired under foreclosure by Japanese aliens, since statute referred only to agricultural lands which were not covered by treaty between United States and Japan (St.1923, p. 1023, § 7).

Appeal from Superior Court, Los Angeles County; Robert Walker Kenny, Judge.

Action for declaratory relief by Juan M. Gonzales against H. M. Ito and others. From an adverse judgment, plaintiff appeals.

Affirmed.

Porter C. Blackburn, of Los Angeles, for appellant.

James A. Miller, Louis F. Labarere and John A. Cronin, all of Los Angeles, for respondents.

CRAIN, Presiding Justice.

This is an appeal by the plaintiff from a judgment against him in an action for declaratory relief wherein he sought to have the court determine the legal effect of a transfer by two aliens not eligible to citizenship, named Ito, of certain property used for commercial purposes. The aliens acquired their title to the property through two channels: One, through execution of a judgment which they had obtained from the plaintiff; and another by complying with an interlocutory decree. Prior to May 9, 1927, defendant Ito was in possession of the property as a tenant of the plaintiff and he was conducting a general garage business thereon. On said date he was wrongfully dispossessed by the plaintiff, and he thereafter obtained judgment for damages for such eviction in the sum of \$9,000. The judgment was affirmed on appeal. The

judgment, not having been paid, defendant Ito had the property sold under execution, and the sheriff sold at execution sale all of the plaintiff's right, title, and interest in and to the property. The property already had a vendor's lien against it for \$6,500 which was prior to the lien of Ito's judgment, and, there being no bidder at the sheriff's sale, defendant Ito bid in the property. A sheriff's certificate of sale was issued to him.

Subsequent to the wrongful eviction of Ito, the plaintiff leased the property to a market corporation which later became involved financially, and eventually its rights under the second lease were hypothecated to the Citizens National Bank. After defendant Ito had bought in at the sheriff's sale, the bank brought an action against all the parties herein to determine its rights under a foreclosure clause in the second lease, and there was an interlocutory judgment rendered in that action whereby defendant Ito was given the right to redeem the property by paying approximately \$1,550 to the bank, and it was further ordered and decreed therein that upon the payment of said sum Ito was to be restored to all the right, title, and interest of the plaintiff in and to his original contract of purchase. Within 30 days after the rendition of said interlocutory judgment and on September 6, 1933, the defendant Cronin paid the bank all moneys due it. This payment was made under an agreement with Ito whereby Cronin agreed to buy all of Ito's right and interest in the original contract of sale for \$8,000, subject only to the balance due on the original purchase agreement.

Thereafter defendant Cronin went ahead with his part of the purchase of the property, and the fee title to the property which is still vested in the plaintiff's vendor would be vested in Cronin except for a stop order served upon the sheriff by the plaintiff which has resulted in the sheriff refusing to issue his deed to any one who claims through the sheriff's certificate. The contentions of the plaintiff are: "(a) Aliens not eligible to citizenship can not own or hold real property in the state of California. (b) That no exception is made in behalf of those aliens who have acquired title through foreclosure of a lien on said property. (c) That a conspiracy to defeat the Alien Land Law arises when parties with knowledge of the disabilities, cause title to be taken in the name of such alien. (d) Such transaction, being void, it can be questioned collaterally by anyone." Stating the

question more succinctly, it is—that the sale under foreclosure to Ito was void ab initio, and therefore the defendants have no interest whatever in the property.

The plaintiff's first contention is answered by the Alien Land Law itself (Stats. 1921, p. lxxxiii, as amended by St. 1923, p. 1020), and by one of the treaties referred to therein. Section 2 of the Alien Land Law (as amended by St. 1923, p. 1021) reads as follows: "All aliens other than those mentioned in section one of this act may acquire, possess, enjoy * * * and transfer real property, or any interest therein, in this state, * * * in the manner and to the extent, and for the purposes prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise." The treaty upon which defendant Ito relies is found at 37 U.S. Stats. at Large, 1504, and the pertinent parts of article 1 thereof read as follows: "The citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established. * * * The citizens or subjects of each of the High Contracting Parties shall receive, in the territories of the other, the most constant protection and security for their persons and property."

[1-3] The Alien Land Law has been in effect now for almost sixteen years, and a number of cases have been decided in which the act was construed both by the Supreme Court of California and by the Supreme Court of the United States. One of the clearest principles enunciated in these cases is that any rights guaranteed to the subjects of the high contracting parties in treaties between the United States and other nations cannot be abrogated by the Alien Land Law. In *Asakura v. Seattle*, 265 U.S. 332, 44 S.Ct. 515, 68 L.Ed. 1041, it was held that the language of the treaty was broad enough to comprehend all classes of business which might be reasonably embraced in the word "trade." Defendant Ito was engaged in trade (*State of California v. Tagami*, 195

Cal. 522, 234 P. 102) and the leasing of the property in question from plaintiff was a reasonable and authorized incident thereof. The treaty gave to defendant Ito the right to lease land for commercial purposes, and it gave to him the right to protect his lease in a court of competent jurisdiction including the right to execution upon a judgment for damages for breach of the lease. The Supreme Court of the United States in the case of *Jordan v. K. Tashiro*, 278 U.S. 123, at page 130, 49 S.Ct. 47, 49, 73 L.Ed. 214, said: "The principle of liberal construction of treaties would be nullified if a grant of enumerated privileges were held not to include the use of the usual methods and instrumentalities of their exercise." To hold otherwise would not only be unreasonable, but would be against good morals.

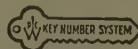
[4] The plaintiff, however, relies upon a part of section 7 of the Alien Land Law (as amended by St.1923, p. 1023) which reads as follows: "No alien, company, association or corporation mentioned in section two or section three hereof shall hold for a longer period than two years the possession of any agricultural land acquired in the enforcement of or in satisfaction of a mortgage or other lien hereafter made or acquired in good faith to secure a debt." And the plaintiff contends in this connection that "the initiative act, therefore, following out the wording and the manner of construction adopted through the implied prohibition in section 7, denies the use and enjoyment of any property acquired by an ineligible alien by foreclosure unless it was agricultural land." The prohibition in section 7 is not an implied prohibition; it is an express one. It is not reasonable to contend, because the act prohibits the holding possession of agricultural land which is acquired under foreclosure for a longer period than two years, that by implication said section prohibits altogether the holding possession of commercial land acquired under foreclosure. The Alien Land Law eliminated the ownership, leasing or cropping of agricultural lands by ineligible aliens. Such lands were not included in the treaty. But the act did not attempt to prohibit such aliens from leasing, occupying, or using real property in accordance with their rights under the treaty. However, a situation might develop under the Alien Land Law where an ineligible alien might legally obtain a lien or judgment on agricultural land and not be able to foreclose said lien or otherwise compel

payment because of the possibility of having to bid in the property to satisfy the debt, which would be contrary to the treaty unless it was conceded that agricultural property like commercial property might legally be purchased at a foreclosure sale—hence section 7, prohibiting ineligible aliens from holding possession of agricultural property obtained under foreclosure for a period of more than two years. But it cannot be reasonably contended that such provision contains an implied prohibition against holding possession of commercial property, when under the express terms of the treaty commercial lands may be leased and occupied by such aliens. Especially is this apparent when it is recalled that such right "shall receive in the territories of the other the most constant protection and security."

The purchase by Ito under foreclosure was not void ab initio, but valid. It follows also from what we have said that there was no conspiracy to defeat the terms of the Alien Land Law.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, Justice pro tem.



12 Cal.App.2d 226

RESH v. PILLSBURY et al.

Civ. 1609.

District Court of Appeal, Fourth District,
California.

Feb. 29, 1936.

1. Evidence ⇨441(8)

Under deed including clause giving grantee all rents, issues, and profits from property granted, oral agreement that during her lifetime grantor should retain rents and profits from property *held* merged in, and nullified by, deed (Civ.Code, § 1625; Code Civ.Proc. § 1856).

2. Evidence ⇨441(8)

Evidence of oral agreement that during her lifetime grantor should retain rents and profits from property conveyed *held* inadmissible to change effect of deed containing clauses giving grantee all rents, issues, and profits from property granted (Civ.Code, § 1625; Code Civ.Proc. § 1856).

3. Appeal and error Ⓒ909(5)

Court of Appeal could not assume existence of agreement that deed containing clauses giving grantee right to rents, issues, and profits from property conveyed should not be recorded so as to entitle grantor to retain life estate in rents and profits as against wife of grantee.

4. Deeds Ⓒ60

Agreement that deed should not be recorded would be void.

5. Deeds Ⓒ181

Destruction of deeds subsequent to their execution and delivery could not operate as reconveyance to grantor named therein (Code Civ.Proc. § 1971).

6. Trusts Ⓒ25(3)

Title to property conveyed by deeds containing clauses giving grantee all rents, issues, and profits from property granted *held* not impressed with equitable life estate in favor of grantor pursuant to oral agreement reserving life estate in rents and profits from property on ground of confidential relationship existing between grantor and grantee, in absence of showing of lack of consideration or abuse of confidence by grantee.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Action by Laura Belle Resh against Louise Pillsbury and another. From an adverse judgment, the named defendant appeals.

Reversed and remanded, with directions.

E. C. Bowen and Albert E. Coger, both of Los Angeles, for appellant.

McFadden & Holden, of Anaheim, for respondent Resh.

BARNARD, Presiding Justice.

The plaintiff conveyed three pieces of property by grant deed to the defendant William H. Pillsbury. His wife, the defendant Louise Pillsbury, claimed a community interest in these properties while the plaintiff claimed a life estate therein with the right to all income therefrom.

In this action which followed, the court found that, during the existence of this marriage, the defendant William H. Pillsbury had been for a number of years associated with and in the employ of the plaintiff; that she transferred these properties to him in consideration of services so rendered to her by him; that on August 3, 1933, the plaintiff employed a lawyer to act

for her in making a settlement with William H. Pillsbury; that she employed this lawyer to prepare deeds to the properties in question together with an agreement of mutual release; that it was there orally agreed between the plaintiff and William H. Pillsbury that the deeds should be immediately delivered by plaintiff to Pillsbury; that it was the intention of both parties that title should immediately pass and vest in Pillsbury; that it was orally agreed by both parties that during her lifetime the plaintiff should have the rents and profits from the three properties; that the three deeds were then executed and delivered to Pillsbury with the intention that they should be immediately effective; and that they were accepted by him with like intention. The findings then set forth the three deeds, all of which included a clause giving to the grantee all of the rents, issues, and profits from the property granted. The court then found that as a part of the same transaction the attorney drew and the parties executed an agreement, which is set forth in the findings, providing that in consideration of these three deeds Pillsbury released the plaintiff from any and all claims of any description arising out of any prior transaction between them and the plaintiff released Pillsbury from any and all claims of whatsoever description arising out of any transaction theretofore had between them, and that this agreement was to constitute a full and complete settlement of all matters between the parties thereto.

The court then found that the plaintiff had for many years been a real estate broker with a large experience; that on October 12, 1933, Pillsbury agreed with the plaintiff that he would surrender to her the three deeds and the settlement agreement, and that they should be mutilated by another attorney; that at the same time these instruments were mutilated by drawing lines through the signatures thereto; that at the same time and place the plaintiff made a will in favor of the said Pillsbury; that these transactions of October 12, 1933, were had without the knowledge or consent of the defendant Louise Pillsbury; that the plaintiff has, since August 3, 1933, received all income from the three properties in question; that it is not true that the plaintiff was to retain said deeds or said agreement or any of them until her death; that she was not to retain the right of disposition of the properties described in the deeds; that it is not true that the plain-

tiff did not know what was contained in the agreement of August 3, 1933, but that she was fully competent to execute said deeds and agreement; and that she executed and delivered the same with full knowledge, comprehension, and understanding of each and all of said instruments.

From the facts so found the court drew the conclusions of law that title to the three parcels of realty passed to and vested on August 3, 1933, in the marriage community of William H. Pillsbury and Louise Pillsbury, subject to a life estate in the plaintiff; that the attempted cancellation of the deeds and agreement by mutilation on October 12, 1933, was void and did not affect the title to the real property; and that the plaintiff is entitled to the income from said real estate since August 3, 1933. Judgment was entered decreeing that the title to the property is vested in William H. Pillsbury and Louise Pillsbury as their community property, subject to a life estate in the plaintiff, and that neither of the defendants have any interest in the rents and profits accruing from said real estate since August 3, 1933.

The appellant Louise Pillsbury has appealed from those portions of the judgment which award a life estate in the property to the plaintiff and which have the effect of depriving the defendants of the rents and profits accruing from said real estate from and after August 3, 1933.

The appellant contends that certain conclusions of law, to the effect that the respondent Resh has a life interest in these properties and that the appellant and the other respondent are not entitled to the income therefrom, are based entirely upon the finding that it was orally agreed between the grantor and grantee named in these deeds that the grantor should have the rents and profits from the properties during her lifetime, and that it follows that the findings of fact do not support these conclusions or that part of the judgment which is appealed from.

We see no escape from the conclusion that the entire title to these properties passed upon the execution and delivery of these deeds. In *Winchester v. Winchester*, 175 Cal. 391, 165 P. 965, 966, the court said: "The conveyance from Elliot Winchester to L. E. Winchester, being in form a grant, bargain, and sale deed, its legal effect, according to its terms, was to immediately pass from Elliot Winchester to L. E. Winchester the entire title in fee simple to the

land described, the present absolute ownership thereof. Civ.Code, §§ 679, 762, 1105. The fee-simple estate thus passed included the present absolute right to all the rents and profits, free from any and every claim of the grantor thereto. The effect of the evidence introduced, if it could have the effect intended by the respondent, would be that instead of the deed being a conveyance of the entire fee, it would be a conveyance with a reservation to the grantor, during his lifetime, of the rents and profits of the land conveyed, to the amount of \$300 a year. To the extent of the reservation of the rents during the life of the grantor, which constituted a substantial part of the fee-simple estate which the deed by its terms purported to convey, the agreement shown by parol evidence would have defeated the conveyance. Under the rule above stated it was incompetent and inadmissible for that purpose. The court below erred in so far as its decision was based on this parol evidence."

[1-5] The oral agreement that during her lifetime the grantor should retain the rents and profits from the properties was merged in the written instruments and was nullified thereby. Civ.Code, § 1625; Code Civ.Proc. § 1856. Evidence of the oral agreement was not admissible under these circumstances for the purpose of changing the effect of the deeds. *Lewis v. Brown*, 22 Cal.App. 38, 133 P. 331. We cannot assume that there was any agreement that the deed should not be recorded, and, in any event, such an agreement would have been void. *Lewis v. Brown*, supra. The destruction of the deeds some months after their execution and delivery could not operate as a reconveyance to the grantor named therein. Code Civ.Proc. § 1971. "A destruction of the deed by the grantee after delivery would not affect its validity, nor operate as a reconveyance to the grantor." *Hall v. Ferguson* (Cal.App.) 47 P.(2d) 1073, 1074.

[6] The respondent Resh seeks to void the effect of the rules of law above referred to by contending that a confidential relationship existed between William H. Pillsbury and herself; that under the authority of such cases as *Knudson v. Adams*, 137 Cal.App. 261, 30 P.(2d) 608, a constructive trust appears; and that, under the facts found, the title to these properties was impressed with an equitable life estate in her favor. In answer to a similar contention the court, in *Dalbkermeier v.*

Rader, 96 Cal.App. 23, 273 P. 600, 603, said: "It may be conceded, as plaintiff contends, that, where confidential relations exist between two parties, and one of them accepts a conveyance of real estate upon a parol promise that he will hold it for the benefit of the grantor, or for the benefit of some third person in whom the grantor is interested, *and there is no other consideration for the conveyance*, a trust arises by operation of law in favor of the grantor, or in favor of the third person for whom the property is to be held. * * * But the mere statement of the rule is sufficient to show its inapplicability to the facts of the present case, because, as indicated by the above italics, the application of the rule depends upon the proposition that there is no consideration for the conveyance other than the mere promise of the grantor to hold the title for the benefit of the grantor or some third person; and here defendant's joint tenancy estates were not conveyed to her for the benefit of someone else, but, as pointed out, were conveyed to her absolutely in consideration of future personal services, which were performed for a period of 5 years, and also as a reward for faithful services rendered plaintiff without wages during the preceding 5 years. And, although no finding was made as to whether defendant was justified in discontinuing her services in 1924, the evidence, in our opinion, is amply sufficient to support the conclusion that, as she claims, she was warranted in so doing. But whether or not such justification existed would seem to be of little importance in this suit to declare a constructive trust, because, even assuming that such legal grounds did not exist, the termination of her services amounted to no more than a breach of contract, involving no fraud, either actual or constructive, and, there being a consideration for the conveyance, a constructive trust did not arise."

The trial court found that the deeds here in question were given in consideration of past services and as a part of a full and complete settlement of all matters between the parties. The evidence is not before us, and nothing is brought to our attention which could throw any doubt upon the fact that an ample consideration for these deeds existed. Assuming that there was a confidential relationship between the parties, there is no showing of any kind that any such confidence was abused. In fact, it

was found that the respondent Resh was represented by her own attorney, who drew the deeds and the settlement agreement, and that both parties executed the instruments with a full knowledge and understanding of their contents. The essential elements necessary to constitute a constructive trust are lacking, and the only question is whether deeds so executed and delivered can be partially set aside upon evidence of a contemporaneous oral agreement which conflicts with the terms of the written instruments. In our opinion, there can be but one answer to that question.

The portions of the judgment appealed from are reversed and the cause remanded for further proceedings not inconsistent with the views herein expressed.

We concur: MARKS, J.; JENNINGS, J.



12 Cal.App.2d 162

**TEED v STATE BOARD OF EQUAL-
IZATION et al.**
Civ. 10708.

District Court of Appeal, Second District,
Division 2, California.

Feb. 27, 1936.

1. Certiorari ☞24
Prohibition ☞6(2)

Letter from state board of equalization, informing ice distributors of continuance of practice of classification of distributors for retail sales tax purposes and containing no threats, *held* not an order or decision of the board justifying interposition of writ of prohibition or alternative remedy of writ of review to prevent action by the board thereunder (Stats.1933, p. 2599, as amended; Stats. 1935, p. 1256, § 2 (e)).

2. Prohibition ☞6(1)

Prohibition lies only to prevent official action of judicial nature.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Petition by Minnie Teed, doing business under the fictitious firm name and style of the Diamond Ice Company, for a writ of prohibition against the State Board of

Equalization, etc., and others. From an adverse judgment, petitioner appeals.

Affirmed.

Mac A. Propp and C. E. Williams, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Walter L. Bowers, Deputy Atty. Gen., for respondents.

CRAIL, Presiding Justice.

[1,2] This is an appeal from a judgment against petitioner, in a proceeding for a writ of prohibition, entered after sustaining a demurrer to her petition without leave to amend. The petition alleged: That on the 16th day of August, 1935, the petitioner received from the state board of equalization the following letter dated July 1, 1935: "This office is in receipt of instructions from Sacramento that pursuant to Section 2, Subdivision (e) of the Retail Sales Tax Act as amended in 1935 [St.1935, p. 1256] the Board will consider ice companies and ice plants retailers and the independent distributors, individual ice delivery-men operating therefrom, as their agents, and will not hereafter issue individual retailers permits under the provisions of the Retail Sales Tax Act to the individual ice delivery-men and independent distributors who are so operating, but will issue a single permit to the ice companies or ice plants as the case may be, under which the ice companies and plants will report and pay the tax on all the business done by the independent distributors and independent ice delivery-men, as has been the practice which was inaugurated on October 1, 1934." That petitioner is engaged in the sole business of manufacturing ice, and makes no resales in the course of business to purchasers for consumption of ice, but only for the purpose of resale. "That, if the contemplated ruling or the enforcement of said ruling is attempted," any sale of ice to an independent distributor would lay the petitioner liable for the payment of taxes. That the failure to issue permits to the driver under the circumstances would in its effect force the petitioner as a manufacturer to pay a retail tax or go out of business. That the board has exceeded its jurisdiction and acted without its jurisdiction and in violation of the provisions of the California Retail Sales Tax Act of 1933 (chapter 1020, Stats.1933, p. 2599, as amended). That, unless restrained,

said board will require that petitioner take out a permit as a retailer and that he report and pay the tax on all business done by independent distributors purchasing ice from petitioner; and the petition prays that the board be restrained from requiring from petitioner any permit as a retailer.

The petition for prohibition rests solely upon the said letter dated July 1st, but not received until August 16th. It will be observed that the letter does not purport to be an order either directing action or restraining action on appellant's part, but contains information regarding the continuance of a policy which had been in practice for nearly a year according to the letter. The letter does not constitute an order or decision of the board or any other official act of the respondent board, and it makes no direct application to the petitioner. It contains no threat of any kind. A writ of prohibition is exercised only to prevent official action of a judicial nature. See cases collected in 21 Cal.Jur. 599 et seq. There is nothing in the letter which would call for the interposition of a writ of prohibition nor, as suggested by the petitioner, the alternative remedy of a writ of review.

Judgment affirmed.

We concur: WOOD, J.; GOULD, Justice pro tem.



URICK et al. v. GUITRON et al. *
Civ. 1592.

District Court of Appeal, Fourth District,
California.
March 4, 1936.

Rehearing Granted March 30, 1936.

1. Fraudulent conveyances ☞137(4)

Transfer of growing crops is not void as to creditors even though transfer was not accompanied by immediate actual and continuous change of possession (Civ.Code § 3440).

2. Fraudulent conveyances ☞137(4)

Matured but unharvested crop of onions held not in possession and control of seller within statute voiding transfers thereof unless accompanied by an immediate change of possession, and hence sale thereof was not fraudulent as to seller's creditor, notwithstanding there was no immediate transfer of

possession of crop at time of sale (Civ.Code § 3440).

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Action by W. E. Urick and C. H. Hollis, a copartnership doing business under the name of Urick & Hollis, against Felix Guitron and another, wherein the Valley Fruit & Produce Company, intervened as third party claimant, after issuance of attachment. From a judgment for plaintiffs, the third party claimant appeals.

Reversed.

Wilbert C. Hamilton and John F. Hoor-naert, both of Los Angeles, for appellant.

Best & Best, of Riverside, for respondents.

SCOVEL, Justice pro tem.

On the 11th day of May, 1935, in the city of Los Angeles, at the approximate hour of 10 o'clock a. m., the appellant herein, Valley Fruit & Produce Company, a corporation, third party claimant, purchased from the defendants, Felix Guitron and Benjamin Guitron, Jr., a certain quantity of Bermuda onions which they had grown upon land in Riverside county; the onions being then matured but not harvested. On the same day plaintiffs herein commenced an action in Riverside county against the defendants, in which action an attachment was issued, and by authority thereof the sheriff attached the crop of onions theretofore sold by defendants to appellant. Appellant, on May 13, 1935, duly filed its third party claim, and, on the hearing to determine the title of said attached property, the lower court found in favor of plaintiffs, holding that the sale was fraudulent as against the creditor of defendants; there having been no immediate transfer of possession of such property at the time of the sale.

The question is therefore presented as to whether or not the transfer of a crop after maturity, but while yet unharvested, is within the provision of Civil Code, § 3440, voiding transfers of personal property in so far as creditors are concerned where made by one having at the time of such transfer the possession or control thereof and not accompanied by an immediate, actual, and continued change of possession of the thing transferred.

[1] It has long been settled that the transfer of a "growing" crop is not void

even though not accompanied by an immediate, actual, and continued change of possession. See *Bours v. Webster*, 6 Cal. 660; *Davis v. McFarlane*, 37 Cal. 634, 99 Am. Dec. 340; *Globe Grain & Milling Co. v. Drenth*, 36 Cal.App. 156, 171 P. 821, 822.

Respondent vigorously contends that, since the crop of onions involved herein had matured prior to the transfer, and was therefore no longer "growing," the foregoing decisions are not applicable, and that, after a crop has matured, any transfer thereof must be accompanied by an immediate, actual, and continued change of possession. While it is true that the crops involved in the cited cases were still growing when the transfers thereof were made, and therefore were properly referred to as "growing crops," the holdings therein were not based upon a determination as to whether such crops were or were not "growing," but upon the question as to whether or not they were capable of manual delivery; the holding being that, since such crops had not been removed from the land, they were not capable of manual delivery, and therefore not "made by a person having at the time the possession or control of the property" within the meaning of Civil Code, § 3440.

In *Bours v. Webster*, supra, it is stated that: "Crops, growing upon land, are not goods and chattels, within the meaning of the Statute of Frauds, and will pass by deed or conveyance, from the very necessity of the case, as they are not susceptible of manual delivery until harvested and reduced to actual possession."

Again in *Davis v. McFarlane*, supra, 37 Cal. 634, on page 638 of the opinion, the court states that: "Although growing crops are chattels, and, as we have seen, will pass by verbal sale, yet they are not susceptible of manual delivery until harvested, and therefore, until harvested they are not 'in the possession or under the control of the vendor,' within the meaning of the statute."

To the same effect is *Globe Grain & Milling Co. v. Drenth*, supra, wherein it is held that: "Growing crops are chattels not susceptible of manual delivery until harvested, and are not 'in the possession or under the control of the vendor' within the meaning of the statute requiring an immediate delivery and continued change of possession. *O'Brien v. Ballou*, 116 Cal. 318, 48 P. 130. To so construe the statute would make it an imperative duty on

the part of the grower to abandon the possession of his farm to the vendee at the time of the sale, a proceeding the statute certainly does not contemplate."

[2] We are therefore of the opinion that no distinction can be made between a "growing crop" and a "matured crop" prior to harvest; the crop not being capable of manual delivery in either instance and therefore not in the possession or control of the grower within the meaning of the statute.

The judgment of the lower court is reversed.

We concur: BARNARD, P. J.; MARKS, J.



12 Cal.App.2d 249

PAPINI et al. v. ALEXANDER SANITARIUM, Inc., et al.

Civ. 9942.

District Court of Appeal, First District, Division 2, California.

March 8, 1936.

Hearing Denied by Supreme Court
April 30, 1936.

1. Hospitals ☞8

Evidence held insufficient to support judgment for death of inmate of private sanitarium on ground that death resulted from negligence of operators of sanitarium in not properly restraining another patient alleged to have caused such death by attack with razor blade and table fork.

2. Death ☞99(5)

\$3,500 to parents for death of their 35 year old son, who was suffering from incurable disease, who was unable to do any hard work, and who was under constant care of physician, held excessive in absence of evidence tending to show his earning capacity.

3. Death ☞58(2)

Substantial damages are recoverable by parent for death of adult son only by showing that deceased had been of actual pecuniary benefit to parent, or that such benefit might be reasonably expected by continuance of his life.

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Suit by Joseph Papini and another against the Alexander Sanitarium, Incorporated, and another. Judgment for plaintiffs, and defendants appeal.

Reversed.

Ross & Ross, of Redwood City, for appellants.

Francis N. Foley, of San Mateo, for respondents.

NOURSE, Presiding Justice.

The plaintiffs sued for damages resulting from the death of their son, Joseph Papini, and had a verdict for \$3,500. The defendants appeal from the judgment on the verdict raising two points—that the evidence is insufficient to show negligence on their part, and that the verdict is excessive.

[1] The record discloses a complete failure of proof in both instances. The action was founded on the theory that the defendants, who conduct a private sanitarium for nervous diseases at Belmont, were negligent in their supervision of a patient named Boliva, and that because of such negligence, Boliva attacked Joseph Papini with a razor blade and a table fork inflicting upon him wounds from which he died. The charges of negligence are found in the fifth and sixth paragraphs of the complaint. They allege that Boliva was by the superior court in San Francisco "duly adjudged dangerously insane," and was "committed" to the defendants' sanitarium, and that the defendants knew that he was suffering from a "form of insanity known as homicidal mania" and that unless restrained might at any time violently attack other patients, and that he had "on previous occasions attacked other persons and was a dangerous person to be at large or unrestrained." In paragraph 6 it was alleged that by reason of the carelessness and negligence of the defendants in failing to protect Joseph Papini from "the homicidal tendencies and mania and attack" of Boliva, the latter on the 24th day of December "procured a razor blade and a table fork and then and there attacked said Joseph Henry Papini" inflicting upon him wounds from which death proximately resulted on the 3d day of January, 1934. The undisputed evidence not only fails to prove these material allegations of the complaint, but in almost every instance it completely disproves them.

The facts disclosed by the evidence are that Boliva had been injured in the course of his employment and was seeking compensation before the State Industrial Accident Commission. While these proceedings were pending, physicians in charge of the case recommended that he be placed in the defendants' sanitarium, and be permitted to freely mingle with the other patients. This was done with full knowledge and sanction of his guardian and the physicians in charge. In the month of November, 1933, he was called before the Industrial Accident Commission for further hearing, and at that time assaulted the attorney for the insurance carrier. Testimony was offered that this assault was deliberately provoked by the attorney for the purpose of instituting insanity proceedings against Boliva, but this was denied by the attorney when called as a witness in this case. The undisputed evidence is that Boliva became angered at the conduct of the attorney and that immediately after the assault the latter filed a charge in the superior court of San Francisco and endeavored to have Boliva adjudged insane. The only portion of those proceedings which appears in the record is the judgment ordering that Boliva be "discharged from custody." Evidence was offered that his guardian thereafter returned him to the sanitarium with instructions that the judge in the insanity proceedings had ordered that he be paroled in the custody of his guardian and that the sanitarium was directed to place him under constant guard. The bailiff of the court in the insanity proceedings testified to conversations which he had had with the judge in the insanity proceedings relative to what should be done in regard to his care and custody after he had been discharged. The incompetency of all this testimony is so apparent that no further comment is required, but the only testimony offered, both competent and incompetent, completely disproves plaintiffs' allegation that Boliva had been "duly adjudged dangerously insane." There is no evidence that he was "committed" to the sanitarium. The only evidence is that he was taken there by his guardian and that the cost of his maintenance was paid by his insurance carrier. There is no evidence of any character that any of the defendants knew that he was suffering from any form of insanity known as "homicidal mania" and no evidence that the patient had that disease or that he was suffering from any disease other than am-

nesia, which is a loss of memory. There is no evidence that the defendants knew that unless restrained he might violently attack other patients, or that they knew that he had attacked other persons on previous occasions, or that he was a dangerous person to be at large or unrestrained. The only evidence as to the knowledge of the defendants of a previous attack is that they had information from his guardian and from Boliva himself that the assault committed at the hearing before the Industrial Accident Commission was provoked by the party assaulted. There is no evidence that they knew or had any reason to believe that this claim of justification was disputed until the witness testified in this case. There is no evidence that the defendants carelessly or negligently allowed Boliva to wander through the sanitarium unrestrained or that they did anything other than a reasonable person would have done under similar circumstances with the information which they had of the mental condition of the particular patient. The undisputed evidence is that he came to the sanitarium as an "amnesia" patient only. If he was "dangerously insane" the lunacy commission and the insanity court found to the contrary, and the defendants could not be charged with knowledge of what did not exist.

Coming to the allegations of paragraph 6, there is no evidence that Boliva procured a razor blade or that he used a razor blade in an attack upon Papini, and there is not a particle of evidence to prove that Boliva attacked Papini with a razor blade, a table fork, or in any manner whatsoever. The only facts proved are that Boliva, Papini, and another patient were eating their lunch in the men's sitting room, that some of the attendants heard a scream, and Papini was seen coming out of the room with a cut on his neck. Attendants entered the room where the three patients had been eating, and found Boliva with a table fork in his hand. From this the plaintiffs assume that Boliva attacked Papini and caused the injuries complained of. The only possible theory upon which this assumption could be based is that an inference might be drawn from the fact that Boliva had a table fork in his hand immediately after the injuries were inflicted, but this inference would be immediately dispelled by the presumption that a criminal attack was not committed. If inferences are to be indulged in, it is just

as reasonable to infer from the evidence that Papini had often threatened suicide, that these wounds were self-inflicted. Aside from all inferences and presumptions, it was necessary for the plaintiffs to prove that the assault was made as they alleged, and that it was not provoked by the conduct of the patient.

[2, 3] The award of damages is without any evidentiary support. Papini was 35 years of age, his father 75, and his mother 56. He had suffered with hemophilia since he was four years old. The plaintiffs owned a fruit ranch at Coloma, and their son helped them about the ranch until September 3, 1931, when he was taken to defendants' sanitarium for treatment for his mental condition. Because of his physical ailment he was unable to do any hard work, and had already passed the period of life expectancy of patients of that type. His left leg was stiff and could not be bent at the knee; his left hip and elbow were stiff and could be used only with great difficulty. These conditions arose from internal bleeding and were pronounced incurable. He was constantly under the care of the physician at the sanitarium because of bleeding from superficial wounds caused by a scratch or the use of a razor. The physician in charge endeavored to get him interested in light work in the garden, but the patient after working two hours suffered an internal hemorrhage in his knee joints, and was unable to do any work of any character during his long stay at the institution. Physicians in active charge and observation of the patient testified that his physical condition was incurable, and that his mental condition had not improved during the period from September 3, 1931, to January 1, 1934. Lay witnesses testified that they had seen him on Thanksgiving and Christmas Days during his confinement when was taken to their homes by an attendant at the hospital. Their evidence seems to be that he was normal mentally, and the sister of the deceased consulted the physician in charge some time during the spring of 1932 and obtained permission to put her brother in a private home. From this it is argued that the physician at that time held the opinion that the patient was cured mentally, but the facts are that

she did not remove him from the sanitarium, and that all those who were competent to express an opinion as to his mental condition testified that it had not improved during his stay in the institution, but that he did have lucid intervals which indicated a slight improvement for short periods during their observation. The medical testimony discloses that few victims of hemophilia live beyond their twenty-second year. All the expert witnesses agreed that this patient had lived beyond the period of expectancy, and that he might die because of his ailment at any time. All witnesses agreed that he was unable to do any manual labor of any consequence, and that an internal hemorrhage might be expected from a slight jar or overexertion. The plaintiffs did not take the stand as witnesses, and offered no evidence of any character tending to show the earning capacity of the deceased—what he contributed to them in the past or what he might be expected to contribute in the future. For the two years that he had remained in the sanitarium, the entire expense for care and maintenance had been paid by his sister, and all the evidence unmistakably shows that if he had returned to his parents, he would have been a financial burden to them. There is, however, no evidence of any character tending to show what, if any, damage the plaintiffs have suffered. In this respect the case is controlled by *Parsons v. Easton*, 184 Cal. 764, 770, 195 P. 419, 421, where the court approved the rule stated in 17 Corpus Juris, 1331, reading: "When the action is by a parent for the death of an adult son, substantial damages are recoverable only by showing that the deceased had been of actual pecuniary benefit to his parent, or that such benefit might be reasonably expected by the continuance of his life, the reasonable character of such expectation to appear from the facts in evidence, such as for instance the age of deceased, his wages, habits as to economy, and amount of help given by deceased to his parent."

The judgment is reversed.

We concur: STURTEVANT, J.;
SPENCE, J.

12 Cal.App.2d 306

IVES v. PRUDENTIAL INS. CO. OF AMERICA.
Civ. 10748.

District Court of Appeal, Second District,
Division 2, California.
March 9, 1936.

1. Appeal and error ☞1008(1)

Question held to insure has become permanently disabled within disability provision of life policy is for determination of trial court.

2. Insurance ☞665(5)

Court was not bound to accept positive statement of insured, seeking disability benefits under life policy, that he became permanently disabled on given day.

3. Insurance ☞665(5)

Evidence held to justify judgment denying recovery of disability benefits on ground that insured was not totally and permanently disabled before life policies lapsed.

Appeal from Superior Court, Los Angeles County; Wilber F. Downs, Judge.

Action by John H. Ives against the Prudential Insurance Company of America. Judgment for defendant, and plaintiff appeals.

Affirmed.

Joseph A. Ball, of Long Beach, for appellant.

Loeb, Walker & Loeb, of Los Angeles (Henry Duque, Harry Friedman, and Herman F. Selvin, all of Los Angeles, of counsel), for respondent.

WOOD, Justice.

Plaintiff seeks to recover disability benefits under two policies of life insurance which he claims are due him for total and permanent disability dating from September 10, 1926. He appeals from a judgment in favor of defendant insurance company.

For failure to pay premiums, the two policies lapsed on February 18, 1928, and January 17, 1929. One of the policies provided that defendant would make payment "if the Insured shall become totally and permanently disabled, either physically or mentally, from any cause whatsoever, to such an extent that he (or she) is rendered wholly, continuously and permanently unable to engage in any occupation or perform any work for any kind of com-

pensation or financial value during the remainder of his (or her) lifetime, and if such disability shall occur at any time after the payment of the first premium on this Policy, while this Policy is in full force and effect." A provision quite similar was contained in the other policy. The trial court found that "plaintiff's disability if any, did not become total and permanent until some time subsequent to the date of the lapsing and forfeiture of each of said policies of insurance as hereinafter found." This finding is attacked by plaintiff, who contends that it is not supported by the evidence.

At the time plaintiff asserts he became totally disabled he was an agent of defendant company and was familiar with the provisions of the company's policies. Nevertheless, he did not file with the company his claim for total disability until April 27, 1929, more than a year after the lapse of one policy and more than two months after the lapse of the other. In answer to a letter in which defendant asked why a claim was not filed while the policies were in force, plaintiff wrote: "My reason for not pressing the claim while the policies were in force is because as I have stated before, that it was being done through the Veterans Bureau, as I had first had sinus in the service and wanted to service connect it but failed as I could not locate the doctor who had lost or failed to make a record of my illness when I had the flu and sinus in Breast 1919. There was not much use for me to apply to you until I was considered wholly and permanently disabled as you know what the policy says about that. However, your records show that I did all possible before that even."

Plaintiff's medical testimony is of no substantial aid to his case and he must depend almost entirely on his own testimony. He made the general statement that he had become totally disabled in 1926. In detailing the circumstances of his illness and his physical condition, he testified that in the early part of September, 1926, he "became ill suffering from a severe influenzal cold, headaches and a pain over the eyes. The headaches would remain for a period of three to four days and would then subside. The headaches were so severe that I was confined to my bed. I had a pain in the sinuses and over my eyes and I was very dizzy. * * * After this illness my headaches were continuous for

about two years and my eyesight began to fail, particularly in the left eye. I became so nervous and irritable that I could not bear to see or talk to anyone. * * * My speech began to be affected around November, 1927, and became steadily worse. I did not work in Minnesota after September, 1926, except that an old friend of mine requested me to call and gave me an application for a policy of life insurance with The Prudential Insurance Company of America. I did no actual work in selling this policy. I left Minneapolis on September 15th, 1928, for California. Since coming to California I have been able to do no work. My headaches have continued. I tried to sell insurance policies two or three times in the last several years but had to give up because of my speech and my general condition. I stay in bed most of the morning. I spend some time on the beach. I have a headache every day in my forehead. My speech has become no worse since 1927 but it has not improved. * * * I am able to and do play poker for money two or three times a week. I spend some of my time at the Club playing poker and other card games. Except for my attempts to sell a policy of insurance since my arrival in Long Beach, I have never at any time attempted to do any work or obtain any employment."

[1-3] The question whether a policyholder has become permanently disabled is for the determination of the trial court. *Sherman v. Continental Casualty Co.*, 103 Cal.App. 518, 284 P. 946. The court was not bound to accept the positive statement of the insured that he became permanently disabled on a given date. *Davis v. Judson*, 159 Cal. 121, 113 P. 147. The court had an opportunity to observe the apparent physical condition of the insured at the time of trial, to note the degree of his mentality, his asserted nervousness and the extent of the impairment of his speech. As said in *Dietlin v. General American Life Insurance Co.* (Cal.Sup.) 49 P.(2d) 590, 594: "The trial court here was vested with the power of judging of the credibility of the witnesses, and in the exercise of that function may have had in mind the temptation on the part of plaintiff to magnify the seriousness of his condition." The court doubtless considered such a temptation as well as the fact that plaintiff did not file his claim until long after the time asserted as the date of the commencement of his permanent disability and after

both policies had lapsed; and the further fact that the plaintiff wrote to the company on April 29, 1932, "There was not much use for me to apply to you until I was considered wholly and permanently disabled as you know what the policy says about that." Plaintiff's detailed statement as a witness concerning his physical ailments does not necessarily lead to the conclusion that he was permanently ill or totally incapacitated from working during September of 1926 or at any time thereafter while the policies were in force. The finding under attack is not without support in the evidence.

The judgment is affirmed.

We concur: CRAIN, P. J.; GOULD, Justice pro tem.



12 Cal.App.2d 188

GOULD et al. v. WESTERN DAIRY PRODUCTS, Inc., et al.
Civ. 10714.

District Court of Appeal, Second District,
Division 2, California.
Feb. 28, 1936.

1. Constitutional law ☞62

Legislative bodies have right to delegate power to administrative officials to determine facts in carrying out provisions of legislative enactments.

2. Automobiles ☞8, 208

Legislative body of city of Burbank held authorized to delegate to board of police commissioners power to determine which intersections should be designated as boulevard stop intersections, so that instruction in action for death of motorist that, if deceased motorist did not stop at intersection, which was designated a stop intersection, at which collision occurred, he was contributorily negligent, was proper (St.1931, p. 2131, § 145).

Appeal from Superior Court, Los Angeles County; Wm. S. Baird and Emmet H. Wilson, Judges.

Action by Minnie Gould and another against the Western Dairy Products, Incorporated, and another. Verdict for defendants, and, from an order granting mo-

tion for a new trial, the defendants appeal.

Reversed.

Jennings & Belcher and Louis E. Kearney, all of Los Angeles, for appellants.

Claud B. Andrews and Rodney F. Williams, both of Los Angeles, for respondents.

WOOD, Justice.

This action was commenced by the heirs of Albert T. Gould, who was killed May 14, 1934, in an automobile accident at the intersection of Lake and Alameda streets in the city of Burbank, to recover damages resulting from his death. A jury trial was conducted before Judge William S. Baird and a verdict was returned in favor of defendants. A motion for a new trial was heard by Judge Emmet H. Wilson during the absence from the state of Judge Baird. Judge Wilson granted the motion "on the ground of errors in law occurring at the trial and excepted to by the plaintiffs." Defendants have appealed from the order granting a new trial.

Boulevard stop signs of the type referred to in the California Vehicle Act (St. 1923, p. 517, as amended) had been erected at the intersection in question in 1927 under the direction of the board of police commissioners of Burbank and were in place at the time of the accident. The only eyewitness, defendant Borgquist, driver of the other car involved, testified that decedent did not stop his car at the intersection. An ordinance of the city of Burbank was introduced in evidence providing in part as follows: "The Board of Police Commissioners is hereby authorized and required to place and maintain, or cause to be placed and maintained upon such street or streets as in its opinion shall be deemed advisable at or near the property line of the boulevard, appropriate signs upon such street or streets, or devices or marks in the roadway, such signs, devices or marks to bear the word 'Stop' or the words, 'Boulevard Stop' in such position and with letters of a size to be clearly legible from a distance of fifty feet (50) along the street or streets intersecting such boulevard. Such streets or intersections, when the signal, device or marks are placed and maintained by the Board of Police Commissioners, as in this section above provided, shall be considered as boulevard stop intersections or boulevard stop streets, as the case may be. Every operator of a vehicle or

street car traveling any boulevard stop intersection or boulevard stop street shall bring such vehicle or street car to a full stop at the place where such street meets the prolongation of the near property line of such boulevard."

The trial judge instructed the jury in part as follows: "If you find from the evidence that Albert Gould violated the provisions of this ordinance, as just read to you, then I instruct you that the said Albert Gould was guilty of negligence as a matter of law; and if such negligence, if any, proximately contributed in any degree, however slight, to the happening of the accident and the injuries resulting in his death, then the plaintiffs cannot recover and your verdict must be in favor of the defendant." In upholding the order granting the new trial, plaintiffs contend that the instruction was erroneous for the reason that the legislative body of the city of Burbank did not designate the intersection in question as a place for a boulevard stop but left to the police commissioners the matter of determining which intersections should be so designated.

If it was the legal duty of decedent to make the boulevard stop, the instruction was correct and the order granting the new trial was erroneous. In *Borum v. Graham*, 4 Cal.App.(2d) 331, 40 P.(2d) 866, 868, the defendant's automobile injured plaintiff, a pedestrian, while she was crossing the street in a painted crosswalk. An ordinance of the city of Pasadena was received in evidence, by which it was made unlawful for a vehicle to be driven onto any crosswalk marked as provided in section 5 thereof while a pedestrian was walking on certain parts of the crosswalk. The court upheld the right of the legislative body of Pasadena to delegate to administrative officials the power to determine which intersections should be marked. We quote: "Section 5 provided that the chief of police, subject to the approval of the city manager, was authorized to mark crosswalks equal in width to the adjacent sidewalks, by appropriate devices, marks, or white lines on the surface of the roadway at all intersections where in his opinion there is particular danger to pedestrians crossing the roadway. Pursuant to this section, the chief of police had marked pedestrian crosswalk white lines across Colorado street at its intersection with South Broadway, but greater in width than the adjacent sidewalk, which excess of width we deem immaterial herein. There was

some question raised by appellant as to failure of proof of the securing of approval thereof by the city manager. Such approval must be deemed proven, in the absence of evidence to the contrary, by the presumption of law that official duty has been performed by the officer charged therewith. Section 1963, subd. 15, Code Civ.Proc. Appellant also claims that section 5 of the ordinance contained a delegation of legislative power to the chief of police. The function of the chief of police was administrative, not legislative. For the proper enforcement of its ordinance, the city legislative body may delegate a power to an officer to determine some fact or state of things upon which the ordinance makes or intends to make its own action depend. In *re McLain*, 190 Cal. 376, 212 P. 620. We conclude, therefore, that section 5 of the ordinance was a valid enactment."

[1] The right of legislative bodies to delegate power to administrative officials to determine facts in carrying out provisions of legislative enactments has been upheld in many cases. In *Carter v. Stevens*, 211 Cal. 281, 295 P. 28, 32, a forceful opinion by Mr. Justice Henshaw delivered in *Gaylord v. City of Pasadena*, 175 Cal. 433, 166 P. 348, is quoted with approval. "Even a casual observer of governmental growth and development must have observed the every-increasing multiplicity and complexity of administrative affairs—national, state, and municipal—and even the occasional reader of the law must have perceived that from necessity, if for no better grounded reason, it has become increasingly imperative that many quasi legislative and quasi judicial functions, which in smaller communities and under more primitive conditions were performed by the legislative or judicial branches of the government, are intrusted to departments, boards, commissions, and agents. No sound objection can longer be successfully advanced to this growing method of transacting public business. These things must be done in this way or they cannot be done at all, and their doing, in a very real sense, makes for the safety of the republic and is thus sanctioned by the highest law. For, as the Supreme Court of the United States declares: 'Indeed, it is not too much to say that a denial to Congress of the right, under the Constitution, to delegate the power to determine some fact or the state of things upon which the enforcement of its enactment depends, would be "to stop the

wheels of government" and bring about confusion, if not paralysis, in the conduct of the public business.' *Union Bridge Co. v. United States*, 204 U.S. 364, 27 S.Ct. 367, 51 L.Ed. 523."

[2] Following the ruling of *Borum v. Graham*, *supra*, we must conclude that the city of Burbank had the right to delegate to the board of police commissioners the power to determine which intersections should be designated as boulevard stop intersections. The right to delegate the power to determine which crosswalks should be marked as safety crosswalks is substantially the same as the right to delegate the power to determine the locations of boulevard stop signs. Plaintiffs argue that since the matter of marking crosswalks is not covered by the California Vehicle Act it is a matter upon which the city of Pasadena was free to legislate, whereas the matter of placing boulevard stop signs is covered to some extent by the California Vehicle Act. They also argue that the legislative body of the city has been given the power by the California Vehicle Act to designate which intersections shall be considered as boulevard stop intersections and therefore this delegation of power could not be passed on to administrative officials. This argument is not sound. If the city had the power to delegate in the one case by the same reasoning it had the power to delegate in the other case. Moreover, the power to enact an ordinance on the subject was not received from the California Vehicle Act but rather the power to legislate on the subject was one of the powers of the city of Burbank which it retained unless that power was taken away by the enactment of the California Vehicle Act. Section 145 of the California Vehicle Act as in force at the time of the accident (St. 1923, p. 563, § 145, as amended by St. 1931, p. 2131) is in part as follows: "Nothing in this act contained shall be so construed as to prevent boards of supervisors in their respective counties and the legislative bodies of incorporated cities from providing by ordinance for the regulation of traffic by means of traffic or crossing officers or semaphores or other signalling devices on any portion of the public highways where the traffic is heavy and continuous, nor from designating certain public highways as boulevards nor from designating certain intersections of public highways and requiring that all vehicles shall be stopped before entering or crossing such boulevards or at one or more entrances to

any designated intersection of public highways." It will be noted that the city of Burbank was not given the power in the California Vehicle Act to enact the ordinance in question but rather the power in the city to enact the ordinance was especially recognized and preserved by the California Vehicle Act.

Our disposition of the main contention of defendants makes it unnecessary to pass upon their additional contentions that the intersection in question, having been maintained as a boulevard stop intersection for seven years under the circumstances shown, was a de facto boulevard stop intersection, that regardless of the validity of the ordinance it was the plain duty of decedent to bring his automobile to a stop; and that in any event if decedent did not stop his car he was clearly guilty of negligence, from which it is argued that the plaintiffs suffered no prejudice by the giving of the instruction under discussion.

The jury was given other instructions which are criticized by the plaintiffs. The reasons given above for upholding the quoted instruction are applicable to the other instructions which are claimed to be erroneous.

The order granting a new trial is reversed.

We concur: CRAIL, P. J.; McCOMB, Justice pro tem.



12 Cal.App.2d 146

CITY OF LOS ANGELES v. FORRESTER

et al.

Civ. 9955.

District Court of Appeal, Second District,
Division 2, California.

Feb. 26, 1936.

Hearing Denied by Supreme Court
April 23, 1936.

1. Quieting title ⇨52

Statute did not, as contended, give trial court discretion to deny city's motion for writ of possession, made over five years after entry of judgment quieting city's title to public park lands, though accompanying affidavits did not set forth sufficient reason

for delay (Code Civ.Proc. § 685, as amended by St.1933, p. 2499).

2. Execution ⇨75

Exercise of sound discretion requires trial court, notwithstanding considerable delay in making application therefor, to issue execution pursuant to statute unless it appears inequitable to enforce judgment (Code Civ.Proc. § 685, as amended by St.1933, p. 2499).

3. Quieting title ⇨52

That occupants of public park lands made improvements thereon relying on city's conduct *held* not to preclude city from obtaining writ of possession over 20 years after judgment quieting city's title.

4. Adverse possession ⇨7(2)

Municipality's rights in public land may not be divested by adverse possession or laches.

5. Quieting title ⇨52

That occupants of public park lands acquired title after entry of judgment quieting city's title *held* no defense to city's motion for writ of possession.

6. Motions ⇨42

If motion is denied without prejudice to its renewal, subsequent motion is not objectionable on ground of *res judicata*.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by the City of Los Angeles against Marie Forrester and others. Judgment was entered for plaintiff in 1914 quieting its title to certain lands then occupied by defendants. From an order denying plaintiff's motion for a writ of possession, plaintiff appeals.

Reversed with direction.

Ray L. Chesebro, City Atty., F. Von Schrader, Asst. City Atty., and Randolph Karr, Deputy City Atty., all of Los Angeles, for appellant.

Randall & Bartlett and Kenneth W. Kearney, all of Los Angeles, for respondents.

McCOMB, Justice pro tem.

This is an appeal by plaintiff from an order of the trial court denying a motion after judgment for an order directing issuance of a writ of possession.

March 24, 1914, judgment was entered in favor of plaintiff quieting its title to cer-

tain land located in Elysian Park, Los Angeles, Cal., then occupied by defendants. In 1919, 1920, 1926, and 1927, plaintiff obtained orders directing the issuance of writs of possession. Pursuant to these orders two writs were issued and returned unexecuted and two were never issued.

In 1931 an ex parte application for an order directing the issuance of a writ of possession was granted and a writ of possession was issued. March 24, 1932, on motion of the defendants an order was made vacating the ex parte order for a writ of possession without prejudice to an application for an order for a writ of possession on notice. April 25, 1934, after notice to defendants a motion for a writ of possession was heard and denied.

The single question presented for determination is:

Was it an abuse of discretion for the trial court to deny plaintiff's motion for a writ of possession made after the lapse of more than five years from entry of a judgment quieting its title to public park lands?

Defendants urge that the trial court's order should be sustained for the reason that:

First. The record before this court is insufficient for a review of the questions presented upon this appeal.

Second. Section 685 of the Code of Civil Procedure vests in the trial court the discretion to deny such a motion when sufficient reasons for the delay in applying for a writ of possession are not set forth in affidavits accompanying the motion.

Third. It would be inequitable for plaintiff to enforce a writ of possession because defendants in reliance on plaintiff's conduct have made improvements upon the property which they occupy.

Fourth. Laches have barred plaintiff's right to a writ of possession.

Fifth. The trial court in denying the motion properly considered the fact that subsequent to the entry of judgment defendants had acquired title to the property.

Sixth. The motion before the trial court was res judicata, in view of the order of March 24, 1932, vacating an ex parte order directing the issuance of a writ of possession.

Defendants' first contention is untenable, since their motion to dismiss this appeal predicated on the same ground was denied

by our Supreme Court. *City of Los Angeles v. Forrester* (Cal.Sup.) 48 P.(2d) 27.

[1, 2] The second proposition is answered by the decisions of our Supreme Court in *Doehla v. Phillips*, 151 Cal. 488, 495, 91 P. 330, and *Harlan v. Harlan*, 154 Cal. 341, 343, 98 P. 32; cases holding that, when a judgment has not been enforced, the exercise of sound discretion requires the trial court, notwithstanding a considerable delay on the part of the plaintiff in making application therefor, to issue a writ of execution pursuant to the terms of section 685 of the Code of Civil Procedure, as amended by St.1933, p. 2499, unless it appears inequitable to enforce the judgment. In the instant case, for reasons hereinafter given, the equities urged by defendants are not available against the state or a subdivision thereof.

[3] The third contention is untenable, in light of the decision in *City of Sacramento v. Clunie*, 120 Cal. 29, 30, 52 P. 44, holding that adverse possession for forty years and the expenditure of the sum of \$20,000 for improvements upon the property claimed by the city did not constitute an equitable estoppel. A similar conclusion was reached in the case of *Taylor v. Spear*, 196 Cal. 709, 717, 238 P. 1038.

[4] The fourth claim of defendants is contrary to the rule announced in *People v. Kerber*, 152 Cal. 731, 733, 93 P. 878, 125 Am.St.Rep. 93; *San Leandro v. Le Breton*, 72 Cal. 170, 177, 13 P. 405; and *Martin v. City of Stockton*, 39 Cal.App. 552, 557, 179 P. 894, which uniformly hold that the rights of a municipality in public land may not be divested by adverse possession or laches.

[5] The fifth proposition is contrary to the decision in *Landregan v. Peppin*, 94 Cal. 465, 468, 29 P. 771, in which our Supreme Court stated that it was not a sufficient defense to an application for a writ of possession for defendant to show that subsequent to the date of judgment he had acquired title to the property in question.

[6] As to defendants' final contention, the law is well settled in this state that, if a motion is denied without prejudice to its renewal, an objection to a subsequent motion on the ground of res judicata may not be properly sustained. *Bowers v. Cherokee Bob*, 46 Cal. 279, 286; *Andersen v. Superior Court*, 187 Cal. 95, 102, 200 P. 963; *Tiffany Productions, Inc., v. Superior Court*, 131 Cal.App. 729, 22 P.(2d) 275.

For the foregoing reasons the order appealed from is reversed. The trial court is directed to grant plaintiff's motion made April 25, 1934, and to order the issuance of a writ of possession accordingly.

It is so ordered.

We concur: CRAIL, P. J.; WOOD, J.



12 Cal.App.2d 237

In re WEVER'S ESTATE.

HODGKINS et al. v. AMERICAN TRUST CO.

et al.

Civ. 10086.

District Court of Appeal, First District, Division 2, California.

March 2, 1936.

Hearing Denied by Supreme Court
April 30, 1936.

1. Courts ⇨92

Court's opinion is not to be disregarded wholly because it is obiter dictum.

2. Wills ⇨807

Word "chargeable" within statute providing that, unless different intention is expressed in will, abatement takes place in any class only as between legacies of that class, and legacies to a spouse or kindred are chargeable only after legacies to person not related to testator, *held* to relate to word "payment" in preceding statute covering all provisions relating to resort to property "for the payment of legacies" (Probate Code, §§ 751, 752).

[Ed. Note.—For other definitions of "Chargeable" and "Payment," see Words & Phrases.]

3. Wills ⇨807

Abatement takes place equally between all legatees of certain class, and cannot apply to one only of one class and one of another (Probate Code, § 752).

4. Wills ⇨807

"Class" within statute providing that, unless different intention is expressed in will, abatement takes place in any class only as between legacies of that class, *held* to refer to any one of five kinds of legacies specified in Probate Code (Probate Code, §§ 161, 752).

[Ed. Note.—For other definitions of "Class," see Words & Phrases.]

5. Wills ⇨807

Unless different intention is expressed in will, legacies to spouse and kindred must be preferred over other legacies of same class when property is insufficient to pay such legacies in full, but property of estate is liable for debts, expenses of administration, and family allowance, with exception of specific legacies and devises mentioned in statute (Probate Code, §§ 750-752).

6. Appeal and error ⇨333

Death of an appellant does not in itself justify dismissal of appeal, but, ordinarily, substitution of administrator is required.

7. Appeal and error ⇨334(1)

Appeal *held* not dismissible as to appellant who died after appeal, notwithstanding administrator was not substituted where deceased appellant was merely beneficiary under testamentary trust which never became operative and interest of deceased could be determined in probate court.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

In the matter of the estate of Etta F. Wever, deceased. From an order in favor of the American Trust Company and others, Helen Hodgkins and Gaston W. Fowler appeal, and, after second named appellant's death after appeal was perfected, motion was made to dismiss appeal as to him.

Motion to dismiss appeal denied, and order reversed.

Pierce & Sherwin, of Oakland, for appellant Hodgkins.

Paul F. Fratessa and George C. Hadley, both of San Francisco, for appellant Fowler.

Louis W. Bennett, of Berkeley, for respondents Smith.

Edwin M. Otis, of San Francisco, and Stanley D. Whitney, of Alameda, for respondent American Trust Co.

NOURSE, Presiding Justice.

On the denial of a petition for rateable partial distribution, the probate court determined the persons to whom and the manner in which, distribution should be made. The appellants are the granddaughter and brother, respectively, of the testatrix. They state three questions are involved in the appeal, but concede that, if the question of the abatement of the legacies is determined favorably to them, the other points may be deemed waived. We confine our

examination to this question, as the order must be reversed on that ground.

The question involves an interpretation of sections 750, 751, 752 of the Probate Code. General legacies under the will aggregated \$59,000, of which sum \$25,000 was bequeathed to kindred of the testatrix and the remainder to persons not related. The will was executed in January, 1929, and at that time testatrix had property more than sufficient to meet all bequests. At the time of her death, values had decreased so that little more than \$28,000 was on hand for distribution. The appellants contended on the hearing of the petition for distribution that the general legacies to persons not related to the testatrix should first abate under the provisions of section 752 of the Probate Code. The respondents took the position that this section gives preference to spouse and kindred in the matter of debts alone, and in support of their position cite and rely on Estate of Apple, 66 Cal. 432, 6 P. 7, as the only authority in this state covering the subject.

The Apple Estate involved a case where the testator died a resident of Nevada, leaving several demonstrative legacies covering bonds which were not in this state at the time of his death. Administration was taken on other personal property located here, and the probate court assumed to distribute the bonds as well. Since the bonds were insufficient to meet the legacies in full, distribution was made on the theory that the legacies to the kindred were to be preferred over those to others. The Supreme Court stated that the question involved on the appeal was whether the law of the domicile controlled; it being conceded that the law of Nevada made no distinction between legacies to kindred and legacies to those not related. All the justices agreed that the law of Nevada controlled and that the abatement should be applied rateably to all legacies. A majority of the court then stated that, even if the law of California should govern, the same result would follow. The discussion on this subject is what respondents rely upon as controlling here. The appellants correctly point out that that part of the opinion is obiter dictum, and two of the justices concurring in the first part of the opinion expressed the same view in respect to the portion relating to the law of this state.

[1] But an opinion is not to be disregarded wholly because it is obiter dictum. The real criticism goes to those portions of

an opinion which assume to determine matters outside the issues, and hence not fully discussed and considered. That criticism is not applicable to the portion of the Apple opinion which discusses the California Statutes. But, even so, the opinion is not controlling at this time because of the radical change in the statutes involved. It will be noted that the conclusion was based almost exclusively on the *position* of the Code sections as they stood at that time. Emphasis is laid on the fact that, as originally enacted, section 1359 of the Civil Code related to the order of resort to property of the estate for payment of debts, that section 1360 related to the order of resort to legacies for the payment of debts, and that section 1361, which gave a preference to legacies to spouse or kindred, immediately followed these sections. It was then said that, because of this arrangement of the sections, it appeared to be the intention of the Legislature to prefer such legacies as to payment of *debts* alone, and that the following section 1362, relating to abatement, was complete in itself and had no relation to the preference given in the preceding section. It should be noted here that the entire portion of the opinion relating to this subject is confined to the question of *debts*. Nothing is said as to the liability for family allowance or expenses of administration. Section 1361 was given the subtitle "Legacies, how charged with debts," and the opinion expressly holds and emphasizes that the preference to spouse and kindred related to *debts* only. Yet section 1359, as amended in 1874 (Code Amendments 1873-74, p. 234), provided that the family allowance and expenses of administration must be paid "before any debts are paid." We can see no reason why the preference given by section 1361 should not apply to these matters as well as to the debts of the estate, except that the statute does not say so, and, if we added them to the section, that would be judicial legislation.

As the arrangement of the Code sections was relied on in the interpretation given in the Apple opinion, their rearrangement in the Probate Code has a significant bearing upon the interpretation of the sections as they now stand. The Probate Code is a revision and restatement of the entire subject-matter, and we must look to the provisions of that Code as written. The office of the court "is simply to ascertain and declare what is in terms or in substance contained

[in a statute], not to insert what has been omitted, or to omit what has been inserted." Section 1858, Code Civ.Proc.

Section 750 of the Probate Code relates to the order of resort to estate assets for payment of debts, expenses of administration, and family allowance, all of which items are put on the same basis in so far as liability for payment is concerned. This section embraces provisions formerly found in sections 1560, 1562, and 1563 of the Code of Civil Procedure and in section 1359 of the Civil Code. The final clause of the new section reads: "And thereafter *all other property* devised and bequeathed is liable for the same, in proportion to the value or amount of the several devises and legacies, but specific devises and legacies are exempt from such liability if it appears to the court necessary to carry into effect the intention of the testator, and there is other sufficient estate."

Section 751 of the new Code embraces some of the provisions of section 1360 of the Civil Code with little change in language, but with the omission of the fourth subdivision of the old section. Section 752 is a complete new draft embracing provisions of sections 1361 and 1362 of the Civil Code. Section 751 has been given the subtitle, "Order of resort for payment of legacies"; section 752 carries the subtitle, "Order of abatement of legacies."

A careful reading of these sections discloses a manifest intention of the Legislature to make them all-inclusive of the subjects therein contained. Section 750 makes all property of the estate primarily liable for payment of the debts, expenses of administration, and family allowance, and declares the order in which the property shall be resorted to for those purposes. The only exception is property covered by specific devises and legacies under certain circumstances. Section 1359 of the Civil Code, from which much of the language of the new section was taken, contained the proviso, "except as otherwise specially provided," and this gave rise to the interpretation in the Apple Case that section 1361 "otherwise provided." Section 1563 of the Code of Civil Procedure read: "The estate, real and personal, given by will * * * is liable for the debts." The new section reads: "*All other property* devised and bequeathed is liable for the same." In this section the word "chargeable" is not used, but the words "liable" and "liability" are employed, and, as we have said, there is no

exception made or saved as to the liability imposed on *all* the property of the estate except that of specific devises and legacies.

[2] Coming to section 751 of the Probate Code, we find the notable exception reading, "except as otherwise provided in this code." Here is a section which, with this exception, covers all the provisions relating to the resort to property "for the *payment* of legacies." This is followed immediately by section 752, which reads: "Unless a different intention is expressed in the will, abatement takes place in any class only as between legacies of that class, and legacies to a spouse or to kindred are chargeable only after legacies to persons not related to the testator." Here the word "chargeable" relates directly to the word "payment" found in the preceding section, and no inconsistency arises from reading that clause as an exception to the previous section on order of payment of legacies. On the other hand, there is nothing in section 752 which discloses any intention to skip over section 751 and back to 750 so as to create another exception in that section in addition to the only one which is there written. If it were not the intention of the Legislature to extend this preference in the payment of legacies under section 751, there is no reason why it should have been made to follow that section and no reason why it should have been incorporated in a section relating to abatement and not in the section relating to payment of debts. If this is not the proper construction, it is difficult to say what other construction could be proper—whether the section should be read as a general exception to all liability for debts, expenses of administration, and family allowance, mentioned in section 750, or whether it is an exception applicable to the liability for *debts* alone as held in the Apple Case.

Reading the sections as a whole, the reasonable interpretation is this: Section 750 makes all property of the estate liable for debts, expenses of administration, and family allowance, with the single exception of property covered by specific devises and legacies under certain conditions. The order in which the property is to be resorted to for that purpose is clearly defined, and no devise or legacy is exempt except as noted. Section 751 covers an entirely separate and unrelated matter—the order of resort to property for payment of *legacies*. It includes and relates to all property, except as otherwise provided. Section 161 of the Probate Code contains one of these ex-

ceptions—the case where a specific legacy fails. In such a case, resort cannot be had to other property of the estate. Section 752 contains another provision contrary to the general directions of section 751.

[3-5] The reasonable interpretation of this section is that abatement takes place equally between all legatees of a certain class and cannot apply to one only of one class and one of another. The “class” mentioned in this section is any one of the five kinds of legacies stated and defined “according to their nature” in section 161 of the Probate Code. Thus, if there are three demonstrative legatees and three annuitants, abatement cannot be charged to one or more of those in each class and not to all of that class. But the last clause of this section picks up a group of legacies not theretofore mentioned in the Code; it does not refer to the “class” or nature of legacies defined in section 161, but refers to the character of the *legatee*. It clearly prefers over the general provisions of the section as to abatement in the payment of all legacies, the spouse and kindred in whatever class their legacies may fall. The first portion of the section is in full harmony with section 751, and, reading these together, we have the manner in which the property is to be resorted to in the payment of legacies and the flat declaration that, if the property is insufficient, abatement shall take place equally in each class of legacies. The last clause of section 752 is an exception to the previous section coming from the language “except as otherwise provided in this code.” Where this section declares the order in which property must be resorted to in the payment of legacies, the last clause of section 752 declares that the property bequeathed to spouse and kindred shall be “chargeable” with the *payment* of these legacies only after legacies to persons not related are so charged. The obvious intention of the sections is that, “unless a different intention is expressed in the will,” legacies to spouse and kindred shall be preferred over other legacies of the same class when the property is insufficient to pay all such legacies in full, but that all

property of the estate shall be liable for the debts, expenses of administration, and family allowance, with the single exception of the specific legacies and devises mentioned in section 750. If any other or different purpose was intended, the Legislature has failed to use any language in these three sections of the Code which would disclose such purpose, but we purposely refrain from deciding the related question of the apportionment as between the various legatees of the liability for debts, expenses, and family allowances because the parties have stipulated that such question is not involved in this proceeding. We have held that all property of the estate is made primarily liable for these charges because it was necessary to so hold in order to arrive at the proper interpretation of sections 751 and 752. But whether the latter section applies to section 750 as well as to 751, or whether spouse and kindred should contribute proportionally to such charges as under section 753, are questions which must be determined only when the issues are properly raised for decision.

[6,7] The appellant Fowler died after the appeal was perfected, and a motion to dismiss the appeal as to him was heard and submitted with the case on its merits. This motion should be denied because the death of an appellant does not in itself justify a dismissal of the appeal. Ordinarily, we require a substitution of the administrator. In this matter Fowler was merely the beneficiary under a trust contained in the will which would give him a monthly allowance until the day of his death. The trust has never become operative because no distribution to the trustees has been made. His estate may have some litigable interest, but that can be determined in the probate court, and no one is prejudiced by the failure to substitute here.

The motion to dismiss the appeal is denied. The order is reversed.

I concur: STURTEVANT, J.

I concur in the judgment: SPENCE, J.

12 Cal.App.2d 150

WILFERT v. PETERS.
Civ. 9409.

District Court of Appeal, First District, Division 1, California.

Feb. 27, 1936.

Hearing Denied by Supreme Court
April 27, 1936.

Trial $\hookrightarrow$ 296(4, 5)

In negligence action where jury was correctly instructed on subjects of contributory negligence, burden of proof, and proximate cause, giving of additional instructions relating to contributory negligence which were erroneous in part held not reversible error.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by Alwin Wilfert against Harry E. Peters. Judgment for defendant, and plaintiff appeals.

Affirmed.

See, also, (Cal.App.) 47 P.(2d) 310.

Alfred Nelson, Rupert R. Ryan, and Jos. J. Yovino-Young, all of Oakland, for appellant.

Hartley F. Peart and Gus L. Baraty, both of San Francisco, Tinning & DeLap, of Martinez, and Howard Hassard, of San Francisco, for respondent.

PER CURIAM.

An action for damages in which the defendant was charged with malpractice. The averment was denied, and it was alleged that plaintiff's failure to follow defendant's instructions proximately contributed to his injury. A jury returned a verdict for the defendant, and the plaintiff has appealed from the judgment entered thereon.

The sufficiency of the evidence to support the verdict is conceded, but it is contended that certain of the court's instructions were prejudicially erroneous.

The jury was fully and correctly instructed on the subjects of contributory negligence, the burden of proof, and proximate cause, but in instructions which followed the court, referring to the contributory negligence rule, omitted to state that such negligence in order to bar a recovery must have proximately contributed to the damage complained of; and with respect to the quantum of proof necessary in this connection used the word "satisfaction." As

part of another instruction it was stated that the plaintiff must prove want of contributory negligence. These instructions were, as held in cases cited by plaintiff, erroneous; and in several instances such errors were in the circumstances considered sufficient to justify a reversal. After an examination of the whole record, however, and in view of the fact that the jury was correctly instructed as to the rules mentioned, we are not convinced that the errors complained of were prejudicial to a degree which fairly supports the conclusion that there was a miscarriage of justice.

The judgment is affirmed.



12 Cal.App.2d 286

PRESCOTT et al. v. FARQUHAR et al.
Civ. 1593.

District Court of Appeal, Fourth District, California.

March 4, 1936.

Hearing Denied by Supreme Court
April 30, 1936.

1. Principal and surety $\hookrightarrow$ 145(1)

Judgment in claim and delivery for depreciation of property and its redelivery held res judicata in action on redelivery bond for damages for detention of property from time of its redelivery until time of trial, since issue of redelivery was necessarily involved in the prior action (Code Civ.Proc. §§ 510-512, 1911).

2. Replevin $\hookrightarrow$ 130

Sureties who executed redelivery bond, having secured redelivery of property by means of bond, cannot, in action on bond, assert that deputy sheriff did not take possession of property (Code Civ.Proc. §§ 510-512).

3. Replevin $\hookrightarrow$ 130

Sureties on redelivery bond cannot escape liability on ground they themselves failed to justify (Code Civ.Proc. §§ 510-512).

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by M. F. Prescott and another, copartners doing business under the fictitious firm name and style of the Home Oil Company, against W. C. Farquhar and

another. From an adverse judgment, the plaintiffs appeal.

Reversed.

Burton E. Hales, of Redlands, for appellants.

Hert & Withington, of San Bernardino, for respondents.

SCOVEL, Justice pro tem.

In about the month of September, 1930, plaintiffs herein filed an action in claim and delivery against one Ray Dillingham, praying for the recovery of certain personal property then in the possession of said defendant or for the value thereof in case a delivery could not be had, together with damages for the detention thereof.

The plaintiffs in said action made the affidavit, requisition, and bond as provided in sections 510, 511, and 512 of the Code of Civil Procedure. These documents were delivered to J. A. Rivera, constable of Redlands township, who was also a special deputy sheriff. Rivera went to the property upon which the personal property described in the claim and delivery action was located and told Dillingham that he was taking possession of the property. Dillingham stated that he would put up a redelivery bond to retain possession of the property. This bond was thereafter given by him to the constable; the sureties thereon being the defendants in the action from which this appeal is taken. Plaintiffs in the claim and delivery action recovered judgment for the return of the property or the value thereof if delivery of said property could not be had, "together with the sum of \$600 damages suffered by the plaintiff by way of depreciation in the value of said property since the commencement of the action." In its findings of fact, upon which such judgment was based, the court found, among other things, "that the property described in plaintiffs' complaint was regularly taken by the sheriff of San Bernardino county by virtue of the written requisition, affidavit and undertaking furnished by the plaintiff and that within five days thereafter the defendant filed a redelivery bond and that the said property was redelivered to the defendant, Ray Dillingham, who continued to hold and use the same until the date of the trial."

The defendant in said action having failed to pay the judgment for \$600 damages for depreciation in the value of the property, plaintiffs thereupon filed this ac-

tion against the defendants herein, sureties upon the redelivery bond.

At the first trial hereof, judgment was entered in favor of the defendants, from which an appeal was taken, and the judgment reversed; this appeal being reported in *Prescott et al. v. Farquhar et al.*, 135 Cal.App. 469, 27 P.(2d) 390, 392. After the return of the remittitur, the action was again tried and judgment entered in favor of the defendants, from which judgment this appeal is taken. At the trial thereof, evidence was introduced on behalf of the defendants tending to show that the affidavit, requisition, and bond in the original claim and delivery action were never delivered to the sheriff of San Bernardino county, that in seizing, or attempting to seize, the property involved in the action, J. A. Rivera was in truth and in fact acting as constable of Redlands township and not as a deputy sheriff and that no actual seizure was made. The respondents herein therefore contend that, since no legal seizure was made, there could be no redelivery, and that the bond given by them to secure a redelivery was without consideration and void.

Without passing upon the sufficiency of the evidence to sustain respondents' position, we are of the opinion that any such contention has been answered adversely by the findings and judgment of the court in the claim and delivery action, and that the defendants are therefore barred from raising such defense at this time.

Section 1911 of the Code of Civil Procedure provides what matters are concluded by a judgment as follows: "Matters concluded by judgment.—That only is deemed to have been adjudged in a former judgment which appears on its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto."

In *Kruger v. California Highway Indemnity Exchange*, 201 Cal. 672, at page 679, 258 P. 602, 605, the court quotes with approval the following statement of the rule from *Pioneer Savings & Loan Company v. Bartsch*, 51 Minn. 474, 53 N.W. 764, 38 Am.St.Rep. 511. "Hence, if a surety stipulates for any particular method by which the liability of his principal or of himself shall be fixed, he is bound by it. If he has undertaken, either expressly or by implication from the position which he has assumed with reference to pending

Feb. 21, 1936.

Rehearing Denied March 17, 1936.

Hearing Denied by Supreme Court
April 20, 1936.

litigation, to be responsible for the result of a suit between others, to which he is not a party, and to which he has not been made privy by notice and an opportunity to defend, then, in the absence of fraud and collusion, the judgment against the principal alone would be conclusive evidence against him of every fact which it was necessary to find to recover such a judgment. This would be because he had so contracted."

[1] It will be recalled that the judgment, upon which the action herein is based, was for the recovery of damages for the detention of the property by the defendant in the claim and delivery action from the time of its redelivery until the time of trial. In order for the plaintiff in such action to have recovered such judgment, there necessarily was involved a determination of the legality of the redelivery, and the court, in the claim and delivery action having rendered judgment against the defendant for depreciation of the property after its redelivery, must have found as the basis upon which to render such judgment that the property was seized by the sheriff and property redelivered to the defendant. It therefore follows that the matter is now *res judicata* in so far as the defendant in that action and the sureties on his redelivery bond, the respondents herein, are concerned.

[2, 3] To support the judgment, respondents raise the further point that no justification upon the redelivery bond was ever made by them. The same contention was made in the former appeal herein. *Prescott v. Farquhar*, *supra*. And, whether or not the ruling therein made is the law of the case upon this appeal, we are of the opinion that it sets forth a true statement of the new law applicable to the case wherein it states that, "having secured a redelivery by means of this bond, the respondents should neither be heard to say there was no taking of possession which necessitated a redelivery, nor should they be permitted to escape the plain obligation they have assumed by relying on the claim that they have themselves failed to justify in the manner required of them by the statute."

The judgment is reversed.

We concur: BARNARD, P. J.;
MARKS, J.

1. Limitation of actions $\Rightarrow$ 183(4)

In action against personal representatives of deceased vendor for rescission, answer alleging that plaintiffs ought not to maintain action because of five years which had elapsed since contract was entered into and other causes *held* sufficient pleading of limitation (Probate Code, § 708; Code Civ. Proc. § 339).

2. Limitation of actions $\Rightarrow$ 60(8)

Cause of action for return of purchase money paid under realty contract on ground of failure of consideration *held* barred by limitations where not commenced within two years after money was paid (Code Civ. Proc. § 339).

3. Limitation of actions $\Rightarrow$ 195(5)

To rescind contract for purchase of realty and recover purchase money paid thereunder on ground that contract was procured by fraud of vendor, purchasers were required to prove not only that promise was fraudulent because vendor had no intention to perform at time he made promise, but also that fraud was not discovered by purchasers until date which would bring action within statute of limitations (Code Civ. Proc. § 339).

4. Executors and administrators $\Rightarrow$ 221(3)

Conduct of personal representatives of vendor after his death would not be competent to show original fraudulent intention of vendor at time of contract (Code Civ. Proc. § 339).

5. Fraud $\Rightarrow$ 58(1)

Mere failure to carry out promise is not proof of fraud (Code Civ. Proc. § 339).

6. Vendor and purchaser $\Rightarrow$ 341(3)

Evidence *held* insufficient to establish fraud of vendor in making promise to plant trees on property sold so as to entitle purchasers to rescind contract and recover money paid thereunder for fraud in inducement of contract.

7. Limitation of actions $\Rightarrow$ 100(6)

Cause of action for rescission of contract for sale of realty and for recovery of money paid thereunder for fraud of vendor in inducing contract by promise to plant trees on property *held* barred by limitations where vendor died 4½ years prior to com-

mencement of action, at which time all evidence of fraud was known to purchasers.

8. Executors and administrators ⇨443(7)

In action against personal representatives of deceased vendor to rescind contract for purchase of realty and recover purchase money paid thereunder for fraud of vendor and failure of consideration, complaint failing to allege that claim had been filed against estate of vendor prior to commencement of action *held* insufficient (Probate Code, § 707).

9. Pleading ⇨406(5)

Objection that complaint for money judgment against representatives of decedent did not state cause of action because of failure to allege that claim had not been filed against estate prior to commencement of action could be raised at any time (Probate Code, § 707; Code Civ.Proc. § 339).

Appeal from Superior Court, Los Angeles County; Thomas P. White, Judge.

Action by Harry P. Jacobson and others against Nella Wilde Mead and others. Judgment for plaintiffs, and defendants appeal.

Reversed.

Jess E. Stephens, of Los Angeles, for appellants.

Benjamin & Benjamin and Aaron Elmore, all of Los Angeles, for respondents.

GOULD, Justice pro tem.

When plaintiffs in January of 1927 signed an agreement to purchase a city lot, they demanded that there be inserted in the contract, in addition to the usual street improvement provisions therein contained, a further covenant that vendor would plant trees in the parkway along the street upon which the lot faced. This insertion was made by vendor's agent. A few days later, upon making the balance of the down payment of \$1,340, plaintiffs again requested confirmation of the agreement as to the planting of trees and other improvements, and the vendor's agent gave plaintiffs a letter signed by himself as agent to the effect that the seller would make the improvements specified. Dissatisfied with this memorandum, signed only by the agent, plaintiffs again requested and secured a statement signed by the vendor himself, agreeing "to install at my own expense" certain street improvements "and to plant the park-

ing to trees on Griffith Park Blvd." No trees were planted, and in June, 1932, plaintiffs served notice of rescission of the contract to purchase upon the grounds of failure of consideration and false and fraudulent representations inducing the contract of sale. When plaintiffs' demand for return of the money they had paid and for cancellation of the note and trust deed they had executed for the unpaid balance of the purchase price was refused, they filed the within action. The original vendor being deceased, the suit was brought against defendants as personal representatives of and successors in interest to said vendor. Judgment went for plaintiffs, and defendants appeal.

The original vendor died a few months after plaintiffs made their contract to purchase. The suit to rescind, commenced more than four years after his death, was prosecuted against his personal representatives. There was no allegation in the complaint and no showing in the evidence that a claim was presented against the estate of the deceased within the period allowed by law, or at all, and the period for presentation of claims had expired long before the within action was commenced. Failure to file a contingent claim against the estate is fatal to the prosecution of this action. Section 707, Probate Code. As stated in *Verdier v. Roach*, 96 Cal. 467, at page 479, 31 P. 554, 558: "Timely notice of all claims which may prejudicially affect an estate should be given to the administrator, so that he may have an opportunity to investigate their merits, and to contest them, if advisable, before the evidence of their invalidity shall be lost. That they should be forever barred if not presented within the time prescribed by law is surely no greater hardship than that absolute claims should be so barred." The cited case discusses at length the whole matter of contingent claims, and compels the conclusion that such a claim should have been filed in the estate of the deceased vendor herein as an indispensable precedent to bringing the within action.

The judgment is reversed.

CRAIL, Presiding Justice (concurring).

We have had a world of trouble in reaching a decision in this case, and I wish to state my reasons for a reversal of the judgment. On February 8, 1927, William Mead, now deceased, the defendants' testator, entered into a written contract with the plain-

tiffs whereby they purchased a vacant lot at an agreed purchase price of \$8,000, the purchasers paying \$1,600 on the purchase price. At the request of the plaintiffs, the decedent added the following clause to the written contract: "I agree to install at my own expense in the street accessible to said lot a sanitary sewer, city water, gas, electric and telephone wires in underground conduit with connection to curb, cement curb, cement walks on both sides of the street, concrete pavement electroliers, and to plant the parking to trees on Griffith Park Blvd." On March 3, 1927, which was more than five years prior to the commencement of this action, Mead and his wife conveyed the lot to the plaintiffs by grant deed, and the plaintiffs executed their note for \$6,400 secured by a trust deed on the lot. All the improvements above indicated were thereafter installed at large expense by the decedent except the trees, which were not planted. The planting of the trees would have cost a nominal sum, but on November 23, 1927, William Mead died. Thereafter his estate, including the above note and trust deed, came into the possession of the defendants, the representatives of the estate. During the intervening years plaintiffs listed the lot for sale at various times and endeavored to sell it. They never improved the lot, and during the ensuing five years paid the principal down to \$3,800. In June, 1932, they served notice of rescission and brought an action in two counts: (1) For rescission for failure of consideration; (2) for rescission for fraud, i. e., that the decedent obtained the note and trust deed upon the promise that he would plant the trees and said promise was false and made at the time it was made without any intention to perform it. The action was against the representatives of the decedent's estate. The answer of the defendants denied the allegations of the complaint and as a separate defense alleged that plaintiffs ought not to maintain their action because of the five years which had elapsed since the contract was entered into and other causes.

[1] This is an inartistic pleading of the statute of limitations, but under the circumstances of this case we deem it sufficient for the reason that this was a claim against the representatives of a decedent's estate and the statute itself provides that no claim which is barred by the statute of limitations shall be allowed or approved (1) by the executor, or (2) by the judge. Probate Code, § 708. In the case of *Fontana Land Co. v.*

Laughlin, 199 Cal. 625, 250 P. 669, 674, 48 A. L.R. 509, the court said: "The power to nullify acts of the Legislature prescribing a limitation upon the time within which actions may be commenced is not a judicial prerogative. Statutes of limitation have become rules of property. They are vital to the welfare of society and are favored by the law. *Nichols v. Randall*, 136 Cal. 426, 69 P. 26; *Shain v. Sresovich*, 104 Cal. 402, 38 P. 51. They are to be viewed as statutes of repose, and as such constitute meritorious defenses. *Lilly-Brackett Co. v. Sonnemann*, 157 Cal. 192, 106 P. 715, 21 Ann.Cas. 1279. * * * In *Reay v. Hezelton*, 128 Cal. 335, 338, 60 P. 977, 978, the above-cited section was construed by this court, and it was there said: 'As between parties acting in their own right, the plea of the statute of limitations is unquestionably a personal privilege which may be waived. But an executor or administrator, acting for others, and in a trust capacity, is not vested with this privilege, and may not waive such a defense. By section 1499 of the Code of Civil Procedure the personal representative, as well as the judge of the superior court, is forbidden to allow any claim which is barred by the statute of limitation. It would be a most unwarranted evasion of this mandatory provision to permit an executor or administrator by his failure to invoke the plea to suffer judgment upon a claim which, when presented to him, he was bound by law to reject because of the bar of the statute. In *Vrooman v. Li Po Tai*, 113 Cal. 302, 45 P. 470, it was held that the administrator, by appearing and answering, could not waive the objection that the claim in suit was barred by the statute; and in *Boyce v. Fisk*, 110 Cal. 107, 42 P. 473, it is declared that an administrator will not be permitted to waive the statute of limitations upon a claim which is barred. To like effect is *Butler v. Johnson*, 111 N.Y. 204, 212, 18 N.E. 643.' * * * The personal privilege of waiving the statute of limitations expired with the decedent and was not transmitted to the administrator or any other person to be exercised for the benefit of barred claimants to the prejudice of creditors. * * * The refusal to allow barred claims is more than a general policy of the law; it is the positive command of the statute." As is often said in the probate court, the law itself pleads the bar of the statute of limitations against claims against the estates of decedents. See cases cited in 11a Cal.Jur. 785, note 1.

The trial court rendered judgment that the note and trust deed be canceled, and in addition thereto a money judgment against the defendants for \$6,378, with interest and costs.

[2] While an action to recover back money paid on a written contract which thereafter is rescinded is based upon contract, it is not based upon the written contract, but upon a promise implied by law to pay the money to the plaintiff as on money had and received. "*Basis of Action on Rescinded Contract*.—An action to recover back money paid under a contract as money had and received is not based upon the contract, but upon the proposition that the contract has been rescinded, and, being nonexistent, the defendant has money which was paid to him without consideration, and, therefore, has money in his hands which belongs to the plaintiff, and hence upon an implied contract and promise upon his part to repay the same." 17 Cal.Jur. 615, and cases collected under note 2. Such an action must be brought within two years (Code Civ.Proc. § 339). See cases collected under 16 Cal.Jur. 468, note 6. The cause of action for the return of the purchase money because of the failure of consideration was barred by the statute of limitations.

[3] In order to bring their second count within the time limited by the statute of limitations, it was necessary for the plaintiffs to allege not only that the promise to plant the trees was false and fraudulent for the reason that the decedent had no intention at the time he made the promise of performing it, but also that this fraud was not discovered by the plaintiffs until such date as would bring the action within the time limited by the statute of limitations. These allegations and the proof thereof were essential—sine qua non.

[4-6] In answer to the defendants' contention on appeal that there was no evidence that the decedent at the time he entered into the promise intended not to perform it, the plaintiffs fail to marshal any evidence before us, but say "that he [plaintiff] complained of the failure to plant trees several months after the promise; that he was promised that trees would be put in shortly; that he complained persistently [to decedent's representatives] each time a quarterly payment was made; that he was 'stalled' [by decedent's representatives] and not told until March, 1932, definitely that there would be no trees." While it is said in some of the cases that evidence of subse-

quent conduct and speech of the promisor is competent in so far as it may throw light on his original intention, it is obvious that conduct of the decedent's representatives after his death would not be competent, would throw no light on the original intention of the decedent at the time he entered into the contract. There was absolutely no showing in the evidence that after the contract was entered into the decedent during his lifetime evaded his promise or refused to perform it; on the contrary, the evidence shows unerringly that he planned to perform it. All the other obligations of the testator were punctiliously performed. Even the brief of plaintiffs admits that prior to the testator's death the plaintiffs were promised that the trees would be put in shortly. But the testator died. The only evidence which could possibly be claimed as supporting the finding that Mead did not intend to perform the promise at the time it was made is the evidence that the promise was not thereafter performed. The law is thoroughly settled that mere failure to carry out a promise does not prove fraud in the making of it. *Brison v. Brison*, 75 Cal. 525, 17 P. 689, 7 Am.St.Rep. 189; *Langley v. Rodriguez*, 122 Cal. 580, 55 P. 406, 68 Am.St.Rep. 70; *Tisdale v. Bryant*, 38 Cal.App. 750, 757, 177 P. 510. William Mead died eight or nine months after the making of the agreement; not a word of evidence was offered or admitted regarding his speech or conduct during the intervening period.

[7] The decedent died 4½ years prior to the commencement of the action. At the time of the death of decedent the evidence of fraud, if any, was all made. This evidence was all known to the plaintiffs and it cannot be reasonably contended by the plaintiffs 4½ years later, after there had been a world-wide depression and the value of the vacant lot had shrunk to a mere fraction of its former value, that for the first time they discovered the fraud. There is no substantial evidence in the record to sustain such a finding.

[8,9] Furthermore, both counts of the plaintiffs' complaint are wholly insufficient to state a cause of action against the representatives of decedent's estate based upon an implied contract to return money after rescission, for the reason that neither of them alleges that a claim for the sum of \$6,378, or any other sum, had been presented to or filed against the estate of Mead prior to the commencement of the action. Probate Code, § 707, and cases collected under

11a Cal.Jur. 728. The complaint, in so far as it was for a money judgment, is obviously deficient in an essential allegation which plaintiffs cannot supply, and attention to which may be raised at any time.

I concur: WOOD, J.



12 Cal.App.2d 215

PEOPLE v. CANALES.
Cr. 1454.

District Court of Appeal, Third District,
California.
Feb. 29, 1936.

Rehearing Denied March 14, 1936.

Hearing Denied by Supreme Court
March 30, 1936.

1. Weapons ⇨4

Statute prohibiting possession of weapon of kind commonly known as black-jack or billie *held* intended to outlaw instruments ordinarily used for criminal and unlawful purposes, and is not restricted solely to black-jacks or billies (St.1923, p. 695, as amended).

2. Indictment and information ⇨71

Information in statutory language alternatively charging possession of weapon of kind commonly known as black-jack or billie *held* sufficient as against demurrer on ground of uncertainty (St.1923, p. 695, as amended).

3. Weapons ⇨17(5)

Court cannot say as matter of law that 18-inch club of diameter of pick handle cannot be concealed on person (St.1923, p. 695, as amended).

4. Weapons ⇨4

Statute *held* to prohibit possession of weapon of kind commonly known as black-jack or billie irrespective of ability to conceal weapon on person (St.1923, p. 695, as amended).

5. Weapons ⇨17(5)

Court *held* authorized to determine in first instance whether instruments in evidence were within statute prohibiting possession of certain weapons (St.1923, p. 695, as amended).

6. Jury ⇨131(4)

Exploratory examination on voir dire to determine whether peremptory challenge

should be exercised may properly be restricted to matters on which challenge for cause could be interposed.

7. Jury ⇨131(6)

In prosecution against striking miner for possessing prohibited weapon, where both sides at beginning of voir dire examination inquired regarding attitude toward miners' strike, refusal to allow further questions concerning strike and questions regarding jurors' relation, if any, to so-called protective league *held* not error (St.1923, p. 695, as amended).

8. Criminal law ⇨371(12)

Evidence that striking miner, who denied possession of prohibited weapon as charged in information, engaged in fight two months before trial, and threatened and drew knife on strike breakers, and reviled proprietors of boarding house serving employed miners *held* admissible as bearing on motive or reason for possession of weapon, as against contention that such evidence disclosed other unrelated offenses (St.1923, p. 695, as amended).

9. Weapons ⇨17(3)

Where defendant, charged with possessing prohibited weapon, denies possession, any evidence tending to show motive or reason for possession of such a weapon is admissible as bearing on fact of possession (St.1923, p. 695, as amended).

10. Witnesses ⇨372(2)

Excluding question asking people's witness whether he was on probation *held* proper, since person granted probation by court is not, as contended, under obligation to dis-trict attorney.

11. Criminal law ⇨448(12)

In prosecution for possessing prohibited weapon found in defendant's automobile, testimony that witness, standing about six feet back of automobile when it was searched, saw third person enter automobile and presumed he was feeling for something on seat, and that he was patting on cushions, and that witness could see his back *held* properly stricken out as constituting conclusion.

12. Criminal law ⇨656(5)

Court's statement to witness that he was not telling whole truth *held* harmless where court, on objection, directed jury to disregard court's remarks, and subsequently instructed jury that they were exclusive judges of witnesses' credibility and should disregard any inadvertent expression of court suggesting opinion regarding such credibility.

Appeal from Superior Court, Amador County; J. M. McMahon, Judge.

Adolpho Canales was convicted under an information charging the possession of a weapon of the kind commonly known as a black-jack or billie, and he appeals.

Affirmed.

George G. Olshausen, of San Francisco, and A. J. Harder, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and Neal Chalmers, Deputy Atty. Gen., for the People.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Defendant was charged with a violation of chapter 339 of the Statutes of 1923 (page 695), as amended in 1925 and 1931 (St.1925, p. 542; St.1931, p. 2316) commonly known as the Deadly Weapons Act, in that at a certain time and place he did "unlawfully, maliciously, and feloniously possess an instrument or weapon of the kind commonly known as a black jack or billie." To this information defendant entered a plea of not guilty, and subsequently filed a demurrer thereto on the ground of uncertainty in that it did not appear therefrom whether defendant was charged with possessing a black-jack or a billie. The demurrer was overruled and the cause proceeded to trial, resulting in the conviction of the defendant as charged. This appeal is from such conviction.

The evidence in substance was that in the early morning of February 17, 1935, defendant with two others was stopped in his automobile on Main street in the city of Jackson by the sheriff of Amador county. Canales was taken in the sheriff's car to the jail and the car of defendant was driven by a citizen by the order of the sheriff, to the courthouse, where it was searched, and two weapons were found therein, one a club 15¼ inches long, thicker at one end than the other, with nails driven into the larger end and covered with tape. The other was a straight, smooth piece of wood about the thickness of a pick handle, eighteen inches long. The first of these instruments was found in the car of defendant under the rear seat and the other was lying on the front seat covered by a blanket.

[1,2] The first point urged by defendant is that the allegation charging possession of a black-jack or billie is in the alternative, and therefore the demurrer should have been sustained. It will be noted the statute defines the prohibited instruments or weapons not in specific terms, but as

being of a kind commonly known as a black-jack or billie. The definition is purposely broad, for, as stated in *People v. Mulherin*, 140 Cal.App. 212, 35 P.(2d) 174, 176, the Legislature did not prohibit the possession of a black-jack as such or a billie as such as it might have done, but instead and very likely with appreciation of the difficulties of nomenclature, forbade ownership of any weapon of that class; the purpose being to outlaw instruments which are ordinarily used for criminal and unlawful purposes. The court did not err, therefore, in overruling the demurrer.

Defendant contends that the particular weapons introduced in evidence were neither black-jacks nor billies, nor of that class nor kind. The courts have on occasions, attempted to define in general terms what is meant by "billie" and "black jack." In *People v. Williams*, 100 Cal.App. 149, 279 P. 1040, quoting from Webster's Dictionary, black-jack is defined "as a small leather-covered club, or billie weighted at the head and having an elastic shaft." In *People v. Mulherin*, supra, "'black-jack' is defined as a short bludgeon consisting of a heavy head, as of metal, on an elastic shaft or with a flexible handle."

[3,4] So appellant would have us say that the two exhibits received in evidence are not the kind of instruments prohibited by the statute because of their shape and size, and particularly because the instruments offered in the instant case are too long to be concealed upon the person. In the first place, we cannot say as a matter of law that a club of the diameter of a pick handle, 18 inches in length, cannot be concealed upon the person, but would be inclined to take judicial knowledge of the fact that such an instrument can be concealed upon the person. However, we do not believe that that element is a governing quantity in such a weapon. Appellant attempts to read into the statute and apply to instruments of a kind commonly known as black-jacks or billies, the ability to conceal upon the person, but in the title to the act and in the text itself the question of concealment on the person is applicable only to pistols, revolvers, explosive substances, dirks, and daggers.

[5] Another objection by appellant is that the court erred in its instruction in regard to these instruments. The trial court, after quoting various definitions of billies and black-jacks, instructed the jury: "The court instructs you that the instruments be-

fore you are within the purview of the instruments announced in the code." Appellant construes this as an instruction to find for the people on the issue whether the clubs were within the statute. A reading of the instruction discloses the court did not so instruct the jury that the instruments in evidence were weapons prohibited by the act, but merely told them that such instruments were within the field or scope of the act, leaving it for the jury to declare whether these particular clubs actually were illegal weapons. It was, however, within the province of the court to determine in the first instance whether they were such weapons as fell within the purview of the statute.

[6,7] It is next alleged that errors occurred during the selection of the jury. For some time prior to the arrest of defendant and continuing during the trial, a strike was going on among the gold miners of the Jackson area, and defendant himself was a miner out on strike. The court allowed the prosecution and defense, at the beginning of the examination of jurors, to inquire of them on their voir dire as to any prejudice they might have regarding the strike and their sympathy or animus toward the strikers. Later, however, the court on its own motion refused to allow further questions in regard to the strike. The court also refused to allow the defense to inquire of prospective jurors their relation, if any, to the American Protective League. What the American Protective League was or its connection with the case, did not appear.

The defendant was charged with the possession of a certain weapon. The fact of the existence of a strike in the community or their possible membership in some unknown league was not relative to the charge. This line of examination of appellant was an exploration for the purpose of arriving at a decision as to whether a peremptory challenge should be exercised. As was held in the case of *People v. Ecton*, 29 Cal.App. 478, 156 P. 996, and other cases in line with that case, such an examination may properly be restricted to those matters upon which a challenge for cause could be interposed. The prospective jurors were examined at length by counsel, and each juror accepted testified that he had no opinion as to the guilt or innocence of the defendant, and that he could fairly and impartially try the case, and it appears from the record that they did so.

It further appears appellant did not exhaust all of the peremptory challenges allowed him by law.

In *People v. Edwards*, 163 Cal. 752, 127 P. 58, the court there said, and it is still applicable to-day, "The records of the cases appealed to this court, in which rulings made while impaneling a jury have been involved, indicate that there is an increasing tendency to prolong the proceedings inordinately by allowing counsel on either side to indulge in tedious examinations of jurors, apparently with no definite purpose or object in view, but with the hope of eliciting something indicating the advisability of a peremptory challenge, and that the supposed privilege of doing this has been greatly abused." We do not believe the trial court unduly limited counsel in their examination of the prospective jurors on their voir dire.

[8,9] Appellant cites several alleged errors which occurred during the trial, the principal one being in regard to evidence of the commission of other offenses by appellant. Appellant claims that he was charged with the possession of a prohibited weapon which involved no specific intent and the other offenses admitted were: First, engaging in a fight some two months previous to the trial; secondly, telling a strike breaker, "You are not going to last very long on that job, we are going to fix you fellows"; thirdly, drawing a knife on a strike breaker; and, fourthly, driving in front of a boarding house catering to employed miners, and shouting vile names to the proprietors.

It is the claim of appellant that these "other offenses" are so different in their elements to the offense for which he was on trial that it was error to admit them.

It will be recalled that appellant denied possession or ownership of the weapons in evidence, intimating they had been planted in the car; therefore where there is a denial of the possession of the instrument any evidence which tends to show a motive or reason to possess such an instrument is admissible as bearing upon the fact of possession.

[10] Another citation of error was the refusal of the court to permit defendant to question a witness for the prosecution as to whether he was on probation at the time of his testifying, claiming that a witness on probation stands in fear of the district attorney, and might, to obtain his favor, be inclined to testify favorably to the

prosecution. The objection was properly sustained. A person who is granted probation by the court and is answerable to the court alone, is under no obligation of any kind whatsoever to the district attorney, and the fact of probation was neither material nor relevant.

[11] Complaint is made also of an order of the court striking out the testimony of a witness who testified he was present, standing about six feet back of the car of defendant, when it was searched, and saw a Mr. Gibson enter the car and "presumed he was feeling for something on the seat. He was patting on the cushions. * * * I could see his back there." The testimony was properly stricken out as being the conclusion of the witness.

[12] Complaint is made of the following: During the examination of a witness for the defense, the court addressing the witness said: "And if you don't tell the truth you are liable to prosecution for perjury. Now you are not telling the whole truth." To this statement Mr. Olshausen, attorney for defendant, objected, and asked the court to instruct the jury to disregard the court's remarks. To which the court replied: "The jury will disregard the court's remarks." At the conclusion of the trial the court also instructed the jury that they were the exclusive judges of the weight of evidence and credibility of witnesses, and that the court had not expressed nor intended to express any opinion as to what witnesses were or were not worthy of credence, and if any expression of the court during the trial seemed to indicate an opinion relating to any matters in issue, it was to be disregarded. In view of the admonitions and instructions of the court, it cannot be said that the remark inadvertently made by the court constituted prejudicial error.

Numerous other citations of alleged error are set forth in the well-prepared brief of appellant, but having considered the many points raised, we are convinced that none of the allegations of error justify a reversal. A jury without passion or prejudice found the defendant guilty, and a study of the record and of the many assignments of error convinces us that there was not a miscarriage of justice.

The judgment and order appealed from should be affirmed, and it is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.

GIMENEZ v. RISSEN et al.*

SANCHEZ v. SAME.

Civ. 9567, 9568.

District Court of Appeal, Second District,
Division 1, California.

Feb. 27, 1936.

As Modified March 20, 1936.

1. Trial $\hookrightarrow$ 139(1)

Verdict can be directed when, disregarding conflicting evidence and giving to plaintiff's evidence all value to which it is legally entitled, and indulging every legitimate inference which may be drawn from that evidence, result is a determination that there is no evidence of sufficient substantiality to support verdict in favor of plaintiff if such verdict were given.

2. Trial $\hookrightarrow$ 178

Motion for directed verdict concedes as true evidence on behalf of adverse party, with all fair and reasonable inferences to be deduced therefrom.

3. Trial $\hookrightarrow$ 178

On motion for directed verdict, court cannot weigh evidence and judge credibility of witnesses, but must give to plaintiff's evidence all value to which it would be legally entitled if witnesses were believed.

4. Automobiles $\hookrightarrow$ 245(24)

To defeat motion for directed verdict, guests, suing for injuries sustained when automobile in which they were riding overturned, were required merely to offer competent evidence of such substantial nature that it might reasonably be inferred therefrom that driver of guest automobile was guilty of willful misconduct (St.1931, p. 1693, § 141¾).

5. Automobiles $\hookrightarrow$ 181(1)

Mere failure to perform statutory duty is not alone "willful misconduct" within automobile guest statute, but amounts only to "simple negligence," since to constitute "willful misconduct" there must be actual knowledge or its equivalent of peril to be apprehended from failure to act, coupled with conscious failure to act to end of averting injury (St.1931, p. 1693, § 141¾).

[Ed. Note.—For other definitions of "Simple Negligence" and "Willful Misconduct," see Words & Phrases.]

6. Automobiles $\hookrightarrow$ 181(1)

"Willful misconduct," within automobile guest statute, does not mean sort of misconduct involved in any negligence or mere intent to do act which constitutes negligence, but implies intentional doing of something either with knowledge that serious injury is probable, as distinguished from possible, result, or intentional doing of act to harm an-

other with wanton and reckless disregard of its possible result (St.1931, p. 1693, § 141½).

7. Automobiles ⇨245(24)

Whether driver was guilty of willful misconduct in operating guest automobile at excessive speed, so as to be liable under guest statute for injuries sustained by guests, held for jury (St.1931, p. 1693, § 141½).

8. Negligence ⇨1

"Negligence" is opposed to diligence, and signifies absence of care, and is negative in its nature, implying failure of duty, and excludes idea of intentional wrong, so that person ceases to be negligent when he wills to do an injury.

[Ed. Note.—For other definitions of "Negligence," see Words & Phrases.]

9. Automobiles ⇨184

Under statute making person signing application of minor for license to operate automobile liable for minor's negligence in driving such automobile, person signing application is not liable for willful misconduct of minor in operating such automobile (St.1929, p. 522, § 62 (b)).

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Actions by Edward Gimenez, a minor, by Santos Gimenez, his guardian ad litem, and by Antonio Sanchez, a minor, by his guardian ad litem, Adelaida Sanchez, against Robert Rissen and another. From the judgments, the plaintiffs appeal.

Reversed and remanded for new trials in part and affirmed in part.

Peter J. Youngdahl and G. G. Glick, both of Los Angeles, for appellants.

Nourse, Betts & Jones (by Forrest A. Betts), of Los Angeles, for respondents.

WHITE, Justice pro tem.

These appeals are prosecuted from judgments entered upon directed verdicts. By stipulation the two cases were tried together, and by agreement both appeals were consolidated for consideration together in this court.

The actions were for damages for personal injuries sustained by the minor plaintiffs, who were guests in an automobile which overturned on Jefferson avenue, approximately a block east of Higuera street, in Culver City, about midnight, February 12, 1933. Their respective mothers were joined as plaintiffs in the capaci-

ty of guardians ad litem. Named as defendants are the owner and driver of the guest car, Robert Rissen, a minor, and his mother, Mrs. William R. Rissen, who had signed his application for an operator's license.

The evidence discloses that on the evening of the accident a number of young people, including the minor plaintiffs and defendant, met together for a social party; following a discussion of automobiles between the minor plaintiffs and the minor defendant, and particularly of the merits of the automobile owned by the minor defendant, Rissen, the two minor plaintiffs, upon the invitation of the defendant Robert Rissen, entered his automobile, and with him driving, proceeded up the highway, traveling a distance of from two to two and one-half miles, at a speed ranging, according to the testimony, from 48 to 70 miles per hour. Defendant Robert Rissen then made a U-turn and started back at a speed testified to by plaintiff Edward Gimenez to be 80 miles per hour, and admitted by the minor defendant Robert Rissen to be 75 miles per hour, until the automobile came in contact with a manhole, was overturned, and all of the occupants thereof injured. The minor plaintiffs testified that during the ride plaintiff Edward Gimenez remonstrated with the defendant driver and four or five times urged him to slow down and let them out, which requests went unheeded by the driver. Both minor plaintiffs testified that just before the accident and after Gimenez had several times requested Rissen to slow down, the latter said: "The heck with you guys—I can handle this car." Defendant Rissen denied that either of his guests at any time wanted him to slow down or requested that they be permitted to get out of the automobile, or that he uttered the words ascribed to him in the testimony of the minor plaintiffs.

This appeal presents two main contentions, the first of which involves the issue of whether the evidence is such as to warrant a finding of willful misconduct so as to make the driver of the guest car answerable in damages under the 1931 amendment of section 141½ of the California Vehicle Act (St.1931, p. 1693). Should the evidence warrant such a finding, it is then urged that it becomes essential to determine whether such willful misconduct may be imputed to the parent,

Mrs. William R. Rissen, as a signer of her minor son's application for an operator's license.

[1-3] Upon the first proposition, before proceeding to discuss the evidence, it is necessary to set forth the rule governing the power of the trial court to direct a verdict. This question has received the attention of the courts of this state on numerous occasions, and the principles were reviewed in *Re Estate of Lances*, 216 Cal. 397, 14 P.(2d) 768, quoted with approval in *Re Estate of Flood*, 217 Cal. 763, 768, 21 P.(2d) 579, 580, wherein our Supreme Court says:

"It has become the established law of this state that the power of the court to direct a verdict is absolutely the same as the power of the court to grant a nonsuit. A nonsuit or a directed verdict may be granted 'only when, *disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence*, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given.'" *Newson v. Hawley*, 205 Cal. 188, 270 P. 364; *Perera v. Panama-Pacific Int. Exp. Co.*, 179 Cal. 63, 175 P. 454; *Estate of Sharon*, 179 Cal. 447, 177 P. 283; *Estate of Gallo*, 61 Cal.App. 163, 175, 214 P. 496; 24 Cal.Jur., pp. 912-918. Unless it can be said as a matter of law that, when so considered, no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon appeal, or the trial court to set it aside as a matter of law, the trial court is not justified in taking the case from the jury. *Umsted v. Scofield Eng. Const. Co.*, 203 Cal. 224, 228, 263 P. 799. A motion for a directed verdict "is in the nature of a demurrer to the evidence, and is governed by practically the same rules, and *concedes as true the evidence on behalf of the adverse party, with all fair and reasonable inferences to be deduced therefrom*. * * * *Even though a court might be justified in granting a new trial it would not be justified in directing a verdict on the same evidence*. * * * The power of a court in passing upon such motions is strictly limited. It has no power to weigh the evidence, but is bound to view it in the most

favorable light in support of the verdict. * * * If, in the opinion of the court, the evidence is unreliable, it is its duty to grant a new trial, and it may grant such a trial even where there is substantial evidence to sustain the verdict, if it believes that the evidence preponderates against the verdict." *Hunt v. United Bank & Trust Company of California*, 210 Cal. 108, 117, 118, 291 P. 184, 188. In other words, the function of the trial court on a motion for a directed verdict is analogous to and practically the same as that of a reviewing court in determining, on appeal, whether there is evidence in the record of sufficient substance to support a verdict. *Although the trial court may weigh the evidence and judge of the credibility of the witnesses on a motion for a new trial, it may not do so on a motion for a directed verdict.*' (Italics ours.)

"Two important propositions should be noted in the above quotation. First, the trial court, on a motion by a defendant for a directed verdict, cannot weigh all the evidence introduced by both sides; *all evidence in conflict with the plaintiff's evidence must be disregarded*. [Italics ours.] Second, the trial court, in determining such motion, cannot judge the credibility of witnesses, but must give to the plaintiff's evidence all of the value to which it would be legally entitled if the witnesses were believed."

[4] We proceed, then, upon the basis that in order to defeat the motion for a directed verdict plaintiffs were required merely to offer competent evidence of such a substantial nature that it might reasonably be inferred therefrom that the driver of the guest car was guilty of willful misconduct.

Plaintiff Edward Gimenez testified to the following conversation with defendant Robert Rissen: that the latter invited Gimenez to "Come along and I will show you my car"; that accepting such invitation, Gimenez and plaintiff Sanchez, also as an invitee, entered defendant Rissen's automobile, when, according to plaintiff Gimenez' testimony, the defendant driver of the guest car "went anywhere from 100 to 150 feet, and he was going 55 or 60 miles an hour in second; so I said to him, I said, 'Slow down or let us out.' And then, as I remember, he proceeded at that speed in high gear for a distance, I would judge, anywhere from two to three miles." Further in his evidence plaintiff Edward

Gimenez testified: "Then he proceeded, I guess, two to two and a half miles at that speed, and then he turned around at a terrific rate of speed, a speed which I can't judge. It was a back-turn, turning back. Then he drove the car, it seemed, faster and faster, and I told him four or five times to slow down—I don't remember the exact words—and the last thing that was said, he said, 'The heck with you guys—I can handle this car.'" Testifying further, the plaintiff Edward Gimenez, in response to a question as to whether or not he looked at the speedometer, answered in the affirmative, and stated: "On the return trip the speedometer showed eighty miles an hour. His foot was down to the floor boards."

This evidence, in so far as the conduct of the driver of the guest car is concerned, and the conversations between the driver and plaintiff Edward Gimenez, was corroborated in substance by the testimony of the other minor plaintiff, Antonio Sanchez.

With this evidence before us, and considering it in the light most favorable to plaintiffs, we now proceed to a consideration of what evidence is required to support a finding of willful misconduct.

[5, 6] Various definitions of the phrase "willful misconduct," as used in our so-called guest statute, appear in the many cases that have had occasion to consider the same; but our Supreme Court, in the case of *Meek v. Fowler*, 45 P.(2d) 194, 197, adopts as satisfactory the definition in *Turner v. Standard Oil Co.*, 134 Cal. App. 622, 626, 25 P.(2d) 988, 990, wherein it is declared that "'willful misconduct,' within the meaning of this statute, may then be defined as intentionally doing something in the operation of a motor vehicle which should not be done or intentionally failing to do something which should be done under circumstances disclosing knowledge, express or to be implied, that an injury to a guest will be a probable result." Further in the case of *Meek v. Fowler*, supra, the Supreme Court says:

"The case of *Howard v. Howard*, 132 Cal.App. 124, 128, 22 P.(2d) 279, 281, after defining gross negligence as set forth in *Krause v. Rarity*, 210 Cal. 644, 293 P. 62, 77 A.L.R. 1327, and what is meant by willful misconduct as set forth in *Helme v. Great Western Milling Co.*, 43 Cal.App. 416, 185 P. 510, declares that:

"The mere failure to perform a statutory duty is not, alone, willful misconduct. It amounts only to simple negligence. To constitute 'willful misconduct' there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury."

"While the line between gross negligence and willful misconduct may not always be easy to draw, a distinction appears from the definition given in that gross negligence is merely such a lack of care as may be presumed to indicate a passive and indifferent attitude towards results, while willful misconduct involves a more positive intent actually to harm another or to do an act with a positive, active, and absolute disregard of its consequences. [Italics ours.] It seems clear that in excluding all forms of negligence as a basis for recovery in a guest case, the Legislature must have intended that to permit a recovery in such a case the thing done by a defendant must amount to misconduct as distinguished from negligence, and that this misconduct must be willful. While the word "willful" implies an intent, the intention referred to relates to the misconduct and not merely to the fact that some act was intentionally done. In ordinary negligence, and presumably more so in gross negligence, the element of intent to do the act is present and any negligence might be termed misconduct. But "willful misconduct" as used in this statute means neither the sort of misconduct involved in any negligence nor the mere intent to do the act which constitutes negligence. Willful misconduct implies at least the intentional doing of something either with a knowledge that serious injury is a probable (as distinguished from a possible) result, or the intentional doing of an act with a wanton and reckless disregard of its possible result." (Italics ours.)

[7] Upon the record before us, and in the light of the testimony herein set forth, which we must view in the light most favorable to plaintiffs, and without consideration of opposing or conflicting evidence, we conclude that such evidence, if believed by the jury, would support a finding that the defendant driver operated his automobile with a knowledge that serious injury to the occupants would be the probable (as distinguished from the possible) result of his conduct, and that his conduct indicated

a wanton and reckless disregard of its probable results.

Applying the rule laid down in *Re Estate of Flood*, supra, with which we are in accord, and being unable to say, as a matter of law, that no reasonable conclusion or inference of "willful misconduct" can be made or drawn from the evidence, or that the evidence adduced in favor of appellants is so incredible or so lacking in support that if the jury had believed it and returned a verdict in plaintiffs' favor we would be compelled to reverse it on appeal, we conclude that the court below erred in taking the case from the jury and directing verdicts for the minor defendant driver, Robert Rissen. For this reason the judgments herein appealed from in favor of the minor defendant, Robert Rissen, must be reversed.

[8,9] We come now to a consideration of the appeal by plaintiffs from the judgments in favor of Mrs. William R. Rissen, mother of the minor defendant and the signer of said minor's application for an operator's license. Respondents urged that, because section 62 (b) of the California Vehicle Act (St.1929, p. 522) provides that the signer of a minor's application for an operator's license is liable for the "negligence" of the minor, no recovery can be had against such signer for any "willful misconduct" as distinguished from the "negligence" of such minor in the operation of such vehicle.

Upon this latter proposition respondents urge that the liability imposed upon a parent signing the application of a minor child for an operator's license is purely statutory, and such liability must be restricted to the statutory limits of section 62 (b), which, on the date of this accident, February 12, 1933, read as follows: "Any negligence of a minor in driving a motor vehicle upon a public highway shall be imputed to the person or persons who shall have signed the application of such minor for said license, which person or persons shall be jointly and severally liable with such minor for any damages caused by such negligence except in the event the minor is driving a motor vehicle as the agent, or servant or upon the business of a person other than the person who has signed said application."

If "willful misconduct" is a species of negligence, then it follows that the liability for "willful misconduct" is imputed to the person signing the minor's application,

but if "willful misconduct" is not embraced within the term "negligence," then the rules of statutory interpretation would seem to dictate that the Legislature's intent was to confine such imputation of liability to cases of negligent conduct on the part of the minor. Support is given to this conclusion by a review of the history of automobile legislation in this state, particularly as it is found in the so-called guest statute. Section 141¾ of the California Vehicle Act, up to 1931, made the owner or driver, or person responsible, liable for injuries proximately resulting to a guest from the intoxication, willful misconduct, or gross negligence of such driver. In 1931 the Legislature, by amendment to the guest statute, struck therefrom the words "gross negligence," thereby restricting liability for injuries to a guest to those injuries proximately resulting from the intoxication or willful misconduct of the driver. This legislative action, it seems to us, was clearly intended to remove from the statute any liability for even gross negligence, and would indicate that the Legislature understood the distinction between negligence and willful misconduct, and desired to limit liability in this class of cases (except for intoxication) solely to willful misconduct as distinguished from negligence or even gross negligence.

Appellants earnestly contend that the term "negligence," as used in the act, is broad enough in its legal signification to cover both the careless and the willful acts of a minor, but the courts seem to hold that there is a well-defined distinction between mere "negligence" and "willfulness"; that negligence is opposed to diligence and signifies the absence of care; that it is negative in its nature, implying a failure of duty, and excludes the idea of intentional wrong; that it accordingly follows that the moment a person wills to do an injury he ceases to be negligent. *Stephenson v. So. Pac. Co.*, 102 Cal. 143, 34 P. 618, 36 P. 407; *Smith v. Whittier*, 95 Cal. 279, 30 P. 529; *Beach on Contributory Negligence*, § 62; *Gardner v. Heartt*, 3 Denio (N.Y.) 232; *Cleveland, C. C. & St. L. Ry. Co. v. Tartt (C.C.A.)* 64 F. 823; *Raming v. Metropolitan St. Ry. Co.*, 157 Mo. 477, 57 S.W. 268; *Holwerson v. St. Louis, etc., Co.*, 157 Mo. 216, 57 S.W. 770, 50 L.R.A. 850; *Linton Coal & Mining Co. v. Persons*, 15 Ind.App. 69, 43 N.E. 651; *Dull v. Cleveland, C. C. & St. L. Ry. Co.*, 21 Ind.App. 571, 52 N.E. 1013; *Brooks v. Pittsburgh, C., C. & St. L. Ry. Co.*, 158 Ind. 62, 62 N.E. 694.

An interesting and illuminating discussion of this question is found in the case of Tognazzini v. Freeman, 18 Cal.App. 468, 474, 123 P. 540, 543, wherein the court says: "Notwithstanding the confused and indiscriminate use at times of the terms 'negligence' and 'willfulness' by judges and text-writers, it is certain that the weight of authority supports the view that those terms have a distinct and well-defined meaning, which is clearly pointed out in Holwerson v. St. Louis, etc., Co., supra [157 Mo. 216, 57 S.W. 770, 774, 50 L.R.A. 850], where it is said: 'By "negligence" is meant ordinary negligence—a term the significance of which is reasonably well fixed. By gross negligence is meant exceeding negligence—that which is mere inadvertence in a superlative degree. * * * By "willful negligence" is meant not strictly negligence at all, to speak exactly, since negligence implies inadvertence, and whenever there is an exercise of will in a particular direction there is an end of inadvertence, but rather an intentional failure to perform a manifest duty, which is important to the person injured, in preventing the injury, in reckless disregard of the consequences as affecting the life or property of another. Such conduct is not negligence in any proper sense, and the term "willful negligence," if these words are to be interpreted with scientific accuracy, is a misnomer.' " (Italics ours.)

In the case of Meek v. Fowler, supra, our Supreme Court differentiates between the terms "negligence" and "willful misconduct" in the following language: "But willful misconduct as used in this statute means neither the sort of misconduct involved in any negligence nor the mere intent to do the act which constitutes negligence."

And again, in the same case, the Supreme Court says: "As has been repeatedly declared, 'willful misconduct' means something more than negligence—more, even, than gross negligence." North Pacific S. S. Co. v. I. A. C., 174 Cal. 500, 502, 163 P. 910, 911; Kastel v. Stieber, 215 Cal. 37, 47, 8 P.(2d) 474."

It is also noteworthy, in connection with section 62 (b) of the California Vehicle Act, that in 1935 the Legislature, through the adoption of section 352 of the Vehicle Code (St.1935, p. 145), provided that a minor's liability for damages arising out of his driving a motor vehicle upon a high-

way is imposed upon the person or persons who signed and verified the application of such minor for all purposes of civil damages, and specifically provides that such liability shall not be limited to the negligence of the minor, but shall include his willful misconduct as well. Thus we see the Legislature again recognizing the distinction between negligence and willful misconduct; but for us to hold that prior to the adoption of the 1935 amendment, however desirable and advisable such amendment is, in the face of the provisions of the then existing section (section 62 (b) and the language of our courts, that it was intended to impute liability for willful misconduct to the signer of a minor's application for a license, would require us, under the guise of judicial interpretation, to read into the statute a liability which the language used in the law excludes therefrom. This we cannot do.

The judgments in favor of defendant Robert Rissen are reversed, and the causes remanded for new trials. The judgments in favor of defendant Mrs. William R. Rissen are affirmed.

We concur: YORK, Acting P. J.; DORAN, J.



12 Cal.App.2d 329

PEOPLE v. SIMMONS.

Cr. 1867.

District Court of Appeal, First District,
Division 2, California.

March 10, 1936.

1. Kidnapping ☞1

Offense of child stealing is against parent and not against child (Pen.Code, § 278).

2. Kidnapping ☞5

Evidence sustained conviction of child stealing within statute requiring that act must have been done either "maliciously," "forcibly," or "fraudulently" (Pen.Code, § 278).

Word "forcibly" as used in Pen.Code, § 278, defining child stealing and similar statutes, does not necessarily imply use of physical force, and word "maliciously," as used therein, does not have a narrower meaning than in statutory definition in Pen.Code, § 7, subd. 4 as importing a wish to vex, annoy, or injure another person, or an intent to do a

wrongful act established either by proof or presumption of law. Word "fraudulently" is very broad in its meaning, as "fraud" includes all surprise, trick, cunning, dissembling, and unfair ways by which another is deceived.

[Ed. Note.—For other definitions of "Forcibly," "Fraud," "Fraudulent; Fraudulently" and "Maliciously," see Words & Phrases.]

3. Kidnapping ☞5

As proof of element that enticing minor child away from parent must be with intent to detain and conceal to constitute child stealing, courts will consider acts and conduct of parties, together with all circumstances of case both before and after act complained of (Pen.Code, § 278).

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

Jesse Simmons was convicted of child stealing, and he appeals.

Affirmed.

Melvin M. Belli, of San Francisco, and Frederick J. Schoeneman, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

STURTEVANT, Justice.

The defendant was convicted of child stealing as provided in section 278 of the Penal Code. He made a motion for a new trial, but his motion was denied and he has appealed from the judgment of conviction and the order denying his motion.

For some time prior to September, 1934, the defendant had been living in Oakland. He was about thirty-three years of age, had been married, and was the father of two children. However, on June 4, 1934, his wife obtained an interlocutory decree of divorce. For some time Mrs. Ruth E. Kair had been living in an apartment house at 1219 Brush street in the city of Oakland. The defendant first met the Kairs in October, 1933, when he rented an apartment in the building in which they resided. At that time he was known as Jesse Styles. When he came to the apartment he brought a woman to live with him, but when Mrs. Kair learned that the woman was not his wife she directed him to move. He did so, but in March returned and again rented an

apartment. He remained only one month and again Mrs. Kair directed him to vacate the apartment. She did not see him again until the month of August, when she saw him holding her daughter's hand down in the front yard where they were half hidden behind a bush. Mrs. Kair approached him, slapped him and said: "You dirty black cur, don't touch your hand on this girl again or you will regret it the last day you live." The defendant left the premises, but told a neighbor that Mrs. Kair had slapped him and that she would be sorry for it some day. Prior to September, 1934, the defendant and Lucille Kair, a minor, met at times and went out together at night, although never with the consent of Mrs. Kair. They talked of marriage and about going away, but nothing was said to Lucille's mother. The defendant suggested to Lucille that they get married, but also stated that he could not do so under the laws of California until the divorce decree became final. However, they discussed the possibility of going outside of the state and claimed that by so doing they could legally marry. On September 28, 1934, Mrs. Kair left Oakland for a two-day visit and left her children in the care of Mrs. George, a tenant in the same building. For some time prior to that date Mrs. Kair had a savings account which stood in the joint names of herself and Lucille. The account had been so made that Lucille could withdraw money for family necessities in the event her mother was ill, but none of the money in the account belonged to the daughter. When Mrs. Kair left home the passbook was left in the drawer of a dresser, but she gave no consent that Lucille withdraw any of the money. The day after Mrs. Kair left Oakland Lucille visited the defendant at his hotel, and there they planned to leave Oakland. Lucille went to the bank, drew out the entire account, \$320, and turned it over to the defendant. They arranged that she should meet him that night at 10:30. The defendant took the money to an automobile dealer and bought a secondhand Buick for \$170, plus the tax. At about that time he stated to a friend that he was buying it to take a trip, that he had a farm up in Washington or Oregon where he was going to take Lucille. He also stated that she was pregnant and that he was responsible. To the same party he stated that he could be located in the next few days by addressing him as Joe Lenhardt, General Delivery, San Diego, Cal.

The friend was also told by the defendant not to disclose said fact to any one. That night at the appointed hour Lucille left her home with a suitcase containing all her clothes and met the defendant about a block away. At that time Lucille thought she was going to Nevada to get married. However, they drove down through Fresno to San Diego. Just before daybreak the next day they arrived at the home of defendant's sister, Mrs. White. Later on that date they crossed the line to get married at Tijuana, Mexico. Failing to find a justice of the peace, they returned to San Diego. The next day they again went to Tijuana and were there married by a priest. Again they returned to Mrs. White's home, where they remained for about a week, living as man and wife. Three or four days after they left Oakland, Fred Langerman wrote to the defendant at San Diego informing him that the police were looking for him. After remaining a short time longer in San Diego, the defendant gave Lucille money with which to purchase a ticket on the bus and she returned to Oakland. A short time thereafter the defendant also left, intending to hitchhike to Oakland. After Lucille had returned to her home, the defendant both telephoned and wrote Mrs. Kair many times requesting her to withdraw the charges against him. At all times he withheld information as to where he was.

In presenting his appeal, the defendant contends (1) there was no forcible enticing; (2) there was no fraudulent enticing; (3) there was no malicious enticing; and (4) there was no concealment and detention, neither was there concealment nor detention.

[1-3] Section 278 of the Penal Code is as follows: "Definition and punishment of child-stealing. Every person who maliciously, forcibly, or fraudulently takes or entices away any minor child with intent to detain and conceal such child from its parent, guardian, or other person having the lawful charge of such child, is punishable by imprisonment in the state prison not exceeding twenty years." The offense so defined is against the parent and not against the child. *People v. Gillispie*, 104 Cal.App. 765, 767, 286 P. 502. The word "forcibly," as used in this and similar statutes, does not necessarily imply the use of physical force. 1 C.J. 285. The word "maliciously," as used in the statute, does not, at least, have a narrower meaning than as defined in subdivision 4, section 7, of the Penal

Code. The word "fraudulently" is very broad in its meaning. "No definite and invariable rule can be laid down as a general proposition defining fraud, as it includes all surprise, trick, cunning, dissembling, and unfair ways by which another is deceived." *Wells v. Zenz*, 83 Cal.App. 137, 140, 256 P. 484, 485. As the language of the statute is in the disjunctive, it was sufficient if the proof showed that the defendant's act was either malicious, forcible, or fraudulent. The prosecution was not bound to prove all three. The statute does not include "concealment" nor "detention." It does contain as an element "with intent to detain and conceal." As proof of that element, the courts will consider the acts and conduct of the parties, together with all the circumstances of the case both before and after the act complained of. *People v. Black*, 147 Cal. 426, 431, 81 P. 1099, *People v. Taylor*, 88 Cal.App. 495, 500, 263 P. 560, and *People v. Annunzio*, 120 Cal.App. 89, 94, 7 P.(2d) 739. "It cannot be gainsaid that proof of intercourse with the girl by the appellant while they were in Los Angeles tended directly to show the intent with which she was enticed from her parents." *People v. Edenburg*, 88 Cal.App. 558, 568, 263 P. 857, 861. When the proof is measured by the foregoing rules, it is not insufficient in any respect.

The judgment and order appealed from are affirmed.

We concur: NOURSE, P. J.;
SPENCE, J.



12 Cal.App.2d 336

**COOPER v. SUPERIOR COURT IN AND
FOR LOS ANGELES COUNTY et al.**
Civ. 10539.

District Court of Appeal, Second District,
Division 1, California.

March 10, 1936.

I. New trial $\S$ 125

Where new trial was sought by plaintiff on issue of damages only and by defendant on all the statutory grounds trial court was unauthorized, on denial of both motions, to grant new trial solely because original instructions to jury had been destroyed and no stenographic report had been taken of them.

2. New trial 94

Trial court is unauthorized to grant new trial because original instructions were destroyed and no stenographic report of instructions was taken, notwithstanding statute relating to new trial, where an appeal is to be taken and stenographic notes cannot be transcribed (Code Civ.Proc. § 953e).

Original proceeding by Josephine L. Cooper against the Superior Court in and for Los Angeles County and the Honorable Minor Moore, Judge thereof, seeking to annul an order of the trial court granting a new trial.

Order annulled.

Thomas B. Reed and L. G. Shelton, both of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and Douglas De Coster, Chief Deputy Co. Counsel, both of Los Angeles, for respondent Superior Court.

HOUSER, Presiding Justice.

By this proceeding petitioner seeks an order from this court by which a former order that was made by the trial court will be annulled. The facts which give rise to the situation from which petitioner seeks relief, in substance, are as follows:

On the trial of an action that was pending in the superior court, in one cause of action therein the jury returned a verdict in favor of the plaintiff therein (who is the petitioner herein) in the sum of \$2,500; and on a second cause of action therein the jury returned a verdict, likewise in favor of the plaintiff, for the sum of \$700. Thereafter the defendant in said action served and filed a notice of intention to move for a new trial, the grounds of which, as were set forth in said notice, being all the grounds that are specified by the statute in such cases provided. The plaintiff also moved for a new trial as to the cause of action in which she had been awarded a verdict of \$700, but limited the said motion for new trial to the issue of damages only. Following a hearing as to said motions, the trial court made the following order, to wit:

"It is ordered that the motion for new trial made by the plaintiffs and the motion made by the defendants, both and each of them, are denied on the grounds set forth in the notices of the motion, for the reasons given in the written opinion filed herewith;

"It is further ordered and adjudged that by reason of the fact that the stenographic reporter at the time of the trial did not make a record of the instructions of the court as delivered to the jury and by reason of the fact that the instructions as read have been lost or destroyed and there is no way of recovering such instructions by reason of the inability of the stenographic reporter who participated at the trial to produce the court's instructions as delivered, judgment herein is hereby set aside and vacated and a new trial of the action is hereby ordered upon all of the issues as to both the plaintiffs and the defendants, including liability as well as damages, if any."

It thus becomes evident that, as far as any statutory grounds for the granting of a new trial were concerned, each of the motions therefor was denied, but that solely because no stenographic record of the instructions that were given to the jury ever was in existence, and that the originals of those instructions had been lost or destroyed, a new trial of the action was ordered.

[1] On behalf of petitioner it is urged that in the premises the trial court had no power to grant the motion on a ground that was neither statutory, nor specified in the notice of such motion, or, in effect, of its own motion; and the authorities in that regard to which the attention of this court has been directed are in support of that contention. *Quevedo v. Superior Court*, 131 Cal.App. 698, 21 P.(2d) 998, and authorities therein cited; *Manufacturers' Finance Corporation v. Pacific Wholesale Radio*, 130 Cal.App. 239, 19 P.(2d) 1013.

[2] Moreover, although not a part of the record herein, assuming the alleged fact to be true, to wit, that the original instructions that were given by the trial court to the jury had been inadvertently destroyed, and "that the stenographic reporter at the time of the trial did not make a record of the instructions," in the absence of statutory provisions by which such facts or either of them might have been made a ground for new trial, neither of such facts furnishes a valid reason for an order by which a new trial might have been granted. *Visher v. Webster*, 13 Cal. 58; *People v. Botkin*, 9 Cal.App. 244, 98 P. 861.

Nothing contained in either the provisions of section 953e of the Code of Civil Procedure, or in the case of *Moore v. Specialty Oil Tool Co.*, 128 Cal.App. 662, 18 P.(2d) 82, that are cited by respondent herein, de-

tracts from the several rulings in the cases hereinbefore cited.

Since from the record of the proceedings in this court it appears that the respondent has not answered the petition, but has filed a demurrer thereto only, it is ordered that said demurrer be, and it is, overruled.

It is further ordered that the order by which the motion for new trial was granted, both as it may affect the plaintiff and the defendant in the action in the lower court, be, and it is, annulled.

We concur: YORK, J.; DORAN, J.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Action by Louis Krohn, a minor, by his guardian ad litem, Bessie Krohn, against Troy Patrick and others. From an adverse judgment, plaintiff appeals.

Affirmed.

Alfred J. Smallberg, of Los Angeles, for appellants.

Willis I. Morrison and Richard Oliver, both of Los Angeles, for respondents other than Troy Patrick.

Troy Patrick in pro. per.

ROTH, Justice pro tem.

The appeal from the judgment in this action presents primarily the question whether Troy Patrick, one of the respondents (hereinafter called Patrick), was an employee of respondents Superbo Manufacturing Company, a corporation, Superbo Water Heater Company, Julius Brombacher, doing business as Superbo Water Heater Company, and Julius Brombacher (hereinafter referred to as respondents).

The case was tried before a jury, which was instructed to bring in a verdict for all respondents except Patrick. As to Patrick, the case went to the jury on the evidence and instructions of the court. The jury found in favor of Patrick, and, pursuant to the direction of the court, in favor of the respondents. Judgment in favor of all was entered on the verdict.

[1] The order directing a verdict in favor of respondents was made on the theory that the evidence did not establish the relation of employer and employee. This is the primary issue raised on the appeal from the judgment. It is unnecessary, however, to pass upon this question, because the nature of the legal relationship between Patrick and respondents is moot by reason of the fact that the judgment in favor of Patrick must be sustained.

[2] Appellant argues briefly that the evidence does not sustain the verdict in favor of Patrick. None of the evidence is referred to. We have nevertheless read the whole of the bill of exceptions, and find the evidence in such a state as to have permitted the jury to find for appellant or Patrick with legal propriety. It follows that the jury's conclusion is binding on this court.



12 Cal.App.2d 339

KROHN v. PATRICK et al.
Civ. 10574.

District Court of Appeal, Second District,
Division 1, California.
March 10, 1936.

1. Appeal and error ⇐843(3)

Question whether evidence on issue as to whether alleged negligent defendant was employee of other defendants was sufficient for jury held moot and not required to be determined, where jury on sufficient evidence found in favor of alleged negligent defendant.

2. Appeal and error ⇐1001(1)

Where evidence is such as to permit jury to find for either plaintiff or defendant with legal propriety, jury's conclusion is binding on appellate court.

3. Trial ⇐243

In negligence action by 16 year old plaintiff, instruction referring to reasonable and prudent man in defining negligence and other instructions referring to ordinarily prudent person held not conflicting with instruction that jury should not apply to plaintiff the same rules jury would apply to a grown man.

4. Trial ⇐295(1)

Instructions must be read as a whole.

5. Trial ⇐295(1)

A questionable instruction is not ground for reversal when respective rights and duties of parties are clearly ascertainable from charge as a whole.

[3-5] Appellant complains further that the court gave inconsistent and conflicting instructions. The appellant in this case at the time of the accident was 16 years old. The court, in one of its instructions defining negligence, referred to "a reasonable and prudent *man*." (Italics ours.) In another of its instructions the court at length and in detail instructed the jury how to determine the existence of contributory negligence on the part of a minor. In the body of this instruction is the language: "You should not apply to the plaintiff in the case the same rules you would apply to a grown man." In another of its instructions the court refers to "ordinarily prudent persons." We recognize the rule that, when contradictory instructions are given upon a material point, it is frequently impossible for the jury to decide which one to follow, and that it is always impossible, after a verdict, to know which of the conflicting instructions the jury did follow. *Giraudi v. Electric Imp. Co.*, 107 Cal. 120, 40 P. 108, 28 L.R.A. 596, 48 Am.St.Rep.114; *Soda v. Marriott*, 118 Cal.App. 635, 5 P. (2d) 675; *Pittam v. City of Riverside*, 128 Cal.App. 57, 16 P.(2d) 768. We feel, however, that there is no room for the application of said rule. The instructions are not contradictory. One or two, standing alone and unexplained by the others, might be evasive or incomplete. Reading all of the instructions, however, we are satisfied that the jury understood, and in legal theory, at least, adopted the rules of care and negligence as applied to a minor of the age of 16 and not "a grown man." Instructions must be read as a whole, and a questionable instruction is not ground for reversal when the respective rights and duties of the parties are clearly ascertainable from the charge as a whole. *Anderson v. Southern Pacific Co.*, 129 Cal.App. 206, 18 P.(2d) 703; *American Marine Paint Co. v. Nyno Line, Inc.*, 70 Cal.App. 415, 233 P. 366; *Douglas v. Southern Pacific Co.*, 203 Cal. 390, 396, 264 P. 237.

The other instructions criticized by appellant fall within the same category as those alluded to.

None of the other questions raised have any merit.

The judgment is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.

5 Cal.2d 626

**KUENZELL et al. v. CALIFORNIA MUT.
BUILDING & LOAN ASS'N.
S. F. 15467.**

Supreme Court of California.

March 17, 1936.

Mortgages Ⓒ338

Under moratorium act allowing 30 days from effective date to file petition to postpone sale of realty under trust deed where default had been recorded prior to effective date of act, mortgagor whose default had been so recorded and whose petition was filed subsequent to the 30-day period allowed, *held* not entitled to relief (St.1935, pp. 56, 57, §§ 2, 3).

In Bank.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Proceeding by Charles A. Kuenzell and others against the California Mutual Building & Loan Association. From an adverse judgment, the petitioners appeal.

Affirmed.

Pierre A. Fontaine, of Oakland, for appellants.

David C. Dutton, of Oakland, for respondent.

PER CURIAM.

On March 25, 1935, Kuenzell and others filed a petition pursuant to the Mortgage Moratorium Act of January 31, 1935 (Stats.1935, p. 56), to postpone sale of real property under a trust deed. The beneficiary filed a demurrer to the petition, which the court sustained without leave to amend on the ground that the petition was not filed within the time specified by the act. From the judgment entered on the court's order the petitioners have appealed.

A notice of the petitioners' default under the trust deed had been recorded in November, 1934. The act became effective on January 31, 1935. Section 3 thereof provided that at any time within 30 days from the effective date of the act, or within 30 days from the recording of the notice of default, but in any event not later than September 1, 1935, the trustor under a deed of trust may file a petition in the superior court praying for an order postponing the sale of the property under the trust deed. The petition herein was filed on a day subsequent to the expiration

of the 30-day period from the effective date of the act.

The notice of default having been recorded prior to the effective date of the act, the plain provisions of the act required the trustors to file their petition within the 30-day period following the effective date of the act. No argument or statement of fact is made which can excuse the petitioners' failure to bring themselves within those provisions. This is a moratorium act, and the debtor must comply with its provisions in order to be entitled to relief under it. The petitioners had their opportunity to invoke the benefits of the act by filing their application in time. Their failure so to do left the trustee free to perform the duties of his trust. This result is made apparent by reason of the additional provision in section 2 of the act that during the 30-day period following the effective date of the act no sale could be held by the trustee. This court may not rewrite the act to accord with the petitioners' contention that an application might be filed by them at any time up to September 1, 1935.

The judgment is affirmed.



5 Cal.2d 598

**PEOPLE v. CABRERA.
Cr. 3913.**

Supreme Court of California.
March 11, 1936.

Homicide Ⓒ253(1)

Evidence sustained conviction of defendant, who stated that he had made up his mind on day preceding shooting to kill deceased and who did not deny killing or offer any explanation thereof, of first-degree murder.

In Bank.

Appeal from Superior Court, San Bernardino County; Chas. L. Allison, Judge.

Tony Cabrera was convicted of murder in the first degree, and he appeals.

Affirmed.

Albert D. Trujillo and Theo. G. Krumm, both of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., Bayard Rhone, Deputy Atty. Gen., and Stanley Mussell, Dist. Atty., of San Bernardino, for the People.

WASTE, Chief Justice.

In an information filed by the district attorney of San Bernardino county the defendant was charged with the murder of Alberta Smith. Defendant entered pleas of not guilty and not guilty by reason of insanity. The latter plea was subsequently withdrawn. At the conclusion of the trial the jury returned a verdict of murder of the first degree without recommendation. From a judgment imposing the extreme penalty and an order denying a new trial, this appeal is prosecuted.

The cause stands submitted on the transcript of the proceedings had in the court below and a memorandum filed by the Attorney General. No briefs have been filed on behalf of the defendant.

Examination of the record discloses an unprovoked, premeditated homicide properly characterized by the jury as murder in the first degree. It appears that the defendant, twenty-one years of age, and the deceased, a girl seventeen years of age, had been living together as husband and wife, though unmarried, for approximately fifteen months prior to the shooting. Quarrels had resulted in their separation shortly prior thereto. On the day preceding the shooting, the defendant made arrangements to purchase a gun from a merchant dealing in such commodities. Police regulations necessitated a delay of twenty-four hours in the delivery of the weapon. During the morning of the day of the homicide, the defendant returned to the store, paid the balance due on the purchase of the gun, and took delivery thereof. At approximately 11:30 a. m. of the same morning he visited a tavern, accompanied by the mother of the deceased, whom he had met. While there defendant consumed three or four glasses of beer and, during the course of the conversation, displayed the gun, saying he was going to "get" some fellows with whom he had quarreled. It was thereupon agreed that defendant should proceed to the apartment occupied by the deceased and her mother while the latter undertook to locate the deceased, in the hope of effecting a reconciliation of the parties. The defendant and the mother of the deceased left the tavern at approximately 1 p. m. Both the mother

and bartender testified that defendant was not intoxicated when he left. Within a very few minutes all of the parties, the defendant, the deceased, and her mother, met at the apartment. The mother testified that the defendant then requested the deceased to return to him; that she declined, whereupon defendant took the gun out of his pocket and threw it on the bed; that the deceased protested she was too young to die; that deceased then stated that defendant had threatened to kill her on three or four prior occasions; that the defendant said, "You are not afraid to die' and he shot"; that the deceased at the time was sitting in a chair and the defendant was standing immediately in front of her; that the bullet entered the forehead of deceased between the eyebrows; and that when the witness went to summon help the defendant fled.

The bartender at the tavern testified, in addition to other things, that defendant left his place at approximately 1 p. m.; that he returned in about twenty minutes and requested that the witness call him a taxicab in a hurry; that the police car arrived first; and that defendant handed over the gun and left with the police.

The shooting occurred on March 26, 1935, and the autopsy surgeon testified the deceased died on April 3, 1935, from infection and pneumonia that had set in as a result of the bullet wound.

In his testimony before the coroner's jury and in statements freely and voluntarily made to the chief of police and to the district attorney, all of which were offered in evidence, the defendant, in substance, related the facts as above narrated and candidly admitted shooting the deceased because he "loved her." Upon each of these occasions he stated that he had made up his mind on the day preceding the shooting to kill the deceased, the delay in procuring the gun deferring his plan one day.

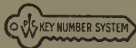
Defendant's defense consisted solely of reading a portion of his testimony given at the coroner's inquest and of his denial of a conversation, testified to by one of the police officers, in which defendant, upon being informed that the deceased would probably recover, is supposed to have said that he was sorry he did not kill her because if she recovered he would "have to serve ten or fifteen years in the pen." Though defendant appeared as a witness on his own behalf, he did not deny the kill-

ing or offer any explanation thereof, nor did he repudiate his confessions other than as just stated.

Further statement of the record is unnecessary. The evidence, as is apparent from the above summary, discloses a cold-blooded, premeditated murder, properly characterized by the jury as murder of the first degree. We have examined the rulings on the evidence and the instructions given to the jury and find nothing therein prejudicial to the defendant.

The judgment and order are, and each is, affirmed.

We concur: CURTIS, J.; LANGDON, J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.



5 Cal.2d 608

PEOPLE v. KIMBALL.

Cr. 3954.

Supreme Court of California.

March 13, 1936.

1. Criminal law §494

Medical evidence that defendant apparently had no known psychoses or mental diseases, and that defendant at time of homicide knew nature and quality of his act and understood difference between right and wrong, *held* to support finding that defendant was sane.

2. Criminal law §48

Defendant's "responsibility" for act depends upon whether defendant knew nature and quality of act at time of its commission, and, if evidence thereof is affirmative, defendant is legally accountable for his act, notwithstanding defendant may be mentally abnormal or defective or may suffer from some nervous disorder.

3. Criminal law §673(2)

In murder prosecution, on plea of not guilty because of insanity, admitting testimony tending to prove corpus delicti and defendant's connection therewith *held* discretionary, where trial court admonished jury that evidence was admitted solely for whatever bearing it might have on sanity issue (Pen.Code, § 1016).

4. Criminal law §637

That defendant was handcuffed to officer throughout trial presented no error,

where defendant had expressed an intent to escape, had threatened to kill several witnesses, and lead pipe had been found concealed under his clothing.

5. Criminal law §645

Refusal to permit counsel for defendant pleading not guilty by reason of insanity to open and close argument on such issue *held* discretionary (Pen.Code, § 1016).

In Bank.

Appeal from Superior Court, Placer County; J. B. Landis, Judge.

Earl Bud Kimball was convicted of murder, and he appeals.

Affirmed.

L. C. Anderson, Al. B. Broyer, and Harvey A. Shiffer, all of Roseville, for appellant.

U. S. Webb, Atty. Gen., Ralph H. Cowing, Deputy Atty. Gen., and Lowell L. Sparks, Dist. Atty., and C. E. Tindall, Deputy Dist. Atty., both of Auburn, for the People.

WASTE, Chief Justice.

Defendant, a youth twenty-two years of age, was charged with murder in an information filed by the district attorney of the county of Placer. He entered pleas of not guilty and not guilty by reason of insanity. Subsequently, he withdrew the former plea, thereby admitting the commission of a wilful and premeditated homicide as charged (section 1016, Pen.Code), and went to trial solely on the sanity issue. At the conclusion of the trial the jury found defendant to be sane at the time of the perpetration of the offense and the trial court imposed the extreme penalty. Defendant appealed from the judgment and order denying a new trial.

While on the witness stand in his own behalf, the defendant admitted having killed two men, for the murder of one of whom he now stands convicted. The other victim remains unidentified. The bodies of his victims had been concealed by dropping them into an abandoned mine shaft. They were discovered purely by accident in a search for cattle that had been missing in the vicinity. Though defendant testified that when quite young he had been kicked in the head by a mule, there is nothing in his testimony that would warrant a finding of insanity. He called no other witnesses in his behalf.

The two alienists appointed by the court to examine the defendant, and one called by the prosecution, testified, in substance, that their respective examinations of defendant satisfied them that defendant presented no evidence of any of the known psychoses or mental diseases, but rather fell into the classification of the "criminally inclined." Each alienist expressed the opinion that defendant, at the time of the perpetration of the homicide of which he stands convicted, knew the nature and quality of his act and understood the difference between right and wrong.

[1,2] This evidence is ample to support the verdict that defendant was sane. It is settled that "responsibility depends upon whether the defendant knew the nature and quality of the act at the time of its commission, and the wrongfulness of the act. If he had sufficient mental capacity to know what he was doing, and to know that it was wrong, he is legally accountable for his act. Even though he may be mentally abnormal or defective, or may suffer from some nervous disorder, he is, under our law, held to full responsibility for his act, unless the evidence brings him within the strict legal meaning of insanity." *People v. Dugger* (Cal.Sup.) 54 P.(2d) 707, 709; *People v. Keaton*, 211 Cal. 722, 724, 296 P. 609.

[3] It is urged that the court below erred in admitting the testimony of certain witnesses tending to prove the corpus delicti and defendant's connection therewith. He contends that by his single plea of insanity he admitted the offense and that the testimony complained of served only to prejudice him before the jury. There is no merit in the point. The trial court declared that the evidence was admitted solely for whatever bearing it might have on the sanity issue. As to the propriety of the ruling there can be no question. In 8 California Jurisprudence 51, § 162, it is said, in part, that it is "competent to prove the acts, conduct and declarations of the defendant, not only at the time of, but also within a reasonable time before and after, the commission of the alleged criminal act, if they appear to have any tendency to show his mental condition when the crime was committed." The matter rests largely in the discretion of the trial court. No abuse thereof appears in this case. Moreover, while on the witness stand in his own

behalf, the defendant narrated many of the circumstances connected with the homicide.

[4] Throughout the trial defendant was handcuffed to an officer. He now contends that the effect of this was (a) to deprive him of a fair and impartial trial, (b) to compel him to be a witness against himself, (c) to deprive him of the right to confer with counsel without the hearing of an officer, and (d) to deprive him of his liberty without due process of law.

After he had voluntarily taken the witness stand in his own behalf and following the testimony of two of the alienists, defendant for the first time objected to being manacled to the officer. In support of his motion to be released from bonds, the defendant cited the case of *People v. Harrington*, 42 Cal. 165, 10 Am.Rep. 296. While ordinarily a defendant should not be manacled or unduly restrained when in court, the cited case recognizes that such restraint is proper when necessary for his detention. The instant case did not present the usual or ordinary situation. In opposition to defendant's motion to be released from the manacles, the prosecution produced evidence tending to show that defendant had expressed an intent to escape; that he had threatened to injure or kill three or four witnesses in the courtroom by striking them over the heads with a chair; that on the first day of the trial a piece of lead pipe, fourteen inches in length, was found concealed in the top of one of his boots and under the leg of his overalls; and that on the afternoon of the same day there was found concealed on his person a bar of hard, dry soap wrapped in a handkerchief, in the nature of a sling. Under the circumstances, there was no error in manacling defendant throughout the trial.

[5] We find no error or abuse of discretion in the ruling of the trial court refusing to permit the defendant to make the closing argument on the sanity issue. *People v. Hickman*, 204 Cal. 470, 482, 268 P. 909, 270 P. 1117; *People v. Goold*, 215 Cal. 763, 766, 12 P.(2d) 958.

The judgment and order are, and each is, affirmed.

We concur: SEAWELL, J.; THOMPSON, J.; SHENK, J.; CURTIS, J.; LANGDON, J.

5 Cal.2d 377

SCHULTZ v. TOWN OF LAKEPORT et al.
Sac. 4989.

Supreme Court of California.
March 10, 1936.

In Bank.

Appeal from Superior Court, Lake County; Benjamin C. Jones, Judge.

On modification.

Prior opinion, 54 P.(2d) 1110.

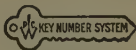
Lovett K. Fraser, of Lakeport, for appellants.

Louis Bartlett, of San Francisco, for respondent.

WASTE, Chief Justice.

The plaintiff and respondent herein having filed on March 4, 1936, his consent to remit all damages in excess of \$226.50 herein, pursuant to the direction in the decision of this court, 54 P.(2d) 1110, filed February 24, 1936, it is ordered that the judgment be, and it is hereby, modified by reducing the same to the sum of \$226.50, and, as thus modified, is affirmed, neither party to recover costs on appeal.

We concur: SHENK, J.; SEAWELL, J.; THOMPSON, J.; CURTIS, J.; LANGDON, J.



5 Cal.2d 425

WILSON et ux. v. BROWN et al.
Sac. 4954.

Supreme Court of California.
Feb. 28, 1936.

Rehearing Denied March 26, 1936.

1. Landlord and tenant ⇨92(1)

Evidence *held* to show that parties to lease, under which lessors reserved right to sell property at any time but gave preference to purchase to lessees, understood that lessees had preferential right to purchase such property at any time offered for sale, although purchaser was willing to accept lessees as tenants.

2. Contracts ⇨147(1)

In construing instrument, intent of parties is controlling.

3. Specific performance ⇨121(3)

Evidence justified denial of defense to suit by lessees in possession of property, under lease giving them preference to purchase in case of sale by lessors, for specific performance of such option, that lessees had rejected opportunity to purchase such property.

4. Specific performance ⇨7

Receipt by lessees in payment of lessor's debt to them of money which lessor had received as part of purchase price of leased premises *held* not waiver of lessees' right to specifically enforce their right of option to purchase such premises under their lease.

5. Specific performance ⇨12

Fact that encumbrance was outstanding against leased premises at time lessees were given preference to purchase premises in case of sale by lessors *held* not to preclude lessees from specifically enforcing such option against purchasers of property free of such encumbrance, where lessees had been given no opportunity to exercise option.

6. Specific performance ⇨126(2)

Where lessors conveyed mortgaged land which included premises leased with option to purchase, trial court properly directed purchasers to convey leased premises to lessees free of encumbrances, with provision for retaining jurisdiction in case of default by purchasers.

7. Appeal and error ⇨1048(2)

Where testimony of party in case tried without jury was vague and ambiguous, close questioning of such party to make certain his real meaning *held* not prejudicial.

In Bank.

Appeal from Superior Court, Sonoma County; Hilliard Comstock, Judge.

Suit by Walter R. Wilson and wife against Samuel Brown and others. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Fred S. Howell, of Petaluma, for appellants.

Lounibos, Schwobeda & McGoldrick, of Petaluma, for respondents.

CURTIS, Justice.

This was a suit for specific performance of an option to purchase contained in a lease of service station premises situated in Petaluma. The lease, entered into between Samuel Brown and his wife, as lessors, and Walter R. Wilson, and his wife, as lessees, contained the following provision, the construction of which is in dispute: "The les-

sors hereby reserve the right to sell the property at any time, and in case of sale, preference to purchase said property shall be given the said lessees." This same paragraph of the lease contained the provision that, in the event the lessees should not exercise said preference, they agreed to sell and convey their interest in the service station fixtures to the said lessors, or any person they might designate, at the then market value. The premises which were held by the lessees under the terms of their lease were a portion of a larger tract owned by the lessors, and the lessors, without giving the lessees the opportunity of purchasing the premises occupied by them, sold the entire tract of land to a real estate dealer, A. W. Baker. This suit was then commenced by the lessees to compel the conveyance to them of said property. The trial court found in favor of the plaintiffs, and entered a judgment directing that plaintiffs should deposit with the county clerk of Sonoma county the sum of \$3,100 as the reasonable value of said premises; that A. W. Baker and his wife should execute and deliver to the said county clerk a good and proper bargain and sale deed conveying title free and clear of all encumbrances to the plaintiffs; that the county clerk should deliver the sum of \$3,100 to A. W. Baker and wife, and deliver to the plaintiffs said deed. The court further provided in said judgment that, if A. W. Baker defaulted in depositing the deed, the county clerk was authorized to return the sum of \$3,100 to the plaintiffs, and the court expressly retained full jurisdiction to the end that further judgment and decree might be entered "in accordance with the foregoing provisions."

[1,2] Appellants claim that the trial court placed an erroneous construction on the lease. In this behalf it is argued that the lessors had the unrestricted right under their lease to sell the property subject to plaintiffs' lease. It is argued that the plaintiffs were given an option to purchase only in the event a sale by the landlord would terminate the lease of plaintiffs, and that, in the event a purchaser was willing to accept the plaintiffs as lessees and continue the lease, plaintiffs could not complain that they had not been given an opportunity to purchase the premises. Although this may now be the claim of the defendants, we think it satisfactorily appears from the testimony of both the landlord lessors and the purchaser, Baker, that it was their understanding that the plain-

tiffs had a preferential right to purchase said property if it was at any time offered for sale by the lessors independent of the continuance of their lease. For example, Samuel Brown, the lessor, testified: "When I offered the whole thing to Baker, I told him he would have to see the Wilsons. When I told Baker I would sell him the whole thing I told him he must give the Wilsons a chance if they wanted it, and he went down and offered it to them." It is elementary that, in the construction of any instrument, the intent of the parties is controlling. There can be no doubt that both parties to the lease, both lessors and lessees, understood by the language therein employed that the lessees should have the first right to purchase the property which they held under lease and on which their service station and a dwelling house were located. As was said in *Hale v. Harbor Petroleum Corp.*, 139 Cal.App. 455, 33 P.(2d) 1039, 1042: "Where the construction given an instrument appears to be consistent with the true intent of the parties as shown by the attendant facts and circumstances, another interpretation will not be substituted on appeal though it seem equally tenable."

[3] Appellants contended upon the trial of the case that the lessees had been offered the opportunity to purchase the premises described in the lease, but had in effect rejected the offer by stating that they did not desire to purchase all of the leased premises. Appellants claimed that the lessees stated that they did not desire to buy the dwelling house, but only the premises on which the service station was located. Had this claim been satisfactorily substantiated upon the trial of the case, it would have been a complete defense to the suit by lessees for specific performance of their option. However, upon the trial both plaintiffs testified positively that no definite offer to sell the premises was ever made to them by the lessors, and Mrs. Wilson denied unequivocally that they had ever stated that they did not desire to buy the dwelling house, but wanted to buy only the land on which the service station was situated. The court made the following finding: "It is not true that plaintiff did express a desire and purpose of purchasing only a portion of the land and premises described in plaintiffs' lease and expressly declined or refused to elect to purchase the remaining portion thereof." It is obvious that, the dispute as to whether or not the lessors actually offered the premises to the lessees,

and whether lessees rejected said offer by a counter offer to purchase only a portion of the premises, having been decided adversely to the contention of appellants upon conflicting evidence by the trial court, such determination will not be questioned here.

[4] Appellants also attempted to prove in the trial court a waiver by the lessees of their right of option under the lease upon the ground that the lessees had presented their bill for \$90.99, due them from the lessor, Brown, who had been trading at their store which was managed in conjunction with the service station, to Mr. Meyer, who was acting as escrow holder in the deal between Brown and Baker, and received payment out of the purchase money deposited by Baker for the consummation of the purchase of the property. The mere fact that the lessees secured payment of their bill against Brown out of the money paid to Brown by reason of the sale of the property would not of itself necessarily constitute a waiver, particularly in view of the testimony of Baker that the bill was presented to Meyer after the sale between himself and Brown had in fact been consummated. The lessees were merely securing payment of their account from an available fund, and there is nothing to indicate that by such action they waived their right of option, even though they knew at the time they obtained payment that it was money paid to Brown as the purchase price upon the premises in question.

[5] Appellant Baker also complains that, in addition to the title to the premises held by Brown, there was at the time of his purchase an outstanding right in the mother of Brown to one-third of the rents, issues, and profits from said property. Baker argues that, as Brown's title was so encumbered at the time he entered into the option with the lessees, he (the purchaser) should not be required to convey a title free and clear of this encumbrance. The record shows no separate negotiation for the purchase of this interest in the property, but does show that the purchase price by Baker of \$7,000 covered the entire property free and clear of this encumbrance. It may be implied, we think, that, when Brown gave to the Wilsons the option to purchase the leased premises, it was understood between the parties that a satisfactory title to the property would be furnished by Brown. Brown secured a release of this encumbrance upon the sale of the

property to Baker. Had he sold to the lessees under their option, he would have been required to secure such a release, as he was to give them a satisfactory title. Unquestionably the value of this release in so far as it affected the leased premises was taken into consideration by the trial court in fixing the sum of \$3,100 as the price plaintiffs should pay for a conveyance of the leased premises. Baker, taking with notice of the rights of the lessees, stands in the same position as Brown, and cannot, therefore, be heard to complain.

[6] Appellant Baker also complains that there is outstanding against the entire property purchased by him a mortgage in the sum of \$5,000 held by the Bank of America National Trust & Savings Association. He insists that in the purchase of the property he paid the sum of \$2,000 in cash and assumed the mortgage of \$5,000 due the bank as the balance of the purchase price of \$7,000. As the \$3,100, ordered by the court to be paid by the plaintiffs, will not clear off the entire mortgage on the large tract purchased by him from the lessors, and the bank cannot be made to release from the mortgage the premises desired by the plaintiff, Baker argues that he is required by said decree to pay off the balance of the \$5,000 debt in order to furnish to plaintiffs a deed to the property covered by plaintiffs' lease free and clear of all encumbrances. It is impossible to tell from the record whether or not the mortgage for \$5,000 was paid off by Baker at the time of the sale or not. The pleadings of defendants, as well as the agreement of sale entered into between Brown and Baker, indicate that the entire purchase price was paid by Baker, and the property was deeded to him free and clear of encumbrances. There is, however, testimony in the record of Mr. Meyer to the effect that \$2,000 in cash was paid by Baker and the mortgage of \$5,000 assumed by him. It is quite possible that the bank holding the mortgage will be willing through negotiations with Baker to release the portion of the premises to which plaintiffs are entitled upon the payment by Baker of the whole or portion of the \$3,100 which he will acquire from the plaintiffs. The decree gives to him the opportunity of so negotiating. It is to be noted, however, that the decree does not attempt to command Baker at all events to deliver the deed free and clear of all encumbrances. It merely furnishes him with the opportunity of doing so. If

he does not do so, but defaults in the delivery of the deed, then the court has retained jurisdiction, as a court of equity may do, to give such other relief in the premises as the equities of the case may require. The lower court was well within its right in making and entering such a judgment.

[7] Complaint was also made that the defendants were not accorded a fair and impartial trial. The questioning by the judge of Baker is cited as showing a prejudice on his part against this defendant. The case was tried without a jury. Although it is true that the judge questioned this defendant rather closely, it is apparent that the testimony of the defendant was vague and ambiguous, and the questions were asked simply to make certain the real meaning of the defendant.

The judgment is affirmed.

We concur: WASTE, C. J.; THOMPSON, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.



11 Cal.App.2d 274

EL CLARO OIL & GAS CO. v. DAUGHERTY,

Com'r of Corporations.

Civ. 9994 (1-2).

Supreme Court of California.

March 16, 1936.

Licenses ⇐18½

Oil company's issuance of assignments and agreements to assign its interest in oil leases so far as applicable to certain parcels of land and assignment of its interest in one tract covered by such leases in consideration of portion of oil and gas produced thereon by assignee, without permits from commissioner of corporations, *held* violation of Corporate Securities Act (Deering's Gen.Laws 1931, Act 3814, § 2 (a), par. 7).

In Bank.

Appeal from Superior Court, Los Angeles County; J. J. Trabucco, Judge.

Suit by the El Claro Oil & Gas Company against Edwin M. Daugherty, as Commissioner of Corporations of the State of California. From an adverse judgment, defendant appealed. A judgment for

plaintiff was reversed by the District Court of Appeal [53 P.(2d) 1028], and plaintiff petitions for a hearing in the Supreme Court.

Petition denied.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for appellant.

Arthur C. Fisher, of Los Angeles, for respondent.

PER CURIAM.

In denying respondent's petition for a hearing in this court, we withhold our approval from those portions of the opinion of the District Court of Appeal which hold, or can be construed as holding, that the three instruments therein considered were not, when issued separately, within the meaning of section 2, division (a), paragraph 7 of the Corporate Securities Act (Deering's Gen.Laws 1931, Act 3814). It is not necessary to determine these questions at this time. We are convinced that the transactions here involved, when entered into without a permit, constitute a violation of the act.

The petition is denied.



5 Cal.2d 615

BRYCE v. O'BRIEN et al.

L. A. 15195.

Supreme Court of California.

March 17, 1936.

1. Appeal and error ⇐931(1)

Where appellant fails to specify errors committed by trial court or to set out wherein evidence is insufficient to support findings and judgment, sufficiency of evidence to support findings will be presumed.

2. Deeds ⇐74

Widow's delivery of deed wherein name of grantee was left blank to facilitate efforts to arrange exchange of property for bonds *held* not to estop widow from asserting invalidity of title of purchaser from person whose name was wrongfully filled in as grantee, so as to preclude recovery of property.

3. Deeds ⇐76

Instrument wholly void cannot be made foundation of good title even under equitable

doctrine of bona fide purchaser, notwithstanding that encumbrancer acted in good faith in dealing with person who apparently held legal title.

In Bank.

Appeal from Superior Court, Los Angeles County; J. T. B. Warne, Judge.

Action by Alice C. Bryce against Robert T. O'Brien and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Kibbey, Cooper & Dulin, Walter B. Kibbey, William H. B. Haymond, and W. Fenimore Cooper, all of Los Angeles, for appellants.

A. W. Brunton, of Los Angeles, for respondent.

WASTE, Chief Justice.

Respondent moves for an order dismissing the appeal or affirming the judgment.

The action is one to quiet title to real property, and involves the rights of the respective parties as to claims arising under a forged deed, one signed by plaintiff but placed in the hands of another party with the name of the grantee left blank. Plaintiff, an elderly widow, was induced by one Ruark to execute a blank deed covering certain real property in order, he suggested to plaintiff, to facilitate his efforts in arranging its exchange for certain bonds. Instead, the document was improperly used, and the name of the defendant O'Brien, a partner of Ruark, was inserted therein. He immediately sold the property to the defendants Dobry and Grondona, taking a trust deed thereon for \$1,000. This trust deed was subsequently transferred to the defendant Pacific Finance Corporation. The trial court gave judgment for the plaintiff, and the defendants appeal; their sole contention being that the evidence establishes an estoppel against plaintiff.

[1-3] Appellants have not specified any errors committed by the trial court, and have not set out wherein the evidence is insufficient to support the findings and judgment. While it must therefore be assumed that the evidence does support the findings, all briefs in the case are in, and we have examined the evidence brought here in a bill of exceptions, the substance of which is set out in appellants' brief, and are of the view that it does not

show an estoppel. In effect, it merely indicates that plaintiff was very gullible and careless in delivering a blank deed to Ruark. Under the decisions of this court, that is not sufficient to preclude plaintiff from recovering her property. An instrument wholly void, such as a deed in blank, cannot be made the foundation of a good title, even under the equitable doctrine of bona fide purchase. In such action, the mere fact that an encumbrancer acted in good faith in dealing with persons who apparently held the legal title is not in itself a sufficient basis for relief. For a decision in which this subject is exhaustively considered, see *Trout v. Taylor*, 220 Cal. 652, 32 P.(2d) 968.

The judgment and decree is therefore affirmed.

We concur: SHENK, J.; LANGDON, J.; CURTIS, J.; SEAWELL, J.



5 Cal.2d 612

PEOPLE v. DE MOSS.

Cr. 3971.

Supreme Court of California.

March 16, 1936.

I. Constitutional law ☞199

Criminal law ☞1192

Where statute authorizing trial court to provide for execution of sentence on defendant within specified period after remittitur of reviewing court was amended pending appeal from conviction, to provide a shorter period of execution, order reimposing sentence after remittitur under amendment in accordance with shortened period *held* invalid as *ex post facto* (Pen.Code, § 1193, as amended by St.1935, p. 1867, § 1; Const.U.S. art. 1, § 10, cl. 1; Const.Cal. art. 1, § 16).

2. Criminal law ☞1131(4)

Where question of validity of order which reimposed sentence on defendant after remittitur of reviewing court had become moot because of Governor's reprieve, appeal from such order would be dismissed (Pen. Code, § 1193, as amended by St.1935, p. 1867, § 1; Const.U.S. art. 1, § 10, cl. 1; Const.Cal. art. 1, § 16).

3. Criminal law ☞987, 1023(12)

Order, entered in defendant's absence in accordance with applicable statutes, fixing date of execution of defendant not less than 60 days or more than 90 days from date of order, after expiration of Governor's reprieve, held valid and not appealable (Pen.Code, § 1193, as amended by St.1935, p. 1867, § 1; Pen.Code, § 1227; Const.U.S. art. 1, § 10, cl. 1; Const.Cal. art. 1, § 16).

In Bank.

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Clarence De Moss was convicted of murder, and he appeals from orders reimposing sentence and fixing date of execution. On Attorney General's motion to dismiss appeals.

Appeals dismissed.

Tom Okawara, of Fresno, for appellant.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for the People.

WASTE, Chief Justice.

The defendant De Moss was convicted of the crime of murder of the first degree, and the death penalty was imposed. On appeal, the judgment and order denying a motion for new trial were affirmed. *People v. De Moss* (Cal.Sup.) 50 P.(2d) 1031. Subsequent to the going down of the remittitur, the trial court, in the absence of the defendant, proceeded to reimpose sentence upon the defendant, and pursuant to the provisions of section 1193 of the Penal Code, as amended in 1935 (Stats.1935, p. 1867, § 1), appointed January 3, 1936, as the date on which the judgment should be executed. This date was not less than thirty days nor more than forty-five days from the date of the order.

Subsequently, on January 24, 1936, the trial court, again in the absence of the defendant, made an order fixing April 3, 1936, as the date for the execution of the defendant. From each of these orders the defendant has appealed, and the Attorney General now moves to dismiss each of the appeals.

In support of his appeal from the order of December 2, 1935 (fixing January 3, 1936, as the date of execution), the appellant relies upon the contention that the order was void because made in the absence of the defendant; and on the fur-

ther ground that, as to him, section 1193, as amended in 1935, was ex post facto, having been enacted after the date of the crime of which he was convicted.

At the time of the commission of the crime, October 14, 1934, Penal Code, § 1193, provided that upon receipt of the remittitur of the reviewing court, the trial court should forthwith make and cause to be entered a new order, pronouncing sentence anew against defendant, and appointing a day upon which the judgment should be executed, *which must not be less than sixty days nor more than ninety days from the time of making such order.* In 1935, and while this appeal was pending, section 1193 was amended to provide that the new date of execution must be *not less than thirty days nor more than forty-five days from the time of making such order.* The section, both in its old form and as amended, provided and provides that in such case sentence may be reimposed in the absence of the defendant.

[1,2] But it is obvious that there is a hopeless inconsistency as to the time element between the original section and the section as amended. It would be impossible to fix a date that would satisfy both provisions. In making the order of December 2, 1935, the trial judge assumed to act under the amended section which was in force at that date. As applied to this defendant, such act was clearly ex post facto, and within the prohibition of article 1, § 10, cl. 1, of the Federal Constitution, and of article 1, § 16, of the Constitution of California. The authorities uniformly hold such provisions as section 1193, as amended in 1935, to be ex post facto, if applied to crimes committed prior to the enactment of the law, and the Attorney General so concedes. Consequently, we must hold the order of the trial court made on December 2, 1935, to be null and void as to this appellant. The appeal from that order was a valid appeal until January 2, 1936. On that date, the Governor granted the defendant a reprieve to March 27, 1936. The defendant was therefore not executed on January 3 for two reasons: The trial court had become convinced of its error in proceeding under section 1193, as amended in 1935; and the Governor, by granting the reprieve, had caused the time for execution to be carried beyond the date attempted to be fixed in the void order. The purported order, assuming it had

any effect, no longer has any force. The question to which it was sought to be applied has become moot, and the appeal from the order made December 2, 1935, must be dismissed.

[3] The appeal from the order made on January 24, 1936, fixing April 3, 1936, as the date of execution, presents a different situation. The order, according to the record, purports to have been made by the trial court pursuant to the provisions of section 1227 of the Penal Code. It fixes the date of execution after the expiration of the Governor's reprieve, and safely within the time limits provided by section 1227 and also section 1193 of the Penal Code as applicable to this case—not less than sixty days nor more than ninety days from the time of making the order.

Section 1227 expressly provides that there shall be no appeal from an order fixing the time for and directing the execution. Section 1193 expressly provides that sentence may be reimposed upon the defendant in his absence. The language of section 1227 is susceptible of the same interpretation. It was held in *Re Garbutt*, 198 Cal. 30, 243 P. 420, that these sections permitted the trial court to reimpose sentence upon a defendant then confined in the state prison awaiting execution on a date fixed.

The appeals from the two orders are, and each is, dismissed.

We concur: THOMPSON, J.; SHENK, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.



5 Cal.2d 588

In re MILLER'S ESTATE.

BROWN, Public Adm'r, et al. v. RUF-FENACH.

L. A. 15302.

Supreme Court of California.

March 2, 1936.

1. Counties Ⓒ81

Under constitutional provision authorizing counties to frame charter to provide for

officers other than those required by Constitution and laws of state and for their compensation, county may provide in charter for powers and duties of officers without limitation by general law (Const. art. 11, § 7½).

2. Executors and administrators Ⓒ488

County public administrator is public officer performing governmental function and as such is entitled to legal services of attorney for county where county charter so provides (Pol.Code, §§ 4013, subd. 11, 4153, 4300i; Probate Code, § 1144, as amended by St.1935, p. 842, and §§ 422, 1140, 1141, 1147, 1153; Civ.Code, §§ 172c, 1269b).

3. Corporations Ⓒ377½

Performance of legal services by county counsel for public administrator and permitting county to profit from fees so earned held not violation of statutory prohibition against practice of law by corporation, especially in view of county's interest in fees incurred in administration of estates by public administrator receiving salary (Pol.Code, §§ 4013, subd. 11, 4153, 4300i; Probate Code, § 1144, as amended by St.1935, p. 842, and §§ 422, 1140, 1141, 1147, 1153; Civ.Code, §§ 172c, 1269b; St.1927, p. 38, as amended).

4. Corporations Ⓒ377½

"County" is not "corporation" or "municipal corporation," but is legal subdivision of state, charged with governmental powers, and hence is not within statutory provisions relating to practice of law by corporation (St.1927, p. 38, as amended).

[Ed. Note.—For other definitions of "Corporation," "County" and "Municipal Corporation," see Words & Phrases.]

5. Statutes Ⓒ233

In absence of express words to contrary, neither state nor its subdivisions are included within general words of statute.

6. Statutes Ⓒ82

County charter provision authorizing county counsel to act as attorney for public administrator and collect attorney's fees therefor and pay such fees into county treasury held not unconstitutional as "local or special law" affecting estates of deceased persons, minors, or other persons under legal disabilities (Pol.Code, §§ 4013, subd. 11, 4153, 4300i; Probate Code, § 1144, as amended by St.1935, p. 842, and §§ 422, 1140, 1141, 1147, 1153; Civ.Code, §§ 172c, 1269b).

[Ed. Note.—For other definitions of "Local Law" and "Special Law," see Words & Phrases.]

In Bank.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Proceedings in the matter of the estate of Geo. H. Miller, also known as George H. Miller, deceased. From an order denying allowance for attorney's fees to Everett W. Mattoon, county counsel, for services rendered Ben H. Brown, public administrator in the administration of the estate of Geo. H. Miller, also known as George H. Miller, deceased, upon the objection to such allowance of Emilie Sophie Ruffenach, the public administrator and the county counsel appeal.

Reversed, with directions.

Everett W. Mattoon, Co. Counsel, J. H. O'Connor, Asst. Co. Counsel, and Ernest Purdum, Deputy Co. Counsel, all of Los Angeles, for appellants.

Earl Warren, Dist. Atty., Alameda County, Ralph E. Hoyt, Chief Asst. Dist. Atty., Nathan Harry Miller, and Cecil Mosbacher, Deputy Dist. Attys., all of Oakland, and John J. O'Toole, City Atty., and Dion R. Holm, Asst. City Atty., both of San Francisco, amici curiæ.

Lloyd R. Massey, of Los Angeles (J. B. Joujon-Roche, of Los Angeles, of counsel), for respondent.

Fred A. Steiner, of San Diego, Counsel for Coroner and Public Administrator, San Diego County, and Hugh K. McKevitt, of San Francisco, amici curiæ.

CURTIS, Justice.

This appeal is taken from an order of the superior court of Los Angeles county, sitting in probate, denying any allowance for attorney's fees to the county counsel of Los Angeles for services rendered the public administrator in the administration of the above estate. The sole question presented on this appeal is whether or not the county counsel legally may collect the statutory attorney's fees for services rendered to the public administrator in the administration of an estate, when the county charter requires the fees so collected by the county counsel to be paid into the county treasury.

Section 21 of the Los Angeles County Charter provides in part as follows:

"The County Counsel * * * shall also act as attorney for the Public Administrator in the matter of all estates in which such officer is executor, administrator with the will annexed, or administrator, and the County Counsel shall, in every such matter, collect the attorney's fees allowed therein by law and pay the same into the County Treasury."

Pursuant to this provision, the public administrator employed the county counsel as his attorney in the above estate and it is admitted, and the record shows, that the county counsel performed all the usual and necessary legal services in the probate thereof. When the public administrator filed his final account, he requested an allowance for the statutory fees for the county counsel, as his attorney. The respondent, the sole heir of the estate, objected to the allowance of attorney's fees. Upon the hearing, it was stipulated that the attorney's fees, if paid to the county counsel, under section 21, above quoted, would become the property of the county and would be paid by the county counsel to the county treasurer. The trial court fixed the amount of the attorney's fees at \$554.35, which amount was stipulated to. However, upon the authority of *Whelan v. Bailey*, 1 Cal.App.(2d) 334, 36 P.(2d) 709, it held that such fees were not here collectible by the county counsel, whereupon this appeal from that order was taken by the public administrator and the county counsel. *Whelan v. Bailey*, supra, in interpreting a provision of the San Diego county charter identical with the one here involved, held that it violated certain constitutional and statutory provisions and was invalid. No application to have the cause heard in this court was filed in that case. For reasons hereafter appearing, we are of the opinion that the reasoning of the appellate court in that case is unsound and the decision therein is hereby overruled.

[1] The basic question presented is whether a county charter framed and adopted under section 7½ of article 11 of the Constitution may lawfully authorize the county counsel or district attorney to act as the attorney for the public administrator in the estates handled by the public administrator, and may lawfully authorize the county counsel or district attorney to collect the statutory attorney's fees and pay the same to the county treasurer.

So far as pertinent here, section 7½ of article 11 provides as follows:

"Any county may frame a charter for its own government consistent with and subject to the Constitution * * * and relating to matters authorized by provisions of the Constitution * * * and if approved by a majority vote of the members elected to each House [of the legislature], such charter shall become the charter of such county and shall become the organic law thereof, relative to the matters therein provided

* * * and shall supersede all laws inconsistent with such charter relative to the matters provided in such charter. * * *

"It shall be competent, in all charters, framed under the authority given by this section to provide, in addition to any other provisions allowable by this Constitution, and the same shall provide, for the following matters: * * *

"2. For sheriffs * * * public administrators * * * district attorneys * * * and for their compensation. * * *

"4. For the powers and duties of boards of supervisors and all other county officers, for their removal and for the consolidation and segregation of county offices. * * *

"All charters framed under the authority given by this section, in addition to the matters hereinabove specified, may provide as follows:

"For offices other than those required by the Constitution and laws of the State * * * and for their compensation."

Under this section, it is clear that a county may, in its charter, provide for the powers and duties of its officers, and may do this without limitation by the general law. This was the exact holding in the case of *Reuter v. Board of Supervisors*, 220 Cal. 314, 320, 327, 30 P.(2d) 417, 420. In that case, it was stated:

"At the time of the adoption of said constitutional amendment, the general laws of the state, with meticulous care, had fixed and defined the powers and duties of the board of supervisors and of each and every county officer in the state, except those acting under a city and county government, with which we are not here concerned. Therefore, if the powers and duties of boards of supervisors and county officers, as fixed by the charter, are 'subject to and controlled by general laws,' then any attempt to provide for such powers and duties in the charter would be an idle act and a useless expenditure of effort. If these powers and duties as fixed by the charter conflicted in any way with those fixed by general laws, then, if the proviso is to control, to the extent that they are inconsistent with those fixed by the general laws, they would be ineffective and void. If they did not so conflict with those fixed by the general laws, as we have said before, the charter provisions fixing said powers and duties, though valid, would simply amount to a re-enactment of that which was already the law—a mere superfluous or idle act. We do not think the

framers of the amendment, nor the people of the state who ratified it, contemplated any such absurd result. * * *

"The people of the state in the adoption of this amendment had good cause to believe, and evidently did believe, that they were thereby providing a means whereby they might have home rule in their local and county affairs, including the right, in the words of the amendment, to provide for the powers and duties of their county officers. The amendment as adopted by them, when construed as a whole, is not only susceptible of such a construction, but cannot be given any other reasonable interpretation."

[2] It cannot be doubted that the public administrator is a public officer of the county. The constitutional provision above quoted provides that charters must provide for this officer. Section 4013 of the Political Code provides: "The officers of a county are: * * * 11. A public administrator." Section 14 of the Los Angeles County Charter provides: "The appointive county officers shall be * * * County Counsel * * * Public Administrator. * * *"

As such public officer, it is our opinion that the duties and functions of this officer are primarily governmental in nature. While in many respects the procedure the public administrator follows in many probate matters is the same as that followed by a private administrator, and while it is true that many of his duties could be performed by a private administrator, there are many distinctions between the two. These distinctions are such as to indicate clearly that the public administrator is primarily a public officer performing essentially a governmental function. The purpose of the law creating the office of public administrator was to provide a public officer, acting under his oath of office and official bond, who should be in a position at all times to administer estates where there is a failure of heirs or other persons competent to act. While acting in one sense as the personal representative of the deceased, in a broader sense he represents the government and acts in a governmental capacity. A few illustrations suffice to demonstrate this fact. An appreciable portion of the public administrator's time is devoted to cases arising under section 1144 of the Probate Code, requiring summary probate by the public administrator of estates of \$100 or less (and, as amended in 1935 [St.1935, p. 842] of \$200 or less), in which cases neither the public administrator nor his attorney can collect any fees at all

for their services. The appointment of the public administrator is governed by different rules than those applicable to a private administrator and the former is entitled to appointment, if at all, only by virtue of his office. Section 422, Probate Code; *County of Los Angeles v. Kellogg*, 146 Cal. 590, 80 P. 861. Under section 1140 of the Probate Code, the public administrator is required to take charge of the property of a decedent, which property might be wasted when no administrator or executor has been appointed, and is required to take charge of estates without formal appointment when required by the court. Under section 1141 of the Probate Code, the public administrator's official bond and oath are in lieu of the administrator's bond and oath on the granting of letters. Under section 1147 of the Probate Code, the public administrator's powers of deposits and withdrawals of the money of an estate are restricted. Under section 1153 of the Probate Code, he must return a semi-annual report to the superior court of the estates that he handled. Under Political Code, section 4300i, when the public administrator receives a salary in lieu of fees, as he does in Los Angeles county, all fees and charges for the benefit of estates as limited in that section are made county charges. Under Political Code, sections 4314 and 4013, the public administrator may administer oaths. Under sections 172c and 1269b of the Civil Code, the public administrator must represent the interest of an incompetent spouse upon proceedings to permit the other spouse to sell, mortgage, or lease the community property or the homestead.

From these and other distinctions that could be made, it seems quite clear that the public administrator is a public officer, performing a governmental function. Since this is so, it necessarily follows that he is entitled to the legal services of the attorney for the county, at least, where the county charter so provides. See section 4153 of the Pol. Code. Section 21 of the Los Angeles Charter, *supra*, expressly so provides.

[3] It is seriously urged by the respondent, and by several amici curiæ on her behalf, that the rendering of legal services by a county counsel to the public administrator in his official capacity and permitting the county to profit from the fees so earned, constitutes a violation of the prohibition against the practice of law by a corporation, and also constitutes a violation of several provisions of the State Bar Act (St.1927, p.

38, as amended). These contentions are without merit.

In the first place, as already pointed out, the public administrator is a public officer, performing essentially a governmental function in administering estates and performing his other duties. It, therefore, follows that when the county counsel acts as his attorney, the county counsel is not representing a private individual or carrying on a private law practice for the benefit of the county, but is performing an official duty for the benefit of a county officer. The question of fees is purely secondary. The state Legislature has seen fit to provide that the public administrator and his attorney shall receive the same fees provided for private administrators and attorneys. In the case of estates administered by the public administrator, the state Legislature has seen fit to require those benefiting from the estate to defray part of the cost of administering it by paying these fees. These fees then go to the county treasurer. The county is no more practicing law in this case than when the county counsel represents the county or a school district in court, or when the district attorney represents in court the county or its officers, or when the public defender represents private persons in criminal cases. The county counsel and district attorney and public defender, of course, practice law—it is one of the qualifications of their office—but it is they who are practicing law, not the county. From some of the activities of the district attorney, the county actually makes a profit, as where a bond is forfeited.

There are other situations in which state officers, qualified in some profession, perform governmental functions for which fees are charged, which fees belong to the governmental agency, yet it has never been claimed that the governmental agency involved is practicing those professions.

Thus, under the Statutes of 1929, p. 1505, relating to the supervision of dams by the department of public works, that department, through the state engineer, is authorized to collect fees for engineering services rendered by the department in passing on plans and specifications and in supervising the construction of dams. All fees collected are payable into the state treasury. Could it be contended that the state is practicing engineering, in violation of Statutes of 1929, p. 1645, making it a misdemeanor for any person, not authorized, to practice engineering? Obviously not.

The state division of architecture is authorized to collect fees for services rendered by that department in the approval or rejection of plans for school buildings. St.1933, p. 352. All fees thus collected are payable into the state treasury, yet the act regulating the practice of architecture (St.1901, p. 641, as amended) makes it a misdemeanor for any person to practice architecture without a certificate.

The state, in furnishing engineering and architectural services for which it collects a fee, is not practicing civil engineering or architecture. It is engaged in the performance of a public service authorized by statute. The same reasoning applies to the public administrator and to the county counsel.

In addition to the foregoing, it must be remembered that the county has a material financial interest in estates handled by the public administrator. As already pointed out, under section 4300i of the Political Code, when the public administrator receives a salary in lieu of fees, all charges incurred by him in the administration of estates, except as limited in the section, are made county charges. The prohibition against a corporation practicing law does not preclude a corporation from employing attorneys in any litigation in which it has a financial interest.

[4, 5]. Another and complete answer to the contentions here being considered is that the provisions of the Code of Civil Procedure and the State Bar Act (St.1927, p. 38, as amended) relating to the practice of law by a corporation do not apply to the state or to counties. A county is not a corporation, nor even a municipal corporation. Strictly speaking, a county is not a corporation at all. It is a legal subdivision of the state, charged with governmental powers. People v. McFadden, 81 Cal. 489, 498, 22 P. 851, 15 Am.St.Rep. 66; Dillwood v. Riecks, 42 Cal. App. 602, 608, 184 P. 35; Watson v. Greely, 67 Cal.App. 328, 337, 227 P. 664. Even if it be held that a county is a quasi corporation, as it was called in County of Sacramento v. Chambers, 33 Cal.App. 142, 146, 164 P. 613, it is well settled that in the absence of express words to the contrary, neither the state nor its subdivisions are included within the general words of a statute. Miles v. Ryan, 172 Cal. 205, 207, 157 P. 5; Liebman v. Richmond, 103 Cal.App. 354, 359, 284 P. 731; Mayrhofer v. Board of Education, 89 Cal. 110, 112, 26 P. 646, 23 Am.St.Rep. 451. The prohibition against a corporation prac-

ticing law for these reasons does not apply to a county.

[6] The last point urged is that the charter provision in question conflicts with article 4, § 25, subd. 12, of the Constitution, which provides in part: "The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * Twelfth—Affecting estates of deceased persons, minors, or other persons under legal disabilities." There is no merit in this contention. The matter of depositing in the county treasury the fees collected does not in any way affect the administration of estates. When the fees are paid to the public administrator and by him to the county counsel, the probate of the estate has been completed. After the fees are paid, they are not part of the assets of the estate. The fees are no different from those paid to a private attorney for the same purpose. Obviously, what happens to those fees after they are paid does not affect the estate being probated.

The order appealed from is reversed, and the court below directed to enter its decree in accordance with the views herein expressed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; THOMPSON, J., LANGDON, J.



5 Cal.2d 550
AGRICULTURAL PRORATE COMMISSION
et al. v. SUPERIOR COURT IN AND
FOR LOS ANGELES COUNTY et al.
L. A. No. 15471.

Supreme Court of California.
Feb. 29, 1936.

Rehearing Denied March 30, 1936.

I. Commerce §33(1)

Point of time at which commodity enters into "interstate commerce" and ceases to be subject to state wherein it is produced is when commodity actually commences its journey from one state to another, and until such time arrives, state in which commodity is located has jurisdiction over it (Const.U.S art. 1, § 8, cl. 3).

[Ed. Note.—For other definitions of "Interstate Commerce," see Words & Phrases.]

2. Commerce Ⓒ48

Act creating Agricultural Prorate Commission and prescribing regulations to harvesting and preparation of prorated commodity but not to sale or future disposition thereof *held* not unconstitutional as burdening interstate commerce (St.1933, p. 1969; Const. U.S. art. 1, § 8, cl. 3).

3. Constitutional law Ⓒ62

Sections of act creating Agricultural Prorate Commission, providing for appointment by commission of prorate committee and prescribing duties of such committee, *held* not unconstitutional as delegating legislative powers (St.1933, pp. 1977, 1978, §§ 18, 20, 21, 22, 24; Const. art. 3, § 1; art. 4, § 1).

4. Constitutional law Ⓒ80(2)

Act creating Agricultural Prorate Commission *held* not unconstitutional as conferring judicial powers upon prorate commission (St.1933, p. 1969; Const. art. 6).

5. Constitutional law Ⓒ275(1)**Eminent domain** Ⓒ2(1)

If act creating Agricultural Prorate Commission is within police power of state, rights of individual which may be affected thereby must give way to superior rights of public, and individual cannot complain that his property is taken without due process or without compensation (St.1933, p. 1969; Const.U.S. Amends. 5, 14; Const.Cal. art. 1, §§ 1, 13, 14).

6. Constitutional law Ⓒ275(1)**Eminent domain** Ⓒ2(1)

Act creating Agricultural Prorate Commission as applied to lemon industry with respect to quantity produced and amount to be marketed *held* not violative of due process clauses of State and Federal Constitutions, nor of constitutional provisions against taking of private property for public use without compensation (St.1933, p. 1969; Const.U.S. Amends. 5, 14; Const.Cal. art. 1, §§ 1, 13, 14).

7. Agriculture Ⓒ2

Petition for formation of lemon producing district under act creating Agricultural Prorate Commission *held* not defective so as to preclude formation of district without an election because of allegation that producing factor for purposes of proceeding was a standard box of lemons, where statute defined term "producing factor" as unit of production (St.1933, p. 1970, § 2 (h)).

8. Agriculture Ⓒ2

Petition for formation of lemon producing district under act creating Agricultural Prorate Commission, which specified producing factor as standard box of lemons based on previous year's crop *held* not defective so as to preclude formation of district without

an election, because of failure to base producing factor on current year's crop, where at date of petition but small part of lemon crop had been harvested (St.1933, p. 1969).

9. Injunction Ⓒ75

If prorate lemon district under act creating Agricultural Prorate Commission was not legally formed, injunction would lie against commissioners restraining them from executing terms of act (St.1933, p. 1969).

10. Prohibition Ⓒ5(3)

Prohibition *held* not to lie to restrain superior court from proceeding in action to restrain Agricultural Prorate Commission from enforcing order against lemon producers in prorate lemon district, where complaint in superior court alleged that district was illegally organized, and superior court had merely granted temporary injunction (St. 1933, p. 1969).

In Bank.

Application for writ of prohibition by the Agricultural Prorate Commission of the State of California and others against the Superior Court of the State of California, in and for the County of Los Angeles and the Honorable Emmet H. Wilson, Judge thereof.

Petition denied, and alternative writ theretofore issued discharged.

U. S. Webb, Atty. Gen., Alberta Belford, and Walter L. Bowers, Deputies Attys. Gen., and Edson Abel, of San Francisco, for applicants.

Mathew O. Tobriner, of San Francisco, and A. M. Cathcart, of Palo Alto, amici curiæ.

Jennings & Belcher, Bruce McDaniel, of Redlands, and R. P. Jennings, of Los Angeles (Louis E. Kearney, of Los Angeles, of counsel), for respondents.

CURTIS, Justice.

The 1933 session of the Legislature of this state enacted a statute creating the Agricultural Prorate Commission. Stats. 1933, p. 1969. This act is frequently referred to in the briefs of counsel as the Prorate Act, and for the sake of brevity, we shall refer to it by that name or designation. In section 1 of the act is set forth the declaration of the Legislature, which may properly be deemed as a statement of the reason and purpose of the Legislature in the enactment of this statute. This section is as follows: "The unreasonable waste of agricultural wealth occasioned by

the harvesting, preparation for market and delivery to market of greater quantities of agricultural commodities than are reasonably necessary to supply the demands of the market is opposed to the public interest and the difficulty inherent in any attempt by individuals to correlate within a reasonable degree the supply of any agricultural commodity to current consumptive demands is creating chaotic economic conditions in certain agricultural areas of the State of such severity as to imperil the ability of agricultural producers to contribute in appropriate amounts to the support of ordinary governmental and educational functions, thus tending to increase and increasing the tax burdens of other citizens for the same purposes. In the interest of the public welfare and general prosperity of the State, the unnecessary and unreasonable waste of agricultural wealth, hereinafter referred to as 'agricultural waste,' involved in the harvesting and/or preparation for and delivery to market of agricultural commodities for which there exists only a limited consumer demand should be eliminated while at the same time preserving to all agricultural producers an equality of opportunity in the available markets."

Succeeding sections of the act provide for the creation of an Agricultural Prorate Commission consisting of nine members to be appointed by the Governor with the approval of the senate. This commission is given power to hold hearings and to subpoena witnesses. Each member is empowered to administer oaths in any proceeding before the commission. A full and accurate record of the business transactions of the commission is to be kept and placed on file in the office of the commission. Section 8 of the act provides for the presentation to the commission of a petition for the institution of a program of prorated marketing with respect to any variety or kind of agricultural commodity "which shall be signed by not less than fifty producers, of said variety or kind of agricultural commodity within the proposed prorating zone; provided, that if it be alleged in said petition that it is signed by two-thirds or more in number of the producers within the proposed zone of the commodity as to which it is proposed to institute a prorating program and by the owners of two-thirds or more in number of the producing factors of said commodity in said proposed zone, the number of signers shall be immaterial."

Sections 9, 10, and 11 are as follows:

"Sec. 9. Upon the presentation of any such petition, the commission shall hold a hearing at some central point located within the district described in said petition and proposed to be established as a proration zone. Notice of such hearing shall be given at least ten (10) days prior thereto by publication in a newspaper of general circulation printed and published in the district affected and by posting in at least three (3) conspicuous places in said district. In case the proposed proration zone includes more than one district the required notice shall be given in each district and the commission shall hold hearings in each of said districts. At said hearings, the commission shall receive and hear the evidence offered by the petitioners in support of the petition and by any interested person in opposition thereto. Said hearings may be adjourned from time to time and from place to place as the circumstances may require. A transcript of the proceedings at all such hearings shall be made by the commission and shall be opened to inspection by any interested party.

"Sec. 10. If upon such hearing it shall be made to appear to the commission:

"(1) That the petition is signed in person or by proxy by the required number of producers and by the owners of the required number of producing factors; and

"(2) That the economic stability of the agricultural industry concerned is being or is about to be imperiled by prevailing market conditions; and

"(3) That agricultural waste is occurring or is about to occur; and

"(4) That the institution of a program of prorated marketing will conserve the agricultural wealth of the State and will prevent threatened economic waste; and

"(5) That the institution of a proration program as proposed in the petition will advance the public welfare without injustice to any producer; and

"(6) That the proposed program may be instituted and conducted without permitting unreasonable profits to the producers and that the commodity named in the petition can not be marketed at a reasonable profit otherwise than by means of such a program; and

"(7) That the proposed zone of proration includes all of the producing territory within this State reasonably necessary

to render the proposed program feasible, it shall make written findings to that effect. If in any case of any petition it shall appear to the commission that the inclusion of territory additional to that described in the petition is necessary to the feasibility of the proposed program, it shall postpone further proceedings until notice shall have been given to the producers within such additional territory in the manner provided for in section 8 hereof. Thereafter the commission may complete said hearings and make findings in the manner hereinbefore provided. If the commission shall find against the existence of any of the facts required to be present under this section, it shall deny the petition.

"Sec. 11. If it shall be alleged in said petition that it is signed by two-thirds or more of the producers of the commodity named in the petition within the zone described and by the owners of two-thirds or more of the producing factors in said zone, proof shall be required in support of such allegation and the commission shall make a finding with respect thereto. If it shall find such allegation to be the fact, and shall also find to exist all of the other facts specified in section 10 of this act, the commission shall forthwith make an order declaring the proposed program adopted and specifying the zone in which the program shall be effective."

Sections 21, 22, and 23 provide respectively for certain fees to be collected on issuing certificates to producers sufficient to meet the expense of administering the program; for the making of rules and regulations by the commission; and for the termination of any proration program by petition filed with the commission. Section 24 provides for injunction proceedings to be instituted by the commission against any person who shall market any commodity in violation of any provision of the proration program, and section 25 makes any such person civilly liable in the sum of \$500 for each and every violation to be recovered by the commission in any court of competent jurisdiction. Any amount so recovered is to be paid into the "Agricultural Prorate Commission fund." The act further provides that any person violating any of its provisions shall be guilty of a misdemeanor.

In March, 1935, a petition was filed with the Agricultural Prorate Commission, signed by W. W. Wilson and others, in

which the signers thereof asked for the institution of a program of prorated marketing with respect to lemons grown in the state of California. This petition set forth the necessary facts required of petitions of that character by said Prorate Act. Among other facts stated in said petition, it is alleged therein: "That the producing factor for the purpose of proceeding is hereby specified as a standard packed box of lemons based on the crop from November 1, 1933, to October 31, 1934," and that said "petition is signed by two-thirds or more in number of the producers of lemons in the state of California, * * * and by the owners of two-thirds or more of the producing factors of said commodity in said zone." The following facts showing the necessity for the institution of a prorating program for lemons in said proposed zone are set forth in said petition:

"The marketing of California lemons without any control is subject to gluts and famines in available supplies which detrimentally affect price levels and which have in the past resulted in producers receiving less than their costs of production. The situation has been substantially improved in recent years by means of a voluntary proration program affecting only a portion of the crop but it is now felt that the burden of this surplus control should be spread over all producers.

"The general plan of proration which petitioners suggest for adoption in the proposed proration zone calls for a pro rata curtailment of the marketing privileges of each producer on a basis of available supplies during specified proration periods.

"That unless some form of control of marketing is imposed which permits the relating of the supply of lemons to existing demand, severe agricultural and economic waste will occur in that the resources of the producers will be wasted in preparing for market lemons in excess of the reasonable demand therefor; that the economic stability of the lemon industry is about to be imperiled by prevailing market conditions; that a program of prorated marketing pursuant to said Act will prevent such waste and will conserve the agricultural wealth of the State of California and will prevent threatened economic waste."

After due notice, a hearing was had on said petition at which witnesses were examined and other evidence received. At

its conclusion, the commission rendered its decision, in which it found substantially that all the allegations of said petition were true. It accordingly entered its order that said petition be granted and that a prorated marketing zone or district with respect to lemons produced within a prorated zone comprised of the state of California be instituted and formed. After proceedings duly had, the Agricultural Prorate Commission approved a program for the prorating of lemons grown within the state which had been prepared and proposed by the prorate committee, and appointed Walter Shippey as zone agent for the purpose of administering said program as required by section 18 of the act. The commission through said zone agent was proceeding to enforce said program over the objections of a number of shippers and growers of lemons who thereafter and on or about the 8th day of May, 1935, instituted an action in the superior court of the county of Los Angeles against said commission, the members of said prorate committee, and said zone agent, to enjoin and restrain them from enforcing or attempting to enforce as against the plaintiffs in said action or any of them, any of the terms of the orders of said commission and of said program with respect to the proration of lemons within said prorate zone or district. In said action a hearing was had upon the application of plaintiffs therein for a temporary injunction against the defendants therein. As a result of said hearing, said superior court filed a written opinion in which it expressed its intention of granting said application for a temporary injunction as prayed for. Thereafter the applicants herein, consisting of said Agricultural Prorate Commission, the members of the prorate committee, and its zone agent, being the defendants in said injunction action, instituted this proceeding before the District Court of Appeal of the Second District, Division One thereof, asking that a writ of prohibition issue directed to the respondent court and the judge thereof, commanding them to desist from any further proceedings in connection with any restraining order or preliminary injunction in the action brought against said applicants by said shippers and lemon growers except to dissolve said restraining order or preliminary injunction. The District Court of Appeal denied said petition; whereupon this court, after a petition for a hearing of said action, ordered said pro-

ceeding transferred to this court, and issued an alternative writ of prohibition directed to respondents as prayed for in the petition filed in said District Court of Appeal, and to show cause why they should not be absolutely restrained from any further proceeding in said suit for an injunction. The respondents have appeared herein both by general demurrer and answer. No claim is made that the answer raises any material issue of fact. The applicants herein base their right to the relief prayed for in their petition upon the ground that in the enforcement of said prorate program they were proceeding under the terms and provisions of the Prorate Act, and that the respondent court is without jurisdiction to issue an injunction to prevent the execution of a public statute by officers of the law appointed or selected for that purpose. It is therefore that the major question calling for decision in this proceeding is the constitutionality of the Agricultural Prorate Act.

As the attack upon the statute is made by respondents, it seems that the most logical manner in which to treat the question is to discuss in their order the several objections raised by the respondents as to the validity of said act.

Respondents in their briefs set forth the following grounds on which they claim that the act is violative of the Federal and State Constitutions:

1. It is violative of the commerce clause of the Federal Constitution.
2. It unlawfully attempts to delegate legislative powers in violation of article 3, section 1, and article 4, section 1, of the Constitution of the state of California.
3. It unlawfully attempts to delegate judicial powers in violation of article 6 of the Constitution of the state of California.
4. It is in violation of the Fifth and Fourteenth Amendments of the Federal Constitution and of article 1, sections 1, 13, and 14 of the Constitution of the state of California.

First. The record in this case shows that practically all of the lemon acreage and lemon production of the United States is located in the state of California and that approximately 99 per cent. of all lemons produced in California which are shipped in fresh fruit channels move in interstate commerce and are used and consumed outside of the state of California; that before shipment either in intra-

state or interstate commerce, the lemons, after being picked from the trees, are delivered to various packing houses located in the lemon growing sections of the state, where they are sorted, wrapped, and packed in boxes preparatory for shipment. They are then ready to enter the channels of trade either intrastate or interstate. The bulk of all lemons sold outside of the state of California are sold in carload lots through auction houses located out of the state, and to a large extent in the large cities of this country; that of the total average annual production of lemons in the state approximately only about 16 per cent. are disposed of through by-product channels or similar uses, and that the returns from lemons delivered to by-product and similar plants as a rule are less than the cost of producing lemons delivered for such uses.

Under the Prorate Act, after the prorate program has been formulated and approved by the commission, the agent appointed to administer the program shall issue certificates as provided in said act. These certificates are divided into primary and secondary certificates. Each producer shall be entitled to one primary certificate, which shall indicate to him the amount of the commodity, in the present instance the amount of lemons, which said producer shall be entitled to harvest or otherwise prepare for market. The primary certificate shall also indicate from time to time the number of secondary certificates issued under it. Secondary certificates shall be numbered consecutively and shall be used to control the time and volume of harvesting the crop which the producer, as indicated by the primary certificate issued to him, is entitled to produce. Said secondary certificates shall accompany all deliveries of the prorated commodity into a primary trade channel, and it shall be unlawful for any prorated commodity to be harvested and prepared for marketing unless there shall have been an appropriate secondary certificate issued therefor. It will thus be seen that the regulations prescribed by the act apply only to the harvesting and preparation of the prorated commodity and not to the sale or future disposition thereof.

The question as to just when an article or commodity intended for interstate commerce actually ceases to be subject to the laws of the state in which it is produced, and passes under the jurisdiction of

the federal government where it is governed by the commerce clause of the Constitution of the United States, has been the subject of extensive consideration both by the federal and state courts. A number of cases which have given consideration to this question have arisen in taxation proceedings where the state has attempted to levy a tax upon a commodity which was prepared for shipment beyond the confines of the state. The leading case on this subject is *Coe v. Errol*, 116 U.S. 517, 6 S. Ct. 475, 477, 29 L.Ed. 715. In that case logs had been cut in the state of New Hampshire and hauled to a river bank within the village of Errol in said state with the purpose and intent of putting the logs in the river and floating them down to the state of Maine whenever the water got sufficiently high. While the logs were on the bank awaiting a time when they could be floated down the river and out of the state, the village of Errol levied a tax upon them which was contested by the owner of the logs. He contended that as the logs had been intended and prepared for shipment beyond the state, the tax was an unconstitutional burden on interstate commerce. The case finally reached the Supreme Court of the United States, which court upheld the tax upon the ground that the logs at the time of the levy, although prepared for interstate commerce, and awaiting an opportunity for transportation out of the state, were not the subject of interstate commerce, and would not be until they had actually begun their movement from the state in which they were produced into another state. We quote briefly from the opinion in that case as follows: "This question does not present the predicament of goods in course of transportation through a state, though detained for a time within the state by low water or other causes of delay, as was the case of the logs cut in the state of Maine, the tax on which was abated by the supreme court of New Hampshire. Such goods are already in the course of commercial transportation, and are clearly under the protection of the constitution. And so we think, would the goods in question be when actually started in the course of transportation to another state, or delivered to a carrier for such transportation. There must be a point of time when they cease to be governed exclusively by the domestic law, and begin to be governed and protected by the national law of commercial regulation, and that moment seems

to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the state of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepôt for that particular region, whether on a river or a line of railroad, such products are not yet exports; nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination, or have started on their ultimate passage to that state. Until then it is reasonable to regard them as not only within the state of their origin, but as a part of the general mass of property of that state, subject to its jurisdiction, and liable to taxation there, if not taxed by reason of their being intended for exportation, but taxed, without any discrimination, in the usual way and manner in which such property is taxed in the state."

That case was followed by the case of *Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 43 S.Ct. 83, 67 L.Ed. 237. In that case the state of Pennsylvania, which virtually had a monopoly on the production of anthracite coal, 80 per cent. of which was consumed in other states, levied a severance tax upon such coal at the mouth of the pit. In upholding this tax, the court (260 U.S. 245, at page 259, 43 S.Ct. 83, 86, 67 L.Ed. 237) said: "The reach and consequences of the contention repels its acceptance. If the possibility, or indeed certainty, of exportation of a product or article from a state determines it to be in interstate commerce before the commencement of its movement from the state, it would seem to follow that it is in such commerce from the instant of its growth or production, and in the case of coals, as they lie in the ground. The result would be curious. It would nationalize all industries, it would nationalize and withdraw from state jurisdiction and deliver to federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts and the woolen industries of other states at the very inception of their production or growth, that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof,' wool yet unshorn, and coal yet unmined because they

are in varying percentages destined for and surely to be exported to states other than those of their production."

A similar holding was had in the case of *Utah Power & Light Co. v. Pfof*, 286 U.S. 165, 52 S.Ct. 548, 552, 76 L.Ed. 1038. In that case the power company owned and operated a plant for the generation of electricity, situated in the state of Idaho, and a transmission line extending from the plant into the state of Utah over which electric current was transmitted from its plant into the state of Utah. The state of Idaho levied a tax upon the electricity generated at the plant. The validity of the statute levying such a tax was attacked by the power company. This was an extreme case and it would seem that it might be plausibly argued that the electricity immediately upon its generation entered into interstate commerce and was not therefore subject to taxation by the state of Idaho. The court ruled otherwise and in an extended opinion upheld the statute. We will only set forth herein a brief extract therefrom.

"We are satisfied, upon a consideration of the whole case, that the process of generation is as essentially local as though electrical energy were a physical thing; and to that situation we must apply, as controlling, the general rule that commerce does not begin until manufacture is finished, and hence the commerce clause of the Constitution does not prevent the state from exercising exclusive control over the manufacture."

A more recent case was that of *Chassaniol v. Greenwood*, 291 U.S. 584, 54 S.Ct. 541, 78 L.Ed. 1004. This case arose in the state of Mississippi and involved a tax levied by the city of Greenwood, "upon every person engaged in the business of buying or selling cotton for himself" within the city. It is a well-known fact that the bulk of cotton raised in Mississippi and other Southern states enters interstate commerce. Greenwood was a concentration point for a certain grade of cotton and an active market for its purchase and sale. Chassaniol was one of numerous cotton buyers who dealt in that market. All cotton purchased by him was shipped out of the state. He resisted the tax as a burden on interstate commerce. His contention was found to be without merit by the court, as will appear from the following excerpt from its opinion: "Ginning cotton, transporting it to Green-

wood, and warehousing, buying, and compressing it there, are each, like the growing of it, steps in preparation for the sale and shipment in interstate or foreign commerce. But each step prior to the sale and shipment is a transaction local to Mississippi, a transaction in intrastate commerce. Hence those engaged in performing any such local function may be subjected to an occupation tax, just as the property used, or processed, by them may be subjected to a property tax."

[1] While these authorities all involved the question of taxation, they clearly and definitely establish the point of time at which a commodity enters into interstate commerce and ceases to be subject to the state wherein it is produced, and that point of time is when the commodity actually commences its journey from one state to another, and they further hold that until that time arrives the state in which the commodity is located has jurisdiction over it, and whatever action the state takes in reference to said commodity cannot be held to be violative of the interstate commerce clause of the United States Constitution (article 1, § 8, cl. 3).

A case more in point than those just cited and one which seems decisive of the question now under discussion is the case of *Champlin Refining Co. v. Corporation Commission* (D.C.) 51 F.(2d) 823, Id., 286 U.S. 210, 52 S.Ct. 559, 76 L.Ed. 1062, 86 A.L.R. 403. That case involved the validity of a prorating statute of the state of Oklahoma, known as the "Curtailment Act." Its provisions are strikingly similar to the Agricultural Prorate Act of this state. It sought to stop waste in the production of crude oil and petroleum. Our statute seeks to stop waste in the production of lemons in this state and to preserve the lemon industry. Both the lemons of California and the crude oil and petroleum of Oklahoma enter into interstate commerce in maximum proportions. Yet the statute of Oklahoma was sustained both by the United States District Court and the United States Supreme Court. In its opinion, the latter court upholds the legislation in the following brief but comprehensive statement (286 U.S. 210, at page 235, 52 S.Ct. 559, 565, 76 L.Ed. 1062, 86 A.L.R. 403): "Plaintiff contends that the act and proration orders operate to burden interstate commerce in crude oil and its products in violation of the commerce clause. * * * It is clear that the regulations

prescribed and authorized by the act and the proration established by the commission apply only to production and not to sales or transportation of crude oil or its products. Such production is essentially a mining operation, and therefore is not a part of interstate commerce, even though the product obtained is intended to be and in fact is immediately shipped in such commerce. *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172, 178, 43 S.Ct. 526, 67 L.Ed. 929; *Hope Natural Gas Co. v. Hall*, 274 U.S. 284, 288, 47 S.Ct. 639, 71 L.Ed. 1049; *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10, 49 S.Ct. 1, 73 L.Ed. 147; *Utah Power & Light Co. v. Pfof*, supra. No violation of the commerce clause is shown."

The United States District Court, in an opinion in which two members of the Circuit Court of Appeals participated, was equally emphatic in its views as to the validity of the statute and that it did not conflict with the power of Congress over interstate commerce. These views were expressed as follows (51 F.(2d) 823, at page 829): "We are clearly of the opinion that the scheme of proration is not invalid as a regulation of or burden on interstate commerce. It is true that a substantial portion of the oil produced in this state goes into the channel of such commerce. But in order to conflict with the regulatory power of Congress, there must be a direct burden thereon. In this case, the interference is entirely too remote in character. The principle is too well settled to require citation, that the congressional power of regulation attaches only when interstate transportation has begun. * * * The production of oil is analogous to the manufacture of goods or the mining of coal. Neither is interstate commerce, although the product may be later shipped to other states." (Citing cases.)

It is difficult to conceive of a case more precisely in point with the instant case than the case last referred to. Its statement of the law upon the question involved is so completely convincing that we deem further comment unnecessary.

Respondents have presented a most formidable list of authorities which they contend support their contention that the Prorate Act contravenes the commerce clause of the United States Constitution. The length of this opinion will not permit a reference to all of these authorities. We shall only comment upon three of the cases

cited by respondents, as admittedly they are the strongest cases presented in respondents' favor. They are *Lemke v. Farmers' Grain Company of Embden*, North Dakota, 258 U.S. 50, 42 S.Ct. 244, 66 L.Ed. 458, *Shafer v. Farmers' Grain Company of Embden*, 268 U.S. 189, 45 S.Ct. 481, 482, 69 L.Ed. 909, and *Baldwin*, as Commissioner of Agriculture and Markets of State of New York, v. G. A. F. Seelig, Inc., 294 U.S. 511, 55 S.Ct. 497, 79 L.Ed. 1032.

The first two of these decisions involved statutes enacted by the state of North Dakota. A brief excerpt from the opinion in the *Lemke* Case will demonstrate so radical a difference between that case and the case before us as to render the former of but little assistance in the decision of the question now under discussion. We refer to that portion of the opinion commencing on page 56 of 258 U.S., 42 S.Ct. 244, 247, 66 L.Ed. 458, and reading as follows:

"This Act shows a comprehensive scheme to regulate the buying of grain. Such purchases can only be made by those who hold licenses from the State, pay state charges for the same, and act under a system of grading, inspecting and weighing fully defined in the act. Furthermore, the grain can only be purchased subject to the power of the State Grain Inspector to determine the margin of profit which the buyer shall realize upon this purchase. This authority is conferred in section 23, and the margin of profit is defined to be the difference between the price paid at the North Dakota elevator and the market price, with an allowance for freight, at the Minnesota points to which the grain is shipped and sold. That is, the State officer may fix and determine the price to be paid for grain which is bought, shipped, and sold in interstate commerce. That this is a regulation of interstate commerce is obvious from its mere statement.

"Nor will it do to say that the state law acts before the interstate transaction begins. It seizes upon the grain and controls its purchase at the beginning of interstate commerce."

The case of *Shafer v. Farmers' Grain Company of Embden*, supra, also involved a statute passed by the Legislature of North Dakota relative to the sale and shipment of grain grown within the state. This statute, while not as drastic as the statute held to be unconstitutional in the

Lemke Case, contained many of the features of the earlier statute as appears from a statement in the opinion in the *Shafer* Case reading as follows: "A prior statute, concededly 'having the same general purpose,' was adopted by the state Legislature in 1919 (Laws 1919, c. 138) and held invalid by this court in *Lemke v. Farmers' Grain Company*, 258 U.S. 50, 42 S.Ct. 244, 66 L.Ed. 458, as an interference with interstate commerce."

Each of the statutes attempted to impose regulations upon the buying of wheat and upon its disposition after it had passed into the hands of the purchaser. This is made clear from the following statement in the *Shafer* Case, 268 U.S. 189, at page 200, 45 S.Ct. 481, 485, 69 L.Ed. 909: "The act prevents buying by grade, unless the buyer secures from the state a grading license for himself or his agent. The general practice is to buy and ship without separating the dockage from the wheat, the price paid carrying a right to both. The act requires the buyer to separate the dockage and return it to the producer, unless it be distinctly valued and paid for." This and other passages from the opinion show conclusively that the statute not only regulated the buying of wheat which was intended for interstate commerce, but it went further and required the buyer after the wheat had been bought and had entered interstate commerce to grade the same and return the dockage to the producer unless other arrangements had been made between the buyer and producer. For these reasons the court held that "the act directly interferes with and burdens interstate commerce, and is an attempt by the state to prescribe rules under which an important part of such commerce shall be conducted." 268 U.S. 189, at page 201, 45 S.Ct. 481, 486, 69 L.Ed. 909. There is nothing in these decisions in conflict with the authorities hereto cited which hold that the state has the right to impose regulations upon any commodity produced in the state before such commodity has entered interstate commerce, "even though the product obtained is intended to be and in fact is immediately shipped in such commerce." *Champlin Refining Co. v. Corporation Commission of Oklahoma*, 286 U.S. 210, 235, 52 S.Ct. 559, 565, 76 L.Ed. 1062, 86 A.L.R. 403. Or, as was stated in the same case by the United States District Court, "The principle is too well settled to require citation, that the congress-

sional power of regulation attaches only when interstate transportation has begun." 51 F.(2d) 823, 829.

[2] In *Baldwin*, as Commissioner of Agriculture and Markets of State of New York, v. G. A. F. Seelig, Inc., *supra*, the court had under consideration a statute of the state of New York which prohibited the sale of milk imported from another state unless the price paid in that other state to the producer was up to the minimum price prescribed by the state of New York for purchases from local producers. The court held that such a regulation was a direct interference with interstate commerce as it virtually erected a barrier around the state which prevented shipments of milk into the state unless its sale price met the requirements of the state statute. There is no similarity between the statute of New York which attempted to fix the price of milk shipped into it from another state and the California statute, which simply limits the amount of prorated commodity which can be produced and prepared for marketing, and after the commodity is produced, harvested, and prepared for market leaves the owner free to sell or otherwise dispose of his product to whomsoever may choose to purchase it, and at such price as the purchaser may pay, with perfect liberty to the purchaser to sell or dispose of the purchased article within or without the state as best suits his interest. There is nothing in the three cases relied upon by respondents and which we have discussed above, and which are admittedly the strongest cases in respondents' favor, to overcome those authorities cited in the previous pages of this opinion upon which the applicants rely. The other authorities cited by respondents are of slight aid to the solution of the question before us, and a detailed analysis of them would not add anything to this discussion. We are satisfied from the authorities upon the subject that the Prorate Act contains nothing that infringes upon the exclusive right of the federal government to regulate interstate commerce. It cannot be held unconstitutional upon that ground.

Second. It is next contended that the act is unconstitutional in that it unlawfully attempts to delegate legislative powers in violation of article 3, section 1, and of article 4, section 1, of the Constitution of this state.

The act creates an Agricultural Prorate Commission with the powers and duties set

forth in the act and briefly stated in the beginning of this opinion. It further provides for the appointment by the commission of a prorate committee and prescribes the duties of such committee. It is the contention of the respondent that the imposition of these duties upon the committee is an unlawful delegation of legislative powers. No claim is made that the constitutional provisions are violated by any of the terms of the act prescribing the powers and duties conferred upon the commission. The claimed violation of the constitutional prohibition against the delegation of legislative powers is confined to those provisions of the act defining the powers of the prorate committee. The particular sections of the act which respondents contend contain the provisions claimed by them to be unconstitutional are sections 18, 20, 21, 22, and 24. These sections, briefly stated, prescribe, after the appointment of the program committee, the duties of such committee, which include the duty to determine the method, manner, and extent of prorating under the authority of the prorate commission.

The specific defect ascribed by respondents to the act is that there is no standard whatever laid down by the Legislature to guide the program committee except the exceedingly general declaration of policy contained in section 1 of the act. This criticism of the act is hardly justified. The program after its preparation by the committee must be submitted to the prorate commission for its approval before it becomes effective for any purpose, and the commission, before approving the same, "must find that the same is reasonably calculated to maintain the existence of the facts specified in section 10 hereof." Section 18. Section 10 of the act sets forth seven essential facts which must be made to appear before any prorate district or zone is organized. These seven basic facts are the very foundation of every proceeding for the formation of a prorate district, and every one of them must be found by the commission to exist, or the petition must be denied. As the program must conform to these legislative requirements, we think it cannot be said that no standard has been provided by the Legislature to guide the program committee in framing a proposed program. The authorities therefore cited by respondents to the effect that where the Legislature has failed to provide a standard for the guidance of an administrative body in the performance of its

duties, the statute prescribing such duties is unconstitutional because it unlawfully attempts to delegate legislative powers, have no application in the instant case. The Prorate Act is in many respects similar to the Oil and Gas Conservation Act of this state (St. 1915, p. 1404) construed by this court in the case of *People v. Associated Oil Company*, 211 Cal. 93, 294 P. 717. In that action it was not only held that the act which had for its purpose the prevention of waste of gas produced in this state was within the police power of the state, a question which will be later discussed, but also that a proper standard was provided in the statute for determining when gas is produced in such excessive proportions as to render such production an unreasonable waste of gas. The court in that case (211 Cal. 93, at page 107, 294 P. 717, 724) said: "It would seem, therefore, that the Legislature has plainly adopted the standard so expressed, viz.: that gas may not be produced, under existing conditions where the production thereof so greatly exceeds the market demand therefor, in quantities exceeding a reasonable proportion to the amount of oil produced, as the standard to be applied and beyond which the production is prohibited as being an unreasonable waste of natural gas."

[3] Among the cases cited by respondents is the now famous case of *Panama Refining Co. v. Ryan*, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446, in which the Supreme Court of the United States declared unconstitutional the National Industrial Recovery Act (48 Stat. 195). In that case the court held, among other things, that the attempted delegation of power to the president to interdict the transportation of oil in interstate commerce was void for the reason that nowhere in the act had Congress declared or indicated any policy or standard to guide or limit the president when acting under such delegation. However, in that case the court (293 U.S. 388, at page 421, 55 S.Ct. 241, 248, 79 L.Ed. 446) held that "The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply." A large number of decisions are cited in that opinion

in which acts of Congress have been sustained, which delegated certain powers to boards or officers to be exercised in accordance with established standards. One of the latest of these cases upheld the Radio Act of 1927 (44 Stat. 1162, 1163), which established a radio commission with authority to grant licenses "as public convenience, interest, or necessity requires." *Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266, 279, 285, 53 S.Ct. 627, 634, 77 L.Ed. 1166. Commenting on the radio case, the court in *Panama Refining Co. v. Ryan*, 293 U.S. 388, at page 423, 55 S.Ct. 241, 252, 79 L.Ed. 446, stated: "In construing this provision, the Court found that the statute itself declared the policy as to 'equality of radio broadcasting service, both of transmission and of reception,' and that it conferred authority to make allocations and assignments in order to secure, according to stated criteria, an equitable adjustment in the distribution of facilities. The standard set up was not so indefinite 'as to confer an unlimited power.'" This language is particularly applicable to the question now under discussion in the instant case. The prorate committee is given authority to institute a prorate program, but such program must meet the approval of the prorate commission and must conform to the requirements of section 10 of the act. That the legislative standard prescribed by the Prorate Act of this state complies with the legal requirements approved by the courts of this state is, we think, conclusively established by the following authorities: *Tarpey v. McClure*, 190 Cal. 593, 213 P. 983; *Gaylord v. City of Pasadena*, 175 Cal. 433, 166 P. 348; *Kelley v. Kingsbury*, 210 Cal. 37, 290 P. 885; *Carter v. Stevens*, 211 Cal. 281, 295 P. 28; *Wood v. Pendola*, 1 Cal.(2d) 435, 35 P.(2d) 526, and *A. L. A. Schechter Poultry Corporation v. United States of America*, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570, 97 A.L.R. 947.

Respondents place great reliance upon the recent cases of *Chas. Uhden, Inc., v. Greenough* (Wash.) 43 P.(2d) 983, 98 A. L.R. 1181, *Griffiths v. Robinson* (Wash.) 43 P.(2d) 977, and *State of Washington v. Matson Company*, 47 P.(2d) 1003, decided by the supreme court of the state of Washington; also the case of *Van Winkle v. Fred Meyer, Inc.* (Or.) 49 P. (2d) 1140. But these cases all involved delegations of power to subordinate instrumentalities without prescribing any

standard which the administrative body or individual was to follow in the exercise of such power. They are, therefore, not controlling in the present proceedings for the reasons already stated.

[4] Third. The third ground upon which the respondents contend that the Prorate Act is unconstitutional is that it unlawfully attempts to confer judicial powers upon the prorate commission. The powers of the commission are set forth in the preceding pages of the opinion. The most that can be said respecting the powers bestowed upon the commission is that the commission is granted power to hold hearings and determine facts incidental to the institution of a prorate program over the agricultural commodity named in the petition before it, and, if it finds the facts set forth in the petition to be true, to appoint a committee to prepare and propose such a program and report the same to the commission for its approval. The question thus presented has been so frequently and recently before this court that we deem it unnecessary to do more than refer to our decisions holding that while judicial power may not be delegated to an administrative or legislative body, the mere granting of powers like or similar to those which the prorate committee were empowered to perform, is not against any express or implied provision of the Constitution of this state. The decisions of this court dealing with this question are to be found in *Tarpey v. McClure*, 190 Cal. 593, 606, 213 P. 983; *Dominguez Land Corp. v. Daugherty*, 196 Cal. 468, 483, 238 P. 703; *Department of Public Works v. Superior Court*, 197 Cal. 215, 220, 239 P. 1076; *Globe Cotton Oil Mills v. Zellerbach*, 200 Cal. 276, 277, 252 P. 1038, and *East Bay Municipal Utility District v. Department of Public Works*, 1 Cal.(2d) 476, 478, 35 P.(2d) 1027. In the case of *Globe Cotton Oil Mills v. Zellerbach*, supra, 200 Cal. 276, at page 277, 252 P. 1038, 1039, this court succinctly stated the law decisive of the question before us as follows: "This court is of the view, however, that, admitting that the fish and game commission cannot be granted any power which constitutionally belongs exclusively to the judicial department of the state government, the granting of power to hold hearings and determine facts incidental to the regulation of fish and game, and to the granting of permits to take and use fish, is valid as an administrative or regulatory power, and in

nowise transgresses upon the exclusive functions of the judicial department."

Fourth. The last ground of alleged unconstitutionality of the act is that it violates the Fifth and Fourteenth Amendments of the Constitution of the United States and article 1, sections 1, 13 and 14 of the Constitution of this state. These sections of our State Constitution provide that no person shall be deprived of liberty or property without due process of law; and that private property shall not be taken or damaged for public use without just compensation. The Fifth Amendment of the Federal Constitution contains similar provisions, while the Fourteenth Amendment of the United States Constitution provides that no state shall deprive any person of liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

Respondents point out that the Prorate Act absolutely prevents the marketing by every lemon grower in the state of any portion whatever of his lemon crop except as the program committee may determine to be advisable, or, in other words, that no lemon grower can market any portion of his crop until and unless the program committee says that he may. As a result of the enforcement of the terms of the act, respondents contend that the right of the individual grower to market his crop when and in such manner and under such contracts as he may desire to make is absolutely taken away from him and his liberty of action respecting his own property is destroyed.

This statement of respondents in our opinion correctly interprets the terms of the act as they affect the individual grower of lemons in respect to the harvesting and marketing of any crop of lemons produced by him. Under the terms of the act, the entire crop of lemons grown in the state are made subject to the program instituted by the prorate committee and can only be disposed of in accordance with the program as administered by the committee through the district or zone agent appointed by the committee. No claim is made, however, that the act, as it is enforced through the program instituted by the committee will not act equally and impartially upon all producers of lemons grown in the state, and that if there is any benefit to be derived from the observance of the program by the growers that such benefit will

be enjoyed ratably by all. Nor is it questioned that if any detriment is sustained by a compliance with the terms of the act, such burden or detriment will rest equally upon all lemon growers in proportion to the amount of lemons which each grower produces. Respondents, however, do maintain that the rights of individual growers over the fruit grown by them cannot be interfered with or in any way controlled in the interest of the industry as a whole, or of the general welfare of the state or its citizens.

The theory of the Prorate Act may be briefly stated as follows: There is an overproduction in many agricultural products of the state. That unless the marketing of the commodity in case of its overproduction is controlled and regulated by the state so that the amount of such product to be produced, harvested, and marketed is limited to the amount reasonably necessary to supply the requirements or demands of the market for such commodity, the price of the commodity becomes depressed and drops so low that the market returns do not equal the cost of production. The result of such unregulated sales of commodities has produced "chaotic economic conditions in certain agricultural areas of the State of such severity as to imperil the ability of agricultural producers to contribute in appropriate amounts to the support of the ordinary governmental and educational functions" of the state. The inherent difficulty of any attempt by individuals to adopt such a plan by themselves is referred to in the first section of the act. In this connection, it may be stated that by an affidavit filed in the superior court at the hearing of the application for an injunction and not denied, it is stated that for some ten years immediately prior to the lemon season of 1934-1935, lemon growers producing 90 per cent. of the lemons grown in the state voluntarily entered into a prorate agreement substantially along the lines provided for in the Prorate Act, whereby they limited the marketing and sale through the regular channels of trade of lemons produced by them in an attempt to stabilize the market. The lemons not so sold, to save wasting them entirely, were delivered to by-product plants and sold for a price less than the cost of production. During these same years, the producers of lemons not in said voluntary prorate agreement, while only producing 10 per cent. of the crop produced in the state sold through the

regular channels of the lemon trade 20 per cent. of the lemons so sold. It further appeared from said affidavits that the estimated crop of lemons for the year 1934-1935, being the year to which said prorate program was intended to apply, was 29,000 carloads, and that the average consumption of lemons in the United States for the six years ending October, 1934, practically all of which are produced in this state, was 16,595 carloads. Under these estimates, there was a large surplus in the amount of lemons produced during that year over the amount which could be disposed of at a profit in the regular channels of the lemon trade.

[5] It is the contention of applicants that unless regulations like those imposed by the terms of the statute, or something similar thereto, are applied to the production and marketing of the lemon crop of the state, that the industry will be conducted at a loss to the producers with the result that not only will great "agricultural waste" be entailed, but that the benefits of this great industry will be eventually lost to the state and to its citizens. This condition was no doubt in the minds of the legislators when they enacted the Prorate Act, as will readily appear from the reading of section 1 of the act. While the legislation infringes upon the rights of the individual, as it denies him the right to produce and harvest his crop of lemons at will, can these individual rights be regulated and subjected to the paramount rights of the public? It is conceded that if such legislation can be upheld it can only be sanctioned by resort to the police power of the state. If the legislative act is within the police power of the state, then the rights of the individual which may be affected thereby must give way to the superior rights of the public, and he cannot complain that his property is taken without due process of law or without compensation first paid to him. *Graham v. Kingwell*, 218 Cal. 658, 660, 24 P.(2d) 488; *Gin S. Chow v. City of Santa Barbara*, 217 Cal. 673, 702, 22 P.(2d) 5.

The courts of this state have had frequent occasions to expound the law applicable to the proper exercise of the police power of the state. In a recent case we held that under that power a city by ordinance could establish districts or zones within its boundaries, and limit the uses to which property located in these several zones could be put by the individual own-

er. *Miller v. Board of Public Works*, 195 Cal. 477, 485, 234 P. 381, 383, 38 A.L.R. 1479. As marking the development and growth of the police power, the court in that case said: "In its inception the police power was closely concerned with the preservation of the public peace, safety, morals, and health without specific regard for 'the general welfare.' The increasing complexity of our civilization and institutions later gave rise to cases wherein the promotion of the public welfare was held by the courts to be a legitimate object for the exercise of the police power. As our civic life has developed so has the definition of 'public welfare' until it has been held to embrace regulations 'to promote the economic welfare, public convenience, and general prosperity of the community.' *Chicago, B. & Q. R. Co. v. Illinois*, supra [200 U.S. 561, 592, 26 S.Ct. 341, 50 L.Ed. 596, 4 Ann.Cas. 1175]." In a more recent case we held that it extended to and permitted the regulation of the production of gas and oil in this state even to the curtailment of the amount which could under the terms of the statute be produced. *People v. Associated Oil Co.*, 211 Cal. 93, 294 P. 717, 723. In that case the court sustained the validity of the so-called Oil and Gas Conservation Act. St.1915, p. 1404. After an exhaustive discussion of the subject as applied to the power of the state to enact the legislation in question, the court concluded: "Whatever refinements may be suggested as to the definition of the nature of the property right in gas and oil beneath the surface and uncaptured, we are entirely satisfied that the waste of these natural resources may be regulated and the unreasonable waste thereof may be prohibited in the exercise of the police power of the state, and that the statute in question is not subject to the objections first advanced by the petitioners." Other instances where this court has upheld legislation enacted under the police power of the state are as follows: *In re Madera Irrigation District*, 92 Cal. 296, 309, 28 P. 272, 675, 14 L.R.A. 755, 27 Am. St.Rep. 106; *Odd Fellows' Cemetery Ass'n v. San Francisco*, 140 Cal. 226, 73 P. 987; *French v. Davidson*, 143 Cal. 658, 77 P. 663; *Laguna Drainage District v. Charles Martin Co.*, 144 Cal. 209, 77 P. 933; *Jardine v. City of Pasadena*, 199 Cal. 64, 248 P. 225, 48 A.L.R. 509; *Spinks v. City of Los Angeles*, 220 Cal. 366, 369, 31 P.(2d) 193. In the case of *In re Pedrosian*, 124 Cal.App. 692, 698, 13 P.(2d) 389,

391, we find this significant language, "The power has always been as broad as the public welfare. [Citing authorities.] The police power * * * is co-extensive with the necessities of the situation. [Citing authorities.] All property is held subject to the proper exercise of the police power. *Ex parte Quong Wo*, 161 Cal. 220, 118 P. 714."

Further authorities might be cited from this and other jurisdictions showing the extent to which the police power has been adapted and applied to the solution of problems involving economic and social conditions of present day life. The principles, however, governing the exercise of this high prerogative of sovereignty have now been so well established and so universally recognized that we will end the discussion of the subject by reference to a few recent cases principally from the Supreme Court of the United States.

Probably the most enlightening as well as the most decisive case, in so far as it relates to the question raised by respondents' contention that the Prorate Act violates the due process clause of the Federal Constitution is the recent case of *Nebbia v. People of State of New York*, 291 U. S. 502, 54 S.Ct. 505, 514, 78 L.Ed. 940, 89 A.L.R. 1469. That action involved the Agriculture and Market Laws of New York, which provided for a Milk Control Board with the power to fix the minimum and maximum retail prices to be charged for milk sold by storekeepers. The board fixed the price and *Nebbia* sold milk below the price fixed. His prosecution followed. He was convicted of a violation of the statute and his conviction was affirmed by the Court of Appeals (*People v. Nebbia*, 262 N.Y. 259, 186 N.E. 694), from which court he carried his case to the Supreme Court of the United States. Both courts upheld the statute as a valid and proper exercise by the state of its police power. In the opinion of the Court of Appeals of New York, we find the following statement of the law (262 N.Y. 259, at page 270, 186 N.E. 694, 699): "Doubtless the statute before us would be condemned by an earlier generation as a temerarious interference with the rights of property and contract (*Matter of Jacobs*, 98 N.Y. 98, 50 Am.Rep. 636; *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L. Ed. 937, 3 Ann.Cas. 1133); with the natural law of supply and demand. But we must not fail to consider that the police power

is the least limitable of the powers of government and that it extends to all the great public needs; that constitutional law is a progressive science; that statutes aiming to establish a standard of social justice, to conform the law to the accepted standards of the community, to stimulate the production of a vital food product by fixing living standards of prices for the producer, are to be interpreted with that degree of liberality which is essential to the attainment of the end in view (*Austin v. City of New York*, supra, 258 N.Y. 113, at page 117, 179 N.E. 313); and that mere novelty is no objection to legislation (*People ex rel. Durham Realty Corp. v. La Fetra*, 230 N.Y. 429, 130 N.E. 601, 16 A.L.R. 152).

"The State courts should uphold State regulation whenever possible. They should be clearly convinced that a statute is unconstitutional before they declare it invalid. (Cf. *Ives v. South Buffalo Ry. Co.*, 201 N.Y. 271, 94 N.E. 431, 34 L.R.A.(N.S.) 162, Ann.Cas.1912B, 156, with *Arizona Employers' Liability Cases*, supra [250 U.S. 400, 39 S.Ct. 553, 63 L.Ed. 1058, 6 A.L.R. 1537]; also cf. *People ex rel. Rodgers v. Coler*, 166 N.Y. 1, 59 N.E. 716, 52 L.R.A. 814, 82 Am.St.Rep. 605, with *Atkin v. Kansas*, supra [191 U.S. 207, 24 S.Ct. 124, 48 L.Ed. 148])."

Before the Supreme Court of the United States, *Nebbia* advanced the argument in support of his claim that the statute was unconstitutional that the milk business was not subject to legislative control as it was not so affected with a public use as to bring it within that type of business which public interest demands or even permits to be regulated. The court, after referring to the case of *Munn v. Illinois*, 94 U.S. 113, 24 L.Ed. 77, in which a state statute regulating elevator charges was sustained, went on to say: "The true interpretation of the court's language [in *Munn v. Illinois*] is claimed to be that only property voluntarily devoted to a known public use is subject to regulation as to rates. But obviously *Munn* and *Scott* had not voluntarily dedicated their business to a public use. They intended only to conduct it as private citizens, and they insisted that they had done nothing which gave the public an interest in their transactions or conferred any right of regulation. The statement that one has dedicated his property to a public use is, therefore,

merely another way of saying that if one embarks in a business which public interest demands shall be regulated, he must know regulation will ensue." The court in its opinion had already referred to the conditions existing in the milk business in the state of New York due to demoralizing competition resulting in destructive price-cutting practices by retail stores. The condition there described is in many respects similar to that which exists in the lemon industry in this state as disclosed by the record herein. In view of those existing conditions, the court held that the business was subject to control and regulation and sustained the order fixing the retail price thereof. We quote that portion of the opinion found on page 530 of 291 U.S., 54 S.Ct. 505, 513, 78 L.Ed. 940, 89 L.Ed. 1469: "The milk industry in New York has been the subject of long-standing and drastic regulation in the public interest. The legislative investigation of 1932 was persuasive of the fact that for this and other reasons unrestricted competition aggravated existing evils and the normal law of supply and demand was insufficient to correct maladjustments detrimental to the community. The inquiry disclosed destructive and demoralizing competitive conditions and unfair trade practices which resulted in retail price cutting and reduced the income of the farmer below the cost of production. We do not understand the appellant to deny that in these circumstances the Legislature might reasonably consider further regulation and control desirable for protection of the industry and the consuming public. That body believed conditions could be improved by preventing destructive price-cutting by stores which, due to the flood of surplus milk, were able to buy at much lower prices than the larger distributors and to sell without incurring the delivery costs of the latter. In the order of which complaint is made the milk Control Board fixed a price of 10 cents per quart for sales by a Distributor to a consumer, and 9 cents by a store to a consumer, thus recognizing the lower costs of the store, and endeavoring to establish a differential which would be just to both. In the light of the facts the order appears not to be unreasonable or arbitrary, or without relation to the purpose to prevent ruthless competition from destroying the wholesale price structure on which the farmer depends for his livelihood, and the community for an assured supply of milk."

The court in the *Nebbia* Case then proceeds to discuss the claim of the appellant that the New York act violated the due process clause of the Federal Constitution. In answer to this contention the court declared its position as follows (291 U.S. 502, at page 537, 54 S.Ct. 505, 516, 78 L.Ed. 940, 89 A.L.R. 1469):

"So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the Legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*. 'Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine.' *Northern Securities Co. v. United States*, 193 U.S. 197, 337, 338, 24 S.Ct. 436, 457, 48 L.Ed. 679. And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. The course of decision in this court exhibits a firm adherence to these principles. Times without number we have said that the Legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.

"The lawmaking bodies have in the past endeavored to promote free competition by laws aimed at trusts and monopolies. The consequent interference with private property and freedom of contract has not availed with the courts to set these enactments aside as denying due process.

Where the public interest was deemed to require the fixing of minimum prices, that expedient has been sustained. If the law-making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the Legislature to be fair to those engaged in the industry and to the consuming public. And this is especially so where, as here, the economic maladjustment is one of price, which threatens harm to the producer at one end of the series and the consumer at the other. The Constitution does not secure to any one liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people. Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the Legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty."

In a still later case the United States Supreme Court upheld as constitutional the Milk Control Act of New York under which an order fixing a differential of one cent per quart on sales of milk to stores in favor of milk dealers not having a "well advertised trade name." *Borden's Farm Products Company, Inc., v. Peter G. Ten Eyck*, 56 S.Ct. 453, 455, 80 L.Ed. 669. While the order in question was to continue only for a limited period of time, we think the principle enunciated by the court in sustaining its validity is pertinent to the decision of the point now under consideration in the instant case. In sustaining the order, the court said: "In enforcing its policy of price fixing—a temporary expedient to redress an injurious economic condition—the Legislature believed that a fixed minimum price by dealers to stores would not preserve the existing economic method of attaining equality of opportunity. That method was for the well-advertised dealers to rely on their advertising to obtain a given price, and for the independents to retain their share of the

market, not by counter advertising but by a slight reduction of price. The one expedient the law did not purport to touch; the other by fixing the same minimum for all dealers it would effectually destroy. In these circumstances, it was competent to the law makers to attempt, during the limited term of the legislative experiment, to preserve the existing relationship of advantage established by the past trade practices of the two groups. So to do, we must assume, was within the legislative power under the State Constitution. No prohibition of the expedient is found in the Federal Constitution, unless in the Fourteenth Amendment. We have held that article does not prevent the fixing of maximum and minimum prices for milk, in the circumstances existing in the state of New York in 1933. We now hold that to provide that a differential of one cent maintained by the independent dealers shall continue does not deny their advertised competitors equal protection. There was a plain reason for the classification. It was not merely that appellant had established a good will; it was that there had resulted a balance between that advantage and the resulting disadvantage to the unadvertised dealer, a balance maintained by a price differential. To attempt the maintenance of that balance was to strive for equality of treatment, equality of burden, not to create inequality. To adapt the law to the existing trade practice was neither unreasonable nor arbitrary."

It will be noted that the court in neither of the opinions just referred to places its decision upholding the statutes regulating the milk industry of the state of New York upon the ground that the enactment of such legislation was necessary to promote the public health. On the other hand, it was expressly stated in the *Nebbia* Case, and at least implied in the other, that the property respecting which the legislation was enacted was "affected with a public interest," or "clothed with a public use."

Respondents rely upon a number of earlier cases, principally from the Supreme Court of the United States, among which are the following: *Williams v. Standard Oil Co.*, 278 U.S. 235, 49 S.Ct. 115, 73 L. Ed. 287, 60 A.L.R. 596; *Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522, 43 S.Ct. 630, 67 L.Ed. 1103, 27 A.L.R. 1280; *Tyson & Brother United Theatre Ticket Offices v. Banton*, 273 U.

S. 418, 47 S.Ct. 426, 71 L.Ed. 718, 58 A.L.R. 1236; *Fairmont Creamery Co. v. Minnesota*, 274 U.S. 1, 47 S.Ct. 506, 71 L.Ed. 893, 52 A.L.R. 163, and *Ribnik v. McBride*, 277 U.S. 350, 48 S.Ct. 545, 72 L.Ed. 913, 56 A.L.R. 1327. These cases are all cited in the dissenting opinion in the *Nebbia* Case. They were, of course, called to the attention of the court, but evidently a majority of the court did not choose to follow them.

[6] Under the authorities cited herein, we are of the opinion that the Prorate Act does not violate the due process clauses of the State and Federal Constitutions, nor those sections which provide against the taking of private property for public use. Neither is the act in conflict with the Federal Constitution, which accords to all persons the equal protection of the law. If the state has the authority to fix the price at which a commodity such as milk may be sold and thus avoid the ruinous effect of unrestrained competition, as we understand the decisions of the highest court in this land so held, we can see no difference in principle in a state statute which attempts to regulate the production and marketing of a commodity, where without such regulation the industry would be practically destroyed to the great detriment not only of those engaged therein, but to the state and its citizens as well. The lemon industry, which is directly concerned in this proceeding, as appears by the record before us, affects an exceedingly large number of citizens of the state. The investment therein runs into millions of dollars. Its success contributes in a large measure to the prosperity of the state, and its destruction would be no less than a public calamity, not only to this state, but to all those residing without its limits. We do not feel that we are in any way or to any extent extending the principles of law enunciated in the authorities cited above by holding that such a business is so affected with a public interest or clothed with a public use as to justify the state in the exercise of its police power to impose such reasonable regulations upon the quantity of the commodity that may be produced and marketed therein as will save the industry from destruction from ruthless competition, the direct effect of overproduction. The restraint imposed by the statute operates only upon the quantity to be produced, and the amount to be marketed.

After securing the secondary certificate permitting the marketing of his proportionate amount of lemons produced, the lemon grower is then left free to sell such amount at whatever price he may receive and to whomsoever may desire to purchase the same. The limitation simply limits the amount to be marketed and does not extend to or affect the sale of the commodity. As before stated, the terms of the act apply equally upon all growers, and distributes the benefits and burdens among them in proportion to the amount of fruit produced by them. The act is therefore neither arbitrary nor discriminatory. It cannot be said that any person affected thereby is denied the equal protection of the law.

This concludes the discussion of the grounds of unconstitutionality advanced and relied upon by the respondents in their attack upon the validity of the Prorate Act. As we have indicated in our opinion, they are not well founded, and they afford, neither singly nor collectively, any legal reason for invalidating the act. We think it reasonably complies with all the requirements of the State and Federal Constitution, and its enactment was within the power of the Legislature, as that power is defined and limited by the organic law of our state and federal governments.

Respondents make the further contention that even if the Prorate Act is constitutional, the procedure provided therein for the formation of a district was not regularly followed in the formation and organization, and therefore all orders thereafter made by the commission or the committee are invalid and void. Respondents specify two respects in which they contend that the original petition for the formation of the district is so defective as to render the whole proceedings thereon of no binding effect whatever upon them, or upon any person. As we have seen, the petition for the formation of a district or zone must be signed by not less than fifty producers of the commodity within the proposed prorating zone; provided that if it be alleged in said petition that it is signed by two-thirds or more in number of the producers of said commodity within the proposed zone and by the owners of a two-thirds or more in number of the producing factors of said commodity in said proposed zone, the number of signers shall be immaterial. It is further provided in

the act that if the petition is signed by the owners of two-thirds or more of the producing factors and two-thirds of the producers of the commodity concerned, it need not contain a request for an election, and if it is so alleged in the petition, and at the hearing the commission finds said allegation to be true, then upon proof of the other necessary matters set forth in the petition, the commission may order the formation of the district or zone without the calling of an election. In the petition, which was the foundation of the proceedings involved herein, it was alleged that it was signed by the necessary two-thirds of the producing factors and two-thirds of the producers of lemons within the proposed district, and the commission found this allegation to be true and ordered the formation of the district without an election being held in the proposed district to determine whether the district should be so formed. As stated before, in the petition it was alleged that the producing factor for the purposes of the proceeding is specified as a standard box of lemons, based on the crop season from November 1, 1933, to October 31, 1934. This basis was accepted by the commission and used and acted upon in the proceeding leading up to the organization of the district. Respondents now contend that this basis was erroneous and fatally defective in that the commission had no right to accept the packed box as the producing factor in order to determine whether the petition contained the required number of signatures to entitle the commission to order the district formed without an election, and, furthermore, the action of the commission was equally erroneous and unauthorized in selecting the past season of 1933-1934 instead of the current season of 1934-1935 as the basis of determining whether the petition contained the required number of signatures to authorize the formation of a district without an election.

[7] In support of the first of these two contentions, respondents assert that the term, "producing factor," cannot be said to apply to a packed box of lemons or to any other integral part of that which is produced, but by the use of these words the Legislature intended to refer not to any portion of the commodity which was produced, but to the factor which produced the commodity, such as a lemon tree or an acre of lemons. We would be much inclined to

agree with respondents were it not for the definition of "producing factor" given in the statute itself. By subdivision 2 (h) of the act, "The term 'producing factor' means the unit of production specified in the petition." As we have seen, the petition specified a standard packed box of lemons as the producing factor for the purpose of said proceeding. From the definition given in the act of the term, "producing factor" as "a unit of production," we think it well may mean some definite part of that which is produced, and that in specifying such unit of production, as a packed box of lemons, the petition was within and complied with the terms of the act.

[8] As to the specification of the crop of the past year instead of that of the current year as the basis of determining whether the petition contained the requisite number of signatures, it seems that the petition was dated February 19, 1935. It is conceded that at that date but a small part of the lemon crop of the season had been harvested. Any attempt to fix the exact amount of such crop would be by an estimate of lemons then on the trees. It would be impossible to definitely determine the amount of the crop by a mere estimate so made. On the other hand, the amount of lemons produced the previous year was certain and definitely fixed. By referring to the records of the previous year, the total production of lemons in the state could be ascertained and also the several amounts produced by each individual grower. No attempt was made to show that the adoption of the previous year's crop as a basis of determination worked any injustice or hardship on any grower. On the other hand, the plan adopted was fair and just to all growers. It worked for certainty and definiteness, and in most respects was preferable to a procedure depending upon the uncertain method of a mere estimate of what might be produced during the current year. This resort to the previous year's crop was only had for the purpose of fixing some basis upon which to institute proceedings for the formation of the district. The previous year's crop did not enter into the future acts of the committee in prorating crops thereafter to be produced and made the subject of proration. The proration of any future crop would be governed entirely by the amount of such crop and the individual production

of each grower. We therefore are of the opinion that the specification of a standard packed box of lemons in the petition as a basis of determining whether the requisite number of owners had signed the petition was a substantial compliance with the terms of the act.

[9, 10] In the injunction suit before the respondent court the plaintiffs therein made the claim that the prorate district in which the applicants were purporting to act as officers was never legally formed or organized in that the petition for the formation of said district was never signed by the necessary two-thirds of the lemon producers residing in said proposed district or zone, and therefore the commission had no authority to make its order organizing said district without an election being held therein to pass upon the question of the formation of said district. This claim on the part of said plaintiffs was set forth in paragraph XX of their complaint in which it is alleged, among other things, that "said petition was not signed by two-thirds or more in number of the producers of lemons in California, nor by the owners of two-thirds or more of the producing factors of lemons in California." If that allegation is true, then the district was not legally formed or organized, and if it was not so organized, an injunction against the applicants restraining them from executing the terms of said act would lie. On the hearing of the application for a temporary injunction, an affidavit was filed which purported to deny the allegations of paragraph XX of the said complaint. There is nothing, however, in the record before us to indicate that the respondent court has ever passed upon the issue tendered by the allegations of said paragraph XX. In fact, it would be rather unusual for the court to finally pass upon an issue of fact on an application for a temporary injunction. This issue of fact, however, was presented by the plaintiffs in the injunction suit, and the court had jurisdiction to decide it. So far, it has never done so. The injunction suit is still in the respondent court, and that court has exclusive jurisdiction to hear and determine all undecided issues of facts presented by the pleadings in said suit. Should it determine that said district was legally organized and that the orders which the plaintiffs in said action seek to restrain are valid and binding upon those to whom they are directed, then it would be

the duty of said court to deny the injunction and dismiss the suit. On the other hand, should the trial court find in favor of the plaintiffs in said suit upon the allegations of said paragraph XX, then it would necessarily follow that said orders would have no legal support and the defendants in said suit should be enjoined from enforcing them. For this reason, the application for a writ of prohibition directed to respondents restraining them from proceeding in said action should be denied.

It is therefore ordered that the petition herein be denied, and the alternative writ heretofore issued be discharged.

We concur: WASTE, C. J.; LANGDON, J.; SEAWELL, J.; SHENK, J.

THOMPSON, Justice (concurring).

I concur in the conclusion reached herein that the peremptory writ of prohibition should not issue, but I think it inappropriate in this proceeding to discuss the constitutionality of the act under which the petitioners are proceeding to act or whether the packed box of lemons constitutes a producing factor within the meaning of the act. A writ of prohibition will not lie where the court is exercising but not exceeding nor threatening to exceed its jurisdiction. The respondent court has jurisdiction in the present case not only for the reason pointed out in the majority opinion, but also by reason of section 17 of the act, which section, while relied upon by the respondents, has not heretofore been discussed. It reads as follows: "Any order of the commission instituting a proration program and any other order of the commission substantially affecting the rights of any interested party may be reviewed by any court of competent jurisdiction. Any such action must be commenced within thirty days after the effective date of the order complained of or within thirty days after the injurious ef-

fect complained of." Making the meaning of the Legislature in this regard more patent is the provision in section 9 (as amended by St.1935, p. 1532) for keeping all the evidence, exhibits, data, and transcript at a central point available to all interested parties. The complaint of the respondents, after alleging that the commission exceeded its jurisdiction, not only because of the unconstitutionality of the act, but also because the requisite facts were not proven and because petitioner adopted as a producing factor a unit which was a measure of the production rather than one which the producer "may be expected to utilize for production purposes in the ensuing season," asks not only for injunctive relief, but also that the "court issue such other or different writs herein as to the court shall seem fit and proper and necessary for the protection of the plaintiffs." It is thus made obvious that plaintiffs brought themselves within the spirit and letter of section 17, quoted above. When we bear in mind that the act in question seeks to make provision for the institution of a proration program for any agricultural commodity, it becomes of extreme importance that the trial court be unhampered in its duty of determining when a commodity is "affected with a public interest" so as to justify the compulsory regulation of nonconsenting producers. Aside, therefore, from the usual rules of procedure which dictate that in a proceeding of this character we should only inquire into the jurisdiction of the respondent court, there is the additional reason in this case that the trial court is clothed with the direct authority to make the inquiry and adjudge the cause. We should not attempt to prejudge or dictate how it shall exercise its jurisdiction. The petitioners may well appeal if the court erroneously decides the case against them, and we shall be better able to discharge our function when the case is fully developed.

12 Cal.App.2d 407

In re NOAKES' ESTATE.

NOAKES v. LUTGENS, Director of Department of Institutions.

Civ. 10705.

District Court of Appeal, Second District,
Division 1, California.

March 12, 1936.

1. Insane persons ⇨58

State hospital held not barred from recovering from estate of incompetent war veteran for his support at hospital, for period of four years prior to filing of claim, on ground of laches in not informing incompetent's guardian, who believed that federal government was bearing such expense, that charge was being entered against estate (Pol.Code, § 2181).

2. Insane persons ⇨58

Where record did not show source of estate of incompetent war veteran, reviewing court could not find error in trial court's refusal to make finding that such estate was made up of benefits under Veterans' Act and thus exempt from his creditors' claims (Code Civ.Proc. § 690, subds. 18, 20; World War Veterans' Act § 22, 38 U.S.C.A. § 454).

Appeal from Superior Court, Los Angeles County; Clemmence Brown, Judge pro tem.

Proceeding in the matter of the estate of George B. Noakes, an incompetent person, between E. May Noakes, guardian of the estate of George B. Noakes, and Harry Lutgens, Director of the Department of Institutions of the State of California. From an adverse order, the guardian appeals.

Affirmed.

James H. O'Neill, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

DESMOND, Justice pro tem.

E. May Noakes, sister and guardian of George B. Noakes, a World War Veteran and incompetent, appeals from an order in probate directing payment to the medical superintendent of Norwalk State Hospital of the sum of \$1,440 out of funds of the ward. This amount represented a charge of \$30 per month over a period of four years for care, support, and maintenance of the incompetent at the hospital, no claim

being made for a prior period of three years' care and maintenance, presumably because barred by the statute of limitations. Application for payment was made under section 2181 of the Political Code, which provides that the estates of insane patients harbored at state hospitals shall be chargeable for care, support, maintenance, and expense, except in cases where there is a likelihood that the patient, upon being released, shall become a burden on the community by reason of the charge. In the instant case the court found that the payment of \$1,440 would not reduce the estate to such a point. Appellant contended at the hearing that the order should not be made for two reasons: First, laches; second, exemption of the veteran's property from the claims of creditors. These same objections constitute the grounds of the present appeal.

In regard to the first ground, appellant claims that during all the time the veteran has been confined and cared for at the state institution, he might have been cared for at the expense of the federal government at a United States hospital, or wherever confined by direction of the government, "by reason of the fact that his disability had been incurred in the war"; that the present guardian and her predecessor, the now deceased mother of the incompetent, were never advised by the Norwalk authorities that a charge was being entered against the estate, and both believed that the federal government was bearing the expense of the maintenance of the ward; that because of this belief and "because no mention was made of the payment of these charges, the guardian failed and neglected to make application to the Veterans' Administration for the necessary hospitalization which would have been furnished by said Veterans' Administration to the ward without cost."

[1] In answer to this claim, respondent points out that in a case where the state has an interest in the subject-matter of the litigation in the sense that it has something to gain or lose, the doctrine of laches cannot be invoked against the sovereign (10 Cal.Jur. 535; Anderson v. Nawa, 25 Cal.App. 151, 158, 143 P. 555), and further calls attention to the continuing duty imposed upon the guardian by section 2181 of the Political Code to pay for care, maintenance, and support afforded to her ward in the state hospital.

We feel that under the circumstances and with the claim limited to the four years prior to its filing, the trial court was justified in ignoring the claim of laches. Especially so, since the guardian at any time during the period of confinement could have made inquiry of the hospital authorities as to whether compensation was being made to the state by the federal government for the care of the veteran.

[2] As to the second ground of appeal, exemption of the veteran's property from the claims of creditors, appellant cites section 22, World War Veterans' Act (38 U.S.C.A. § 454), and section 690, Code of Civil Procedure, subdivisions 18 and 20, and asks us to conclude that this veteran's estate is made up of benefits or pensions or both, received under the War Risk Insurance Act (38 Stat. 711, as amended) and the World War Veterans' Act (43 Stat. 607). What testimony, if any, was submitted upon this subject, we do not know. The bill of exceptions indicates that none was offered, and from the record it appears that the trial court refused to make such a finding, although proposed by appellant in paragraph VI of his proposed findings; also refused to make other findings requested by appellant, such refusal in each instance being specified in this appeal as error. Without information in the record relating to the character and source of appellant's property, we are not in position to find error in the court's decision not to make a finding on that subject, and giving consideration to the other errors claimed in the failure of the trial court to adopt other findings proposed by appellant, we hold that they are not well grounded.

Order affirmed.

We concur: YORK, Acting P. J.; DORAN, J.



12 Cal.App.2d 447

PEOPLE v. HIRSCHBEIN.

Cr. 2762.

District Court of Appeal, Second District,
Division 1, California.

March 13, 1938.

1. Criminal law ☞1169(1)

Appellate court will consider case and evidence as a whole in determining whether

prejudicial error was committed in introduction of evidence.

2. Courts ☞107

Where careful examination of entire record and of all evidence introduced established that defendant's conviction was not miscarriage of justice, each objection regarding introduction of evidence made in general way for first time on appeal would not be discussed in detail.

3. Criminal law ☞1023(10)

Appeal does not lie from verdict.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Morris L. Hirschbein was convicted of grand theft, and he appeals.

Affirmed.

J. W. Kearby, E. P. Werner, Edward Linder, and Entenza & Gramer, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John O. Palestine, Deputy Atty. Gen., for the People.

YORK, Justice.

This is designated by appellant as an appeal from "verdict and judgment." Fifteen different judgments were entered on fifteen verdicts, each verdict finding defendant guilty on one of the fifteen counts of the crime of grand theft charged in the information.

The attorneys for appellant are not the attorneys who represented defendant in the lower court. An examination of the transcript discloses the fact that there was sufficient evidence to warrant the jury in bringing in the verdicts which it brought in as to all of the counts charged in the information. The objections of the appellant's counsel on appeal seem to be predicated mainly on the fact that the attorney for defendant at the time of trial did not make as many objections as they now think he should have made to the introduction of evidence, and did not move to strike out certain evidence that was introduced; also, that the conduct of the trial judge was prejudicial to appellant.

[1,2] Each bit of evidence introduced, to which objection was and is now made, standing alone, without the rest of the entire proceedings being scanned with care, might show some reason for some of the objections raised; but this court will take the evidence as a whole and consider the

case as a whole in order to determine whether or not there was committed any prejudicial error. A careful examination of the entire record and of all the evidence introduced convinces this court that there was no miscarriage of justice in the conviction of the defendant. This being so, it is unnecessary to discuss each point raised in detail, because of the general way in which the objections are now made for the first time upon this appeal.

We cannot find anything objectionable in any of the remarks made by the trial judge, even when each remark is set off by itself without a statement of what preceded the remark or what called forth the remark. The record before us fully justifies each remark made by the trial court and shows beyond doubt that any remark objected to was not in any way prejudicial to the defendant.

There being sufficient competent evidence upon which the jury was justified in finding defendant guilty, as charged—in fact, there is almost a complete demonstration of guilt even in the defendant's own testimony—there is nothing in the record which justifies this appeal upon any of the grounds stated by appellant.

[3] As no appeal lies from "the verdict," the attempted appeal therefrom is dismissed. The judgments appealed from are affirmed.

I concur: SHINN, Justice pro tem.

I concur in the judgment: HOUSER, P. J.



12 Cal.App.2d 291

PRATT v. HOPPER et al.
Civ. 9613.

District Court of Appeal, Second District,
Division 1, California.

March 6, 1936.

Rehearing Denied March 30, 1936.

Hearing Denied by Supreme Court
May 4, 1936.

I. Bills and notes  119 Names  10

Statute providing that no person whose signature does not appear on negotiable instrument is liable thereon, but that one sign-

ing in trade or assumed name is liable to same extent as if he signed in his own name, simply expresses law merchant (Civ.Code,   3099).

2. Bills and notes  119

Undisclosed principal of one signing negotiable instrument cannot be charged thereon (Civ.Code,   3099).

3. Evidence  423(6)

Parol evidence is inadmissible to charge principal on negotiable instrument executed by agent without sufficiently indicating principal's identity on its face (Civ.Code,   3099).

4. Evidence  423(6)

Note secured by trust deed held negotiable instrument, behind face of which payee could not go to show that defendants in payee's action for deficiency after sale of security used signer's name as trade or fictitious name and authorized him to act as their agent and that negotiations were carried on by codefendant, who withheld from plaintiff names of other defendants, who took over mortgaged premises (Civ.Code,    3099, 3265).

5. Mortgages  561

Allegations of complaint in action for deficiency on note secured by trust deed that plaintiff sold realty to one defendant, who executed notes and trust deed and then sold realty to codefendants for cash and assumption of balance due plaintiff, held demurrable as predicated cause of action on note signed by actual person and promise by latter defendants to assume liability not resting on separate promise, supported by separate consideration, for benefit of or directly to plaintiff (Civ.Code,   3099).

6. Mortgages  561

Allegations of complaint in action for deficiency on note secured by trust deed for unpaid balance of purchase price of realty that defendant fraudulently represented that he acted for responsible undisclosed purchaser held demurrable as predicated cause of action on attempt to hold undisclosed principal to negotiable instrument (Civ.Code,   3099).

7. Principal and agent  145(4)

While action may be brought against both agent and undisclosed principal, plaintiff cannot have judgment against both, but must elect before close of trial to take judgment against one of them.

Appeal from Superior Court, Los Angeles County; Lester William Roth, Judge.

Action by Mabel E. Pratt against H. C. Hopper, Raleigh P. Trimble, and others.

From a judgment for named defendants, plaintiff appeals.

Affirmed.

Otto A. Gerth, of Los Angeles, for appellant.

Benjamin W. Shipman, of Los Angeles, for respondents.

WHITE, Justice pro tem.

This is an appeal by the plaintiff from a judgment entered against her in an action brought to recover a deficiency on a note secured by trust deed after the security was sold. This appeal involves only the defendants H. C. Hopper and Raleigh P. Trimble. As far as the defendants F. W. Payne and Mitchell Mayer are concerned, they are not involved in this appeal, the record indicating that defendant Payne has not been served with summons and that defendant Mitchell Mayer, also known as M. Numier, was served, failed to appear or plead in the action, and a default judgment was entered against him.

Defendants Hopper and Trimble each interposed a general and special demurrer in the lower court. The demurrers were sustained without leave to amend as to the first and third causes of action, and sustained as to the second cause of action with leave to amend. Upon failure of plaintiff to amend, a judgment was entered in favor of the respondent defendants herein.

Plaintiff's amended complaint contained three causes of action, the first of which proceeds upon the theory that the defendants used the name of Mitchell Mayer as a trade or fictitious name to cover the transaction which they had with plaintiff; that they appointed and authorized Mitchell Mayer to act for them and each of them as agent, and that whatever transaction he consummated he consummated for all of them, jointly and severally; that the negotiations were carried on for Mitchell Mayer and the other defendants by Raleigh P. Trimble, and that he (Trimble) withheld from the plaintiff and refused to disclose to her the names of H. C. Hopper and F. W. Payne, two of the defendants, and who were the persons who really took over the premises in question and for whom the transaction was consummated.

As part of plaintiff's complaint she attached thereto as exhibits the grant deed she executed to the defendant Mitchell Mayer to the real property in question;

the deed of trust executed by Mitchell Mayer, grantee in the aforesaid deed, as trustor, to California Trust Company as trustee, and naming Mabel E. Pratt, grantor in the aforesaid deed, as beneficiary; and also a grant deed executed to the property in question by Mitchell Mayer to the defendants Hopper and Payne. All the exhibits show that the defendant Mitchell Mayer signed in his individual capacity, and not as agent for the other defendants. The exhibits do not show either that a trade-name was used or that the parties thereto were copartners.

[1-3] Section 3099 of the Civil Code reads as follows:

"§ 3099. *Liability on Instrument.* No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name."

The rule embodied in this section of the Civil Code is simply expressive of the law merchant. An undisclosed principal has been held liable except in cases of negotiable instruments and specialties, but the law seems well settled that in the case of negotiable instruments an undisclosed principal could not be charged at any time. In the case of negotiable instruments this restriction arises, not by reason of the status of the parties, but by reason of the character of the instrument. When a negotiable instrument is executed by an agent without sufficiently indicating on its face who the principal is, parol evidence cannot be introduced to charge the principal, although the agent executed the instrument as an agent. This exception to the rule is based upon the reason that each party who takes a negotiable instrument makes his contract with the parties who appear on its face to be bound for its payment; and in suits upon negotiable instruments no evidence is admissible to charge any person as principal thereto unless his name in some way is disclosed on the instrument itself.

This seems to be the uniform rule, and the necessity for uniformity in the interpretation and application of rules concerning negotiable instruments is commented on in *Nelson Co. v. Morton*, 106 Cal.App. 144, 149, 288 P. 845, 847, where the court says: "Justice Holmes has taught us, however, that law does not always keep step with logic. And in an attempt to penetrate the meaning of words or phrases of a statute

affecting common business transactions, it is not wise to take more thought of the husk than of the corn in the husk. Much of the confusion hitherto existing in the decisions, characterized by the United States Supreme Court in *Falk v. Moebis*, 127 U. S. 597, 8 S.Ct. 1319, 32 L.Ed. 266, as 'the anarchy of the authorities' and which led to the formulation of section 20 of the Negotiable Instruments Act, was caused by judicial blindness to mercantile usage and a straining after overnice distinctions which have served but to perplex the man of affairs. Upon questions affecting negotiable instruments it is far more important to have uniform rules than inerrant logic; and uniform laws must necessarily fail of their purpose, unless there is uniformity in their interpretation and application. *Utah State National Bank v. Smith*, 180 Cal. 1, 3, 4, 179 P. 160."

[4] In 1923 (St.1923, p. 193) the Legislature amended section 3265 of the Civil Code to provide that the negotiability of a promissory note, otherwise negotiable in form, secured by a mortgage or deed of trust upon real or personal property, shall not be affected or abridged by reason of a statement therein that it is so secured, nor by reason of the fact that said instrument is so secured, nor by any conditions contained in the mortgage or deed of trust securing the same.

The instrument in question here was therefore a negotiable instrument, and, as the trial court appropriately announced in its memorandum decision sustaining the demurrers, "to hold that one can go behind the face of a negotiable promissory note to show the facts is to nullify section 3099, Civil Code." The demurrers as to the first cause of action were properly sustained without leave to amend.

[5] The second cause of action proceeds upon the theory that plaintiff sold the real estate to the defendant Mitchell Mayer, taking part cash, the balance of the purchase price being represented by a note and trust deed, which real estate was in turn sold by Mitchell Mayer to the defendants Hopper and Payne; that said defendants Hopper and Payne bought the real estate in question from Mayer for \$10,500, paying \$3,000 cash, the balance of said purchase price to be made by the assumption on the part of Hopper, Payne, and Trimble of the balance due and owing by Mitchell Mayer to the plaintiff, Mabel E. Pratt.

The second cause of action, in other words, alleges that the defendants Hopper, Payne, and Trimble became the parties primarily responsible to plaintiff, through the deal they had with Mayer, for the balance of the purchase price due from Mayer to the plaintiff under the original transaction between plaintiff and defendant Mayer.

Nothing appears in the exhibits attached to plaintiff's complaint showing any assumption by respondents of the obligation due under the trust deed executed by Mayer to plaintiff, and, in fact, the record indicates that the grant deed executed by defendant Mayer to defendants Hopper and Payne was executed June 30, 1930, which was three days prior to the execution, on July 3, 1930, of the note and trust deed which was the basis of the obligation of Mayer to plaintiff. The court below sustained the demurrers as to the second cause of action because of the belief that said cause of action was predicated upon a promissory note signed by an actual person and upon an allegation of a promise by these respondents, who were the demurring defendants in the lower court, to assume liability; and that such liability is not tenable unless it rests upon a separate promise, supported by a separate consideration, and either made for plaintiff's benefit or directly to plaintiff. With the holding of the trial court in this regard we are in accord. The demurrers to the second cause of action were properly sustained. *Case v. Egan*, 57 Cal.App. 453, 455, 207 P. 388; *Bean v. Reicker*, 120 Cal.App. 403, 7 P. (2d) 1055.

[6] The third cause of action proceeds upon the theory of fraud alleged to have been practiced upon plaintiff by the defendants. The basis of the fraud, as alleged in the complaint, is that, at the time of the negotiations leading up to the sale of the land in question by plaintiff, in June or July, 1930, defendant Trimble represented to plaintiff that he (Trimble) was representing rich, responsible, and financially able purchasers, but did not care to disclose their names; that they were oil men and did not want their connection openly disclosed; that Trimble represented to plaintiff that the men he was representing were well able to pay the purchase price. Plaintiff further alleges that she relied upon such representations, but that the facts were that defendants used a man by the name of Mitchell Mayer, who was a clerk

working for defendant Hopper at a small salary, as the party in whose name the premises should be taken, and who made the note and trust deed, but who had no financial standing whatsoever. Plaintiff alleges that through the deceit and misrepresentations practiced upon her by the defendants they obtained possession and control of the land for the sum of \$3,000, held it until they ascertained there was no oil on the territory, and then defaulted in the payment of installments due under the note secured by the deed of trust. Plaintiff alleges that, had she known the real purpose of defendants, she would not have conveyed the property except for cash, which she alleges she was able at the time to obtain, because the premises actually had a market value of \$10,500, which market value was reduced to \$2,000 by the time of defendants' default and plaintiff's foreclosure.

From the allegations contained in plaintiff's third cause of action, it is apparent that, while she knew that other persons were interested in the transaction, yet she accepted Mitchell Mayer as the sole maker of the note and the sole purchaser, and now attempts, in a restatement of her first cause of action, to hold such undisclosed principals, because, regardless of the manner in which it is stated, that is the evident and apparent theory of appellant. And for the same reasons that justified the court in sustaining the demurrers as to the first cause of action, without leave to amend, the court was correct in sustaining the demurrers to the third cause of action, without leave to amend. Regardless of the language with which the third cause of action is clothed, it fails to conceal the fact that it is predicated upon an attempt to hold an undisclosed principal to a negotiable instrument. As pointed out by us in our discussion of the first cause of action, this cannot be done.

[7] The record in this case indicates that plaintiff has already obtained a judgment against the agent of the alleged undisclosed principals. While the rule in this state is that an action may be brought against both an agent and his undisclosed principal, the plaintiff may not have judgment against both, but before the close of the case on the trial must elect whether he will take judgment against one or the other. Should this case proceed to trial, plaintiff having already obtained a judgment

against the agent, these respondents, by invoking the rule of election, could defeat appellant's right to a judgment against respondents, after she had taken judgment against the agent, Mayer. *Craig v. Buckley*, 218 Cal. 78, 81, 21 P.(2d) 430.

The judgment appealed from is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.



12 Cal.App.2d 262

**A. G. SPALDING & BROS. v. CONTRA
COSTA COUNTY.**

Civ. 9893.

District Court of Appeal, First District, Division 2, California.

March 4, 1936.

Rehearing Denied April 3, 1936.

Hearing Denied by Supreme Court
April 30, 1936.

1. Counties ⇨146

County paying for goods, sold to school districts thereof through seller's agent, authorized to receive payments in cash or checks and indorse checks for deposit to seller's account, by warrants drawn by county superintendent of schools, approved by county auditor and cashed by county treasurer, *held* not liable to seller for amounts paid such agent in cash and given by him to superintendent, who appropriated money to his own use, though agent indorsed warrants in seller's name.

2. Counties ⇨167

County warrant is not negotiable instrument.

3. Principal and agent ⇨105(1)

When agent, authorized by principal to accept payment for goods sold, receives payment from debtor and gives receipt therefor in principal's name, debt is discharged.

4. Corporations ⇨411

Corporation, engaged for many years in business of selling goods to counties and school districts, required by statutes to pay therefor by warrants drawn on county treasurer and indorsed by legal holders, conferred ostensible authority on agent, through whom it received payments from county for goods sold to school districts, to indorse warrants for collection, and proof that its manager had no actual knowledge of such transactions did not absolve it from constructive knowledge

that agent was required to indorse warrants before making collections.

Appeal from Superior Court, Alameda County; John D. Murphey, Judge.

Action by A. G. Spalding & Brothers, a corporation, against the County of Contra Costa. Judgment for defendant, and plaintiff appeals.

Affirmed.

Donahue, Hynes & Hamlin, of Oakland, for appellants.

Francis P. Healey, Dist. Atty., of Richmond, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued for goods sold and delivered to the county. The defense was payment. The defendant had judgment and plaintiff has appealed on the single ground that the evidence is insufficient to sustain the finding that the account had been paid.

For several years the plaintiff had sold athletic equipment to the school districts of the county, these sales having been made by an agent of plaintiff named Wales. Payments were made by means of warrants drawn by the county superintendent of schools, approved by the county auditor, and cashed by the county treasurer. During the years of 1931 and 1932, Wales made sales to these school districts amounting to over \$11,000, and received from the superintendent of schools warrants calling for over \$14,000, all of which were paid by the county treasurer. Some of these warrants were paid in cash to Wales; some were paid by check drawn to plaintiff. In all cases the warrants were indorsed by Wales in the name of the plaintiff corporation in the presence of the treasurer. The proceeds of the checks were received by plaintiff; the proceeds of the cash payments were given by Wales to the superintendent of schools and appropriated by him to his own use. During the year 1931 Wales was employed as a salesman for plaintiff working out of its Oakland branch store; during the year 1932 he was employed as the manager of that store. Throughout his employment he was authorized to receive payment for goods sold by him either in cash or checks, and was authorized to indorse checks for deposit to plaintiff's account.

[1,2] The question raised by the litigation is one of the powers of a selling agent in making collections for his principal.

55 P.(2d)—33½

The appellant seeks to hold the county to the same liability as that of a bank upon payment of a check upon the account of a depositor when the indorsement on the check is unauthorized. There is no similarity between the two agencies. The county warrant is not a negotiable instrument. *Dana v. San Francisco*, 19 Cal. 486; *Ser-Vis v. Victor Valley Irrigation Dist.*, 190 Cal. 732, 214 P. 223. The county treasurer is not a banker, but is merely an agent of the county for the keeping and disbursement of the funds. The superintendent of schools and the county auditor are both agents of the county, but no one of these officials is the agent of another. It is conceded that warrants covering all the items of the account sued for were duly drawn and approved. It then became the duty of the treasurer to pay to the named payee on presentation. It has become a well-recognized custom in such cases to require an indorsement on the warrant at the time of payment, but this is nothing more than a receipt of payment for the account or claim for which the warrant was drawn.

[3] The only question of law involved is, therefore, when an agent is authorized by his principal to accept payment for goods sold, receives payment from the debtor, and gives a receipt therefor in the name of his principal, is the debt discharged between the principal and the debtor? All the authorities and sound reason compel an answer in the affirmative. *Restatement of the Law of Agency*, § 178; *Hart v. Northwestern Trust & Savings Bank*, 191 Ill. App. 396; 94 A.L.R. 786.

[4] Further facts here are that the plaintiff had been in the business of selling goods to counties and school districts for a long period of years. It must have known that the statutes required payment of these accounts by warrants drawn on the county treasurer and that payments could not be made without an indorsement on the warrant or a receipt from the legal holder. During the time when these defalcations were made and in the years prior thereto, the plaintiff was receiving payment from the county through its agent Wales. This conduct was sufficient to confer ostensible authority in Wales to indorse the warrants for collection, and proof that the manager of the plaintiff in the San Francisco office did not have actual knowledge of these transactions does not absolve the plaintiff from the constructive knowledge that, before these collections could be made by

Wales, some form of indorsement or receipt had to be given by Wales to the county in the name of the corporation.

The judgment is affirmed.

We concur: STURTEVANT, J.;
SPENCE, J.



12 Cal.App.2d 446

**CUFFIELD v. BOARD OF DENTAL EX-
AMINERS OF CALIFORNIA et al.**
Civ. 9196.

District Court of Appeal, Second District,
Division 1, California.
March 13, 1936.

1. Physicians and surgeons ⌘11(3)

Where several witnesses testified unequivocally before board of dental examiners that dentist used assumed name in conducting his practice, board had jurisdiction to suspend his license, and sufficiency of evidence to warrant such action is not reviewable on appeal from judgment affirming it.

2. Holidays ⌘6

Proceeding before board of dental examiners, resulting in suspension of dentist's license, held not invalid because board's action occurred at least in part on Saturday afternoon.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceeding before the Board of Dental Examiners of the state of California and others for suspension of the license of Harold Richard Cuffield to practice dentistry. From a judgment affirming the board's action in suspending accused's license, he appeals.

Affirmed.

George B. Bush, of Los Angeles, for appellant.

Anthony J. Kennedy, of Sacramento, for respondents.

DORAN, Justice.

It was alleged in an accusation filed with the board of dental examiners that appellant herein was licensed to practice dentistry under the name of Harold Richard Cuffield, and that, at the time specified in the accusation, he unlawfully used a cer-

tain false and assumed name, to wit, "Doctor Gordon," in carrying on and conducting the practice of dentistry. After a hearing, the board found the accusation to be true and suspended petitioner's license.

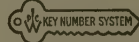
A review of the proceedings of the board of dental examiners by the superior court resulted in a judgment affirming the action of the board, and it is from such judgment of the superior court that petitioner appeals.

[1] It is claimed by appellant that the evidence received by the board of dental examiners and upon which the judgment of the lower court was based was insufficient, and that therefore the board was without jurisdiction. The record reveals that several witnesses testified unequivocally in support of the accusation against appellant, which, when compared with appellant's evidence before the board, at the most presents a conflict, and it therefore cannot be successfully claimed that, for the want of any evidence at all, the board was without jurisdiction; the sufficiency of such evidence is not reviewable on appeal.

[2] It is also contended by appellant that because the action of the board, in part at least, occurred on Saturday afternoon, the proceedings are invalid. In re Heckman, 90 Cal.App. 700, 266 P. 585, holds, in effect, to the contrary.

The judgment is affirmed.

We concur: HOUSER, P. J.; YORK, J.



12 Cal.App.2d 333

PEOPLE v. DUNLAP.
Cr. 2825.

District Court of Appeal, Second District,
Division 1, California.
March 10, 1936.

1. Criminal law ⌘516

To consider testimony as relating confession, there must be admission of guilt.

2. Criminal law ⌘516

"Confession" is voluntary declaration acknowledging declarant's agency or participation in crime or misdemeanor.

[Ed. Note.—For other definitions of "Confession," see Words & Phrases.]

3. Criminal law ¶516

Admission of deputy sheriff's testimony in robbery trial that defendant said that another held the gun *held* not error; such statement not constituting confession.

4. Criminal law ¶518(1)

Deputy sheriff's failure to admonish defendant that latter's statements might be held against him did not render inadmissible such officer's testimony in robbery trial that defendant said that another held the gun, in absence of showing that defendant's statements to witness were involuntary.

5. Criminal law ¶741(3)

Whether defendant's statement, to which deputy sheriff testified in robbery trial, that another held the gun, connected defendant with crime, *held* for jury.

6. Criminal law ¶1163(4)

To justify reversal of conviction for error in submitting verdict to jury, prejudice must be shown.

7. Criminal law ¶1172(1)

Submission to jury of verdict, "We * * * find the charge against the Defendant Guilty of being armed at the time of his commission of the offense as contained in the Information true," *held* not error, warranting reversal of conviction for first degree robbery, as calling gun to jury's attention, where their attention had been called thereto by evidence and no prejudice was shown; statutes defining first degree robbery neither calling for nor prohibiting such verdict (Pen.Code, §§ 211, 211a).

8. Robbery ¶24(1)

Witness' direct and unequivocal testimony in robbery trial that defendant pulled revolver *held* sufficient to sustain conviction of first degree robbery, though nothing was found on defendant to connect him with crime.

9. Criminal law ¶1023(10)

No appeal lies from verdict of conviction or sentence imposed.

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Ellwyn Dunlap was convicted of robbery in the first degree, and, from an order denying his motion for a new trial and the judgment, verdict and sentence, he appeals.

Judgment and order affirmed, and appeal from verdict and sentence dismissed.

John F. Groene, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for the People.

HAAS, Justice pro tem.

Defendant was charged by information with the crime of robbery, a felony. Entering a plea of not guilty, he was duly tried and convicted on the count of robbery of the first degree and sentenced to state prison. He now appeals from an order denying his motion for a new trial, and from the judgment, "the verdict and sentence."

[1-5] In the course of the trial, the trial court heard evidence by the deputy sheriff, J. W. Hurst, in words and figures as follows:

"I said, 'Which one held the gun in the robbery down in Los Angeles, you or the other fellow? He (referring to the defendant) said, 'Jones held it.'"' Appellant asserts that whether or not the words "Jones held it" constituted a confession that was of a voluntary or involuntary character should have been decided by the court at a hearing held out of the presence of the jury until the court rendered its decision, and that "no admonition was given at any time that the same (alleged confession) could or would be used against him"; and that "none of the alleged confessions in any way tended to connect defendant with the crime, and were not admissible at all."

The transcript of the evidence discloses no objection to have been made by counsel for defendant at the time this conversation was given in evidence, nor was any motion made to strike it. The transcript further discloses that the officer admitted several times that the appellant had consistently denied guilt. In order that the testimony may be considered as relating a confession, there must be an admission of guilt. "A confession is the voluntary declaration made by a person who has committed a crime or misdemeanor to another acknowledging his agency or participation in the same." 16 Cor. Jur. p. 714, § 1464. The evidence nowhere discloses an acknowledgment of guilt; on the contrary, refutes such a premise. The words "Jones held it" not constituting a confession, the court cannot be held to have erred, even had an objection been raised to admitting and hearing such evidence in the presence of the jury. The court had read the testimony of the officer given in the preliminary hearing, and the transcript dis-

closes nothing to show that the statements to the officer were involuntary. An admonition by the officer that statements made by the defendant might be held against him was uncalled for. Whether the statement testified to have been made by defendant, namely, "Jones held it," connects defendant with the crime charged, is a question for the jury, taken into consideration in connection with all other evidence adduced.

[6,7] Was it error to submit to the jury the verdict: "We, the Jury in the above entitled action, find the charge against the Defendant Guilty of being armed at the time of his commission of the offense as contained in the Information true"? Appellant offers no reason other than that it called the "gun" to the attention of the jury, to which, of course, their attention had already been called by the evidence. He offers no legal reason in urging that this was error. His repeated words, "This is very grave error," constitute a mere conclusion and assist us not at all. There is nothing in the record to disclose to us that the jury was prejudiced by the court's calling for a verdict on the question as to whether the defendant was guilty of being armed. Prejudice must be shown. *People v. Major Broyles*, 113 Cal. App. 390, 298 P. 131. Sections 211 and 211a of the Penal Code merely define "robbery in the first degree." They neither call for nor prohibit the giving of such a verdict.

[8] Again appellant urges that the evidence is insufficient to convict defendant; that there was nothing found upon defendant to connect him with the crime of any kind. We know of no rule that requires something to be found upon a defendant to identify him with the crime. The defendant himself was identified beyond a reasonable doubt. "Q. Which one of them pulled a revolver? A. The young man in court. Q. The defendant? A. Yes, sir." These answers are direct and unequivocal. From this stand the witness Nyberg never receded.

[9] It is ordered that the judgment and the order, by which defendant's motion for a new trial was denied, be, and they are, affirmed. Since no appeal lies from either "the verdict" or "the sentence," the attempted appeal therefrom is dismissed.

We concur: HOUSER, P. J.; DORAN, J.

12 Cal.App.2d 495

**PERKINS v. FARMERS & MERCHANT'S
SAV. BANK OF SANTA ANA, CAL.**
Civ. 1608.

District Court of Appeal, Fourth District,
California.

March 17, 1936.

1. Limitation of actions $\Rightarrow$ 100(12)

Action instituted in June, 1933, to rescind April, 1929, purchase of note and mortgage for fraudulent representation as to acreage covered, *held* not barred by limitation, in view of allegation that true facts were first discovered on April 9, 1933, notwithstanding county surveyor made survey and reported correct acreage to owner and lessee in June, 1929, in absence of evidence of facts putting assignee on inquiry (Pol. Code, §§ 4218-4220).

2. Mortgages $\Rightarrow$ 251

Assignee, induced to purchase mortgage by fraudulent representation as to acreage covered, could rescind by restoring everything of value which he received, notwithstanding buildings had been torn down, where he knew nothing thereof until afterwards (Civ. Code, § 1691).

3. Banks and banking $\Rightarrow$ 295

Savings bank could be compelled to return what it received through fraudulent representation inducing purchase of mortgage, notwithstanding statutory limitation on authority to guarantee obligation of another (St. 1909, p. 87, as amended).

4. Mortgages $\Rightarrow$ 251

Assignee of mortgage, on establishing that he was entitled to rescind for fraudulent representation, *held* entitled to receive back face value of mortgage and note secured thereby and accrued interest thereon.

5. Mortgages $\Rightarrow$ 270

Evidence *held* to sustain finding that assignee of mortgage suing to obtain rescission had been materially damaged by reason of misrepresentation as to amount of mortgaged land, so as to authorize rescission.

Appeal from Superior Court, Orange County; G. R. Freeman, Judge.

Action by George C. Perkins against the Farmers & Merchants Savings Bank of Santa Ana, California. Judgment for plaintiff, and defendant appeals.

Affirmed.

Rutan & Mize and R. Y. Williams, all of Santa Ana, for appellants.

L. W. Blodget, of Santa Ana, for respondent.

BARNARD, Presiding Justice.

On March 23, 1929, the defendant loaned \$15,000 to one S. W. Miller, taking a note secured by a mortgage on certain real property near Santa Ana, which was then under lease to the Orange County Fair Association. On April 23, 1929, the defendant sold this note and mortgage to the plaintiff, who resided in the state of New York but occasionally visited in Santa Ana. In making this sale one of the defendant's officers represented to the plaintiff that the land covered by this mortgage contained 18 acres. In April, 1933, the plaintiff discovered for the first time that the tract contained but 15.344 acres, or 14.771 acres exclusive of streets. In this action for rescission, which was brought on June 26, 1933, the court found in all respects in favor of the plaintiff and entered a judgment from which this appeal is taken.

[1] It is first contended that this action is barred by the statute of limitations. It is argued that the complaint failed to set forth the times and circumstances under which the facts constituting a fraud came to the knowledge of the respondent so that the court might determine from the allegations of the complaint whether the discovery was made within the statutory period. The complaint alleges that knowledge of the true facts first came to the respondent on April 9, 1933, and the circumstances under which he acquired such knowledge are particularly set forth.

It is also urged that the respondent could have ascertained the true acreage of this land on June 17, 1929, because the county surveyor then made a survey of the same, at the request of the owner and lessee, and reported the correct acreage to them, and that the statute runs from that date. It is not claimed that this information was given to the respondent then or at any other time, but it is argued that it must be presumed that the county surveyor complied with sections 4218 to 4220 of the Political Code and that his records were available to the respondent. Assuming that the county surveyor complied with these sections, we know of no law making these records a sufficient constructive notice to the respondent, and it seems to be

admitted that he had no actual notice thereof. The respondent lived in another state, the interest on the mortgage was paid up to March 22, 1932, and there is an entire absence of evidence of any facts which would reasonably have put the respondent on inquiry. In *Victor Oil Co. v. Drum*, 184 Cal. 226, 193 P. 243, 249, the court said: "Taking up the first point, the evidence amply sustains the finding that the plaintiff did not have actual knowledge of the fraud until December, 1913. The defendants claim, however, that it should have had such knowledge prior to that time and more than three years prior to the commencement of the action, and rely upon the well-established rule laid down in *Lady Washington, etc., Co. v. Wood*, 113 Cal. 482, 45 P. 809, that discovery is different from knowledge, that where a party defrauded has received information of facts which should put him upon inquiry, and the inquiry, if made, would disclose the fraud, he will be charged with a discovery as of the time the inquiry would have given him knowledge. See, also, *Bancroft v. Woodward* [183 Cal. 99] 190 P. 445. * * * The courts will not lightly seize upon some small circumstance to deny relief to a party plainly shown to have been actually defrauded against those who defrauded him on the ground, forsooth, that he did not discover the fact that he had been cheated as soon as he might have done. It is only where the party defrauded should plainly have discovered the fraud except for his own inexcusable inattention that he will be charged with a discovery in advance of actual knowledge on his part."

[2] The second point urged is that the appellant cannot be restored to substantially the same position as if the contract had not been made. This argument is based upon evidence to the effect that the owner of the land tore down certain buildings on said property after the lessee abandoned its lease. It fully appears that the respondent had no knowledge that the buildings were being torn down until this had been completed. The appellant relies upon section 3407 of the Civil Code, providing that a rescission cannot be adjudged for a mere mistake unless the party can be restored to substantially his former position. This is not a case of a mere mistake. The evidence shows that the officials of the bank were told prior to the making of the loan by the lessee that the tract contained 18 acres, that thereafter they secured an application for

a loan from the owner but asked him nothing about the acreage, and he gave them no information on that point. He had already told the lessee that he did not believe the tract contained 18 acres. Without making any inquiries of the owner or taking steps to verify the statement made by the lessee, the appellant made the loan and thereafter definitely represented to the respondent, in selling him the mortgage, that the tract contained 18 acres. The respondent had no part in removing any buildings from the premises and knew nothing thereof until after it had been done. His obligation under section 1691 of the Civil Code was merely to restore everything of value which he himself received. In *Spreckels v. Gorrill*, 152 Cal. 383, 92 P. 1011, 1015, it is said:

"It is claimed that, by reason of these transactions, the conditions had so materially changed that it was impossible for Spreckels to restore to Gorrill everything of value which he had received under the contract; in other words, that the delivery to Gorrill of the stock he sold to Spreckels would not have restored Gorrill to the position he was in immediately before the sale, which is the form in which defendant's counsel prefers to state the proposition. This latter, however, is not an accurate statement of the rule. Under the Code it is only necessary that the rescinding party shall 'restore to the other party everything of value which he has received from him under the contract.' Civ. Code, § 1691. If such restoration is possible, rescission can be accomplished and will be enforced even if the party is not placed in precisely the position which he previously occupied.

* * *

"If the defrauding party can be placed substantially in the same position at the time of the attempted rescission, which he at that time would have occupied if the sale had not taken place and he had retained the stock himself, the demands of equity are fully satisfied and the defrauded party is entitled to be relieved."

It is next urged that the respondent had no right to bring this action for the reason that he had theretofore transferred the equitable title to the note and mortgage to his daughter, through the creation of a trust for her benefit. The respondent testified that he had set up a trust for the benefit of his daughter with himself as the trustee, that by the terms of the trust the interest on this mortgage was to be paid

to his daughter, that he had set aside the interest on this and two other mortgages for her but that he had the power of substitution of other securities, and that the title to the note and mortgage always remained in him. The court found that he was the owner of the note and mortgage and was able to tender back to the appellant everything of value which he had received. The judgment entered in favor of the respondent was conditioned upon his returning the note and mortgage with a proper assignment thereof to the appellant.

[3] Some contention is made that the appellant, as a savings bank, could not become liable in such an action as this for the reason that it is without authority to guarantee the obligation of another under certain sections of the Civil Code and of the Bank Act (St.1909, p. 87, as amended). These limitations upon the contractual powers of a savings bank have no application here, and we are cited to no authority, and know of none, which relieves such an institution from the liability to return what it may have received through a fraudulent representation.

[4] The appellant next contends that the court erred in including in the judgment the amount of interest which was accrued on the note and mortgage but which had not been paid to the respondent. It is contended that such interest could only be allowed from the time notice of rescission was given. Two cases are cited where interest was allowed from the time of giving notice of rescission upon the theory that the money did not become due to the other party until that time. These cases have no application here, and we see no reason why the respondent, upon establishing that he was entitled to a rescission, was not entitled to receive back the face value of the note and the accrued interest thereon.

[5] Finally, the appellant contends that certain findings are not supported by the evidence, which it states is more or less conflicting. Several of these findings are on immaterial matters but all are supported by the evidence. One finding is to the effect that the respondent had no intimation of the falsity of this representation and no means of discovering the truth. The argument on this is the same as that made under the head of the statute of limitations. It is also urged that there is no evidence to support a finding that the plaintiff had been materially damaged by

reason of the misrepresentation as to the amount of land in the tract. The appellant admitted on the stand that its appraisal of the property would have been different had it known there was not 18 acres therein, and that any shortage in the acreage would lessen the value thereof. This evidence alone was sufficient to sustain the finding. *Munson v. Fishburn*, 183 Cal. 206, 190 P. 808; *Spreckels v. Gorrill*, supra.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.



12 Cal.App.2d 342

RANCHO LA SIERRA, Inc., v. BIXBY.
Civ. 10074.

District Court of Appeal, Second District,
Division 1, California.
March 10, 1936.

1. Corporations ¶90(6)

Evidence held insufficient to justify judgment that stockholder was not liable for assessment against stock on ground that board of five directors making assessment had not been reduced from seven to five members in accordance with law (Civ.Code, §§ 362, 362a, 362b).

2. Corporations ¶175

Assessment against stockholder held not invalid on ground that amendment to articles authorizing assessment was not ratified by unanimous consent of stockholders, where amendment was adopted before enactment of statute requiring such unanimous consent (Civ.Code, §§ 331 et seq., 362, 362a, 362b, and § 336 as amended by St. 1933, p. 1380).

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Action by Rancho La Sierra, Inc., against Jotham Bixby. From a judgment for the plaintiff, the defendant appeals.

Affirmed.

Combs & Combs, of Los Angeles, for appellant.

Denio, Hart, Taubman & Simpson, of Long Beach, for respondent.

ROTH, Justice pro tem.

Respondent corporation was organized in 1924 with a board of seven directors. Its articles of incorporation provided at that time, and at the time appellant became a stockholder some time prior to 1929, that its stock was assessable. There was, however, no specific provision for the collection of such assessment by action in court. Under the law as it then existed, when stock was assessable, assessments could be collected by direct action, even though the articles of incorporation did not specifically so provide. *Alameda City Land Co. v. Mortimer*, 92 Cal.App. 113, 267 P. 895; *Marshall v. Wentz*, 28 Cal.App. 540, 153 P. 244.

In August, 1931, by written declaration and consent of more than two-thirds of all the stockholders, in accordance with sections 362, 362a, and 362b of the Civil Code, the articles were amended reducing the board of directors from seven to five. In the same certificate of amendment a provision authorizing the levy and collection of assessments in the manner provided by chapter 9 of title 1 of part 4 of division first of the Civil Code of the state of California (section 331 et seq.), was also made. This latter amendment was made as a substitution for article eighth of the articles of incorporation. As it originally read, said article eighth provided for the levy and collection of assessments "in the manner provided by article 2 of chapter 2 of title 1 of the Civil Code of the state of California." The amendment with reference to article eighth was undoubtedly made because section 336 of the Civil Code, as adopted in 1931 (St.1931, p. 1798), specifically changed the law theretofore existing with reference to bringing actions for collection of assessments, providing: "* * * The only remedy for the collection of an assessment on fully paid shares shall be by sale or forfeiture unless the remedy by action is expressly authorized in the articles. * * *" Realizing that the amendment made of article eighth in 1931 might lack vitality, because of its nonspecific nature, the directors thereafter on January 26, 1932, again amended article eighth of the original articles of incorporation and provided specifically that the directors at their election "may collect any such assessment in any court of competent jurisdiction. * * *" This latter amendment was adopted by the written consents

of more than two-thirds of all the stockholders; defendant herein being one of the consenting stockholders. Thereafter respondent levied assessments in 1932 and in February, 1933. Except as hereinafter pointed out, all proceedings in connection with such levies were regular and in accordance with law. Respondent obtained judgment against appellant for the amount of such assessments, from which judgment this appeal is taken.

[1] Appellant contests the regularity of the assessments, first, on the ground that the board of directors was not reduced from seven to five in accordance with law, in that the amendment reducing the board of directors from seven to five was made by resolution of the board of directors, and thereafter adopted by the stockholders without holding a stockholders' meeting. As a consequence of this alleged procedure, appellant claims that the levy of the assessment originally initiated by the unanimous vote of five directors was not a legally sufficient enactment of the authorizing resolution, even though subsequently consented to in writing by the holders of more than two-thirds of the outstanding shares. A complete answer to this proposition is that there is no evidence that the amendment reducing the board of directors was made as appellant claims. The certificate of amendment recites, after referring to a resolution of the board of directors passed at a meeting of the board on August 31, 1931, which resolution had to do with the first change made in article eighth of the articles of incorporation, as follows: "Subsequent to the adoption of said resolution of the Board of Directors of said corporation, as aforesaid, and prior to the execution of this Certificate, the shareholders of the said corporation holding and representing 1397 shares of the issued and outstanding capital stock of said corporation, being more than two-thirds ($\frac{2}{3}$) of said issued and outstanding capital stock, executed and filed with the Secretary of said corporation their written consent to said resolution of the Board of Di-

rectors and to the amendment of the Articles of Incorporation of said corporation therein provided for, and also provided that the Directors of said Rancho La Sierra, Inc., be decreased from seven (7) to five (5), and that the Articles of Incorporation of said corporation be, and they are amended for that purpose so that Article Fifth thereof shall be in the following form. * * * " (Italics ours.)

There is no evidence that the board of directors was reduced by any other method, and, as stated in the preliminary outline of facts, the method used was expressly authorized by sections 362a and 362b of the Civil Code.

[2] Appellant's second contention is that the resolution amending article eighth adopted January 26, 1932, and consented to by more than two-thirds of the stockholders, was irregularly adopted because it was not ratified by unanimous consent of all of the stockholders. The fallacy of this contention is that all assessments herein sued upon had been levied and causes of action accrued thereon prior to the amendment of section 336 of the Civil Code in 1933 (St. 1933, p. 1380). As amended in 1933, section 336 provided, in substance, that remedy by action could be had only if authorized by the original articles or by amendment to the articles adopted prior to the effective date of the 1933 amendment, and that, in order to amend articles to provide such remedy after the effective date of the 1933 amendment of section 336, it must appear that all stockholders consented, and provided, further, that the certificates of stock must specifically recite that there was such a remedy. The amendment to article eighth was here made on January 26, 1932, as already pointed out, and the portion of section 336 of the Civil Code, as amended in 1933, requiring unanimous consent, has no application. The amended section itself plainly says so.

The judgment is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.

12 Cal.App.2d 353

BARTON v. MAAL.
Civ. 10857.

District Court of Appeal, Second District,
Division 2, California.
March 10, 1936.

1. Judgment ⇨117

Where complaint did not demand foreclosure of mortgage, default judgment granting foreclosure *held* erroneous (Code Civ.Proc. § 580).

2. Stipulations ⇨14(12)

Stipulation that judgment be reversed and costs on appeal taxed against respondent *held* sufficient, under statute, to restore jurisdiction of trial court over subject-matter of the judgment (Code Civ.Proc. § 954a, as added by St.1935, p. 1511).

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by T. W. Barton against Orrie D. Maal. From an adverse judgment, the defendant appeals.

Reversed.

Girard F. Baker, of Los Angeles, for appellant.

Carleton W. Holbrook, of Los Angeles, for respondent.

CRAIL, Presiding Justice.

[1,2] The defendant appeals from a judgment against him foreclosing a mortgage. His contention is that the complaint upon which the action was based did not demand a foreclosure of the mortgage, that the judgment was entered against him upon his failure to appear in the action, and was therefore erroneous for the reason that the court was not authorized to grant relief in excess of that demanded in the complaint. The record on appeal shows clearly that there was no demand in the complaint for the foreclosure of the mortgage, and it is settled law that in a default case the relief granted cannot be greater in amount or different in kind than that prayed for. Code Civ.Proc. § 580; *Foley v. Foley*, 120 Cal. 33, 52 P. 122, 65 Am.St.Rep. 147; *Brooks v. Forington*, 117 Cal. 219, 48 P. 1073; 18 Cal. Jur. 467. Indeed, the parties stipulate that the judgment may be reversed and that costs on appeal of \$47.30 may be taxed against re-

spondent. This stipulation is sufficient under section 954a of the Code of Civil Procedure, as added by St. 1935, p. 1511, to restore jurisdiction of the trial court over the subject-matter of the judgment and a remittitur may issue forthwith.

Judgment reversed, and costs taxed accordingly.

We concur: WOOD, J.; GOULD, Justice pro tem.



12 Cal.App.2d 417

HOOVER CO. v. GROGER et al.

Civ. 10854.

District Court of Appeal, Second District,
Division 2, California.
March 12, 1936.

1. Trade-marks and trade-names and unfair competition ⇨21

Business of first person to enter field doing business under given trade-name will be protected to extent necessary to prevent fraud upon his business and the public, and improper use of trade-name by later entrant into the field is enjoinable.

2. Trade-marks and trade-names and unfair competition ⇨75

Use of another's trade-name that would materially cause deception is enjoinable, notwithstanding intent of infringer, or whether any one has actually been confused by such infringement.

3. Trade-marks and trade-names and unfair competition ⇨71

Name long used by business firm becomes an asset of the business and another may not use that name in his advertisement in such a manner as to confuse the public to disadvantage of firm first using name.

4. Trade-marks and trade-names and unfair competition ⇨71

Where manufacturer had maintained repair shops under name of "Hoover Vacuum Cleaner Repairing," use of that name as a heading for list of persons who did vacuum cleaner repairing in classified section of telephone directory *held* enjoinable as an infringement on manufacturer's trade-name, notwithstanding use of infringers' names with the trade-name.

5. Trade-marks and trade-names and unfair competition ⇨68(1)

Advertisements stating or suggesting falsely that the one advertising possesses the good will of one well known in business constitute unfair competition.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Suit by the Hoover Company, a corporation, against Samuel Groger and others. Judgment for defendants, and plaintiff appeals.

Reversed.

Jerome H. Kann, of Los Angeles, for appellant.

WOOD, Justice.

Plaintiff seeks to enjoin the publication of the names of certain defendants in that part of the telephone directory of defendant Southern California Telephone Company, commonly known as the classified business directory, in such a manner as to mislead the public concerning plaintiff's business. The appeal is taken by plaintiff from a judgment in favor of defendants. No brief has been filed in this court by any of the defendants.

The plaintiff, under the names, "The Hoover Company" and "Hoover Suction Sweeper Company" is and for many years has been engaged in the business of manufacturing vacuum cleaners and maintaining repair stations in the city of Los Angeles and elsewhere throughout the nation. Plaintiff's repair stations and branch offices have for a long period of time used the words "Hoover Vacuum Cleaner Repairing" in connection with their business. The business of plaintiff has become extensive and profitable and the name "Hoover" has become well known to the public. Defendant telephone company publishes periodically in the city of Los Angeles a classified business directory arranged alphabetically in connection with its general telephone directory and has published therein in large and conspicuous type the words "Hoover Vacuum Cleaner Repairing." Under these words appear in much smaller type, also alphabetically arranged, the names of the seventeen defendants other than the telephone company, together with the addresses and telephone numbers of said defendants, the first being "Ace Reliance Electric Service Co." and the last being, "Westlake Vacuum Cleaner

Store." The words "Hoover Vacuum Cleaner Repairing" appear above each of the names of the said seventeen defendants. In several instances the words "Hoover Vacuum Cleaner Repairing" appear in type of the same size as that in which the names of the defendants appear. It is alleged in the complaint that the defendant telephone company is about to again publish the same list in a manner similar to the former publication and that the defendants other than the telephone company, who have no connection with plaintiff, have caused the list to be printed as above indicated with intent to deceive the public and secure for themselves business which otherwise would and should come to plaintiff by misleading the public into believing that the advertisement in question emanated from plaintiff and that said defendants are the authorized agents of plaintiff.

[1, 2] It is the policy of the law to protect the business of the first person to enter the field doing business under a given name to the extent necessary to prevent fraud upon his business and upon the public. *Benioff v. Benioff*, 64 Cal.App. 745, 222 P. 835; *Yellow Cab Co. of San Diego v. Sachs*, 191 Cal. 238, 216 P. 33, 28 A.L.R. 105. A second to enter the field may be enjoined from the improper use of the name established by the first to enter the field. *Morton v. Morton*, 148 Cal. 142, 82 P. 664, 1 L.R.A. (N.S.) 660. It is not necessary for the plaintiff to prove fraudulent intent. The defendants may be enjoined if the natural consequence of their conduct is such as to cause deception. *Dodge Stationery Co. v. Dodge*, 145 Cal. 380, 78 P. 879; 24 Cal.Jur. 630. Neither is it necessary for the plaintiff to prove that any one has actually been confused by the advertisement. *Schwarz v. Schwarz*, 93 Cal. App. 252, 269 P. 755; *Sun-Maid Raisin Growers v. Mosesian*, 84 Cal.App. 485, 258 P. 630.

[3-5] A name long used by a business firm becomes an asset of the business and a party may not use that name in his advertisement in such a manner as to confuse the public to the disadvantage of the firm first using the name. Defendants list their own names in the directory under a general heading using conspicuously the name "Hoover," a name they were not entitled to use and one which only the plaintiff was authorized to use. The name "Hoover" was used in such a manner as to publicize the business of plaintiff's competitors and to lead the public

to believe that the seventeen defendants referred to were duly authorized agents of plaintiff and naturally could be expected to render the quality of service generally rendered by plaintiff. It is stated by Nims in his work on Unfair Competition and Trade Marks (3d Ed.) p. 53: "Advertisements stating or suggesting that the one advertising possesses the good will of one well known in business, when such is not the fact, constitute unfair competition." In *Menendez v. Holt*, 128 U.S. 514, 524, 9 S.Ct. 143, 144, 32 L.Ed. 526, the plaintiff was the owner of a trade-name, "La Favorita." The defendant used this name and used his own name in connection therewith. The court stated: "Holt & Co., then, having acquired the exclusive right to the words 'La Favorita,' as applied to this particular vendible commodity, it is no answer to their action to say that there was no invasion of that right because the name of S. O. Ryder accompanied the brand upon flour sold by appellants, instead of the name of Holt & Co. That is an aggravation, and not a justification, for it is openly trading in the name of another upon the reputation acquired by the device of the true proprietor."

The defendants are without right to list the various names in the classified directory in the manner indicated.

The judgment is reversed.

We concur: CRAIL, P. J.; GOULD, Justice pro tem.



12 Cal.App.2d 309

BECHTEL et al. v. CLEMONS et al.
Civ. 10746.

District Court of Appeal, Second District,
Division 2, California.

March 9, 1936.

Rehearing Denied April 3, 1936.

Hearing Denied by Supreme Court
May 7, 1936.

1. Mortgages ⇨559(2)

Statute providing that deficiency judgment following sale under deed of trust must be limited to sum by which amount due exceeds fair market value of property at date of sale *held* not applicable to note, secured by deed of trust, executed prior to effective date of statute, since statute was not retroactive (Code Civ.Proc. § 580a, as added by St.1933, p. 1672, § 4).

2. Mortgages ⇨559(2)

Statute precluding deficiency judgment on trust deed or mortgage obligation unless notice of breach and election to sell was recorded one year before sale *held* not applicable to note secured by deed of trust, executed before effective date of statute (Civ.Code, § 2924½, as added by St.1933, p. 1674, § 8).

3. Mortgages ⇨529(6)

Mere inadequacy of price realized upon a sale under a trust deed, in absence of irregularity or fraud, was not sufficient ground for voiding sale legally made.

Appeal from Superior Court, San Luis Obispo County; Atwell Westwick, Judge.

Action by H. H. Bechtel against L. J. Clemons and another, in which the defendants filed a cross-complaint making the plaintiff and the Bank of America National Trust & Savings Association cross-defendants. Judgment for plaintiff, and defendants appeal.

Affirmed.

Wallace M. Pence, of San Miguel, for appellants.

C. H. White and D. Bianco, both of San Francisco, and Webster & Lyon, of Paso Robles, for respondents.

GOULD, Justice pro tem.

Defendants executed their promissory note dated August 12, 1932, secured by deed of trust. Upon default in the payments promised, the trust deed was foreclosed, the real property given as security was sold, and the proceeds applied upon the indebtedness. This action is against the makers of the note for the deficiency remaining after application of the proceeds of sale. Defendants filed an answer and cross-complaint, to which the court sustained a demurrer, but granted leave to amend. This defendants declined to do, and judgment accordingly went for plaintiff for the amount of the deficiency.

[1-3] The points raised by defendants in their answer and cross-complaint and presented to this court on appeal have all been decided adversely to appellants' contentions by recent decisions of our courts. That section 580a of the Code of Civil Procedure (as added by St. 1933, p. 1672, § 4) is not retroactive in its application is declared in *Bechtel v. Nelson* (Cal.App.) 51 P.(2d) 99; that section 2924½ of the Civil

Code (as added by St. 1933, p. 1674, § 8) does not apply to notes executed before its effective date is determined by *Brown v. Ferndon* (Cal.Sup.) 54 P.(2d) 712; and it is the settled law of this state that mere inadequacy of the price realized upon a sale under a trust deed, in the absence of irregularity or fraud, is not sufficient ground for voiding a sale legally made. *Bock v. Losekamp*, 179 Cal. 674, 179 P. 516.

Judgment affirmed.

We concur: CRAIL, P. J.; WOOD, J.



12 Cal.App.2d 140

SECURITY FIRST NAT. BANK OF LOS ANGELES v. SUPERIOR COURT IN AND FOR IMPERIAL COUNTY.

Civ. 1634.

District Court of Appeal, Fourth District,
California.

Feb. 25, 1936.

1. Bankruptcy ☞20(1)

Federal court has exclusive jurisdiction of person and property of one petitioning for agricultural composition under Bankruptcy Act until such proceeding is terminated (Bankr.Act § 75 (n), see 11 U.S.C.A. § 203 (n)).

2. Bankruptcy ☞20(1)

State court had no jurisdiction of proceeding by debtor under state debt moratorium act begun before appeal from proceeding brought by him in federal court under Bankruptcy Act had been determined, notwithstanding that, at time of motion to dismiss state court proceeding, federal court's jurisdiction had ended, since federal court proceeding was still "pending" at time state court proceeding was begun (Bankr.Act § 75, as amended, see 11 U.S.C.A. § 203; § 75 (n, r), see 11 U.S.C.A. § 203 (n, r); St.1935, p. 1208; Code Civ.Proc. § 1049).

[Ed. Note.—For other definitions of "Pending," see Words & Phrases.]

Proceeding for a writ of prohibition by the Security First National Bank of Los Angeles against the Superior Court of the

State of California in and for the County of Imperial.

Writ of prohibition issued.

Harry W. Horton, Hickcox & Trude, and Charles B. Provence, all of El Centro, for petitioner.

Lloyd S. Nix, of Los Angeles, for respondent.

BARNARD, Presiding Justice.

This is an application for a writ of prohibition to prevent the superior court of Imperial county from taking any action or exercising any jurisdiction in a certain proceeding for debt relief instituted in that court under the provisions of chapter 348 of the Statutes of 1935 (St.1935, p. 1208).

On or about July 21, 1934, one W. S. Harris filed a petition in the United States District Court in and for the Southern District of California praying for relief under section 75 of the National Bankruptcy Act, as amended (see 11 U.S.C.A. § 203). That court issued an order restraining all creditors of Harris from foreclosing or enforcing liens against his property. In November, 1934, on motion of certain creditors of the said Harris, said court entered an order dismissing the proceeding therein on the ground and upon the finding that Harris was not a farmer under the terms of the Bankruptcy Act and, in particular, under the terms of subdivision (r) of said section (see 11 U.S.C.A. § 203(r)). Harris appealed to the United States Circuit Court and by appropriate proceedings secured a continuance in force of the restraining order preventing lienholders from enforcing their liens by sale or foreclosure. On August 5, 1935, the Circuit Court of Appeals [In re Harris, 78 F.(2d) 849] entered and filed its decision dismissing the appeal on the ground that it had no jurisdiction of an appeal which had been allowed by the District Court, and that it declined to take jurisdiction under a petition for appeal directly presented to that court.

The petitioner herein is the holder of certain trust deeds covering real property belonging to said Harris. These trust deeds secure notes aggregating about \$14,000, of which about \$12,300 is long past due, as is certain interest, together with about \$8,000 advanced by the petitioner for taxes on the land. On or about July 20, 1935, the petitioner recorded a declaration of default in connection with these trust deeds.

On July 20, 1935, the said Harris filed a petition in the superior court of Imperial county, seeking relief under the state debt moratorium provisions of chapter 348 of the Statutes of 1935. This petitioner moved in the superior court for a dismissal of that proceeding on the ground that said court had no jurisdiction of the subject-matter and that at the time of filing said petition by the said Harris the matter of debt relief and all matters in connection with liens on said real property were exclusively within the jurisdiction of the federal court. This motion was denied and this proceeding followed.

[1] It seems to be well settled that subdivision (n) of section 75 of the United States Bankruptcy Act, as amended (see 11 U.S.C.A. § 203 (n)), subjects the petitioner and his property to the exclusive jurisdiction of the federal court, and that when a proceeding is instituted under that act the federal court has exclusive jurisdiction until the proceeding is terminated. In *re Duffy* (D.C.) 9 F.Supp. 166; In *re Dickinson* (D.C.) 9 F.Supp. 227; In *re Houser* (D.C.) 9 F.Supp. 891; *Taylor v. Sternberg* (C.C.A.) 71 F.(2d) 157. It seems to be also well settled that jurisdiction must exist at the time a petition or complaint is filed. *Koenigsberger v. Richmond Silver Mining Co.*, 158 U.S. 41, 15 S.Ct. 751, 39 L.Ed. 889; *Adams v. City of Woburn* (C.C.) 174 F. 192.

[2] At the time the proceeding in question was begun in the state court, the proceeding in the federal court was still pending. Code Civ.Proc. § 1049; *Collins v. Ramish*, 182 Cal. 360, 188 P. 550. In that case the court said: "The appeal having been taken, it necessarily was a pending appeal until decided or dismissed by the Appellate Court. * * * Until it was decided or dismissed, there was no final determination of the action upon the appeal, and the action was therefore still pending."

It therefore appears that at the time the proceeding was instituted in the state court the federal court had exclusive jurisdiction of the matters involved and was then engaged in exercising that jurisdiction. It would seem to follow that the respondent court had no jurisdiction of the petition filed under the 1935 act at the time the same was filed.

The petitioner relies upon the case last cited in support of the contention that at the time the motion to dismiss was made in the respondent court the jurisdiction of the federal court had ended, and that, such jurisdic-

tion having ceased, the respondent court was at liberty to proceed in the matter. In the case referred to it was held that the existence of a former action, subsequently dismissed, should not be taken as a bar to the continuance of another action begun before the first action was terminated. There is considerable difference between the power of a court to determine what shall be recognized as a bar in exercising its jurisdiction, and the jurisdiction of a court to proceed at all. Regardless of what later happened in the federal court, the respondent court had no jurisdiction of the matter in question at the time the petition therein was filed. In our opinion, jurisdiction in the proceeding then pending could not then be created as the result of any subsequent developments in the other court.

Harris chose his own forum, and having conferred jurisdiction upon the federal court it was beyond his power to confer jurisdiction on the state court through the filing of the petition referred to until the prior proceedings were disposed of. If he desired to take advantage of the state law, he could have secured an earlier dismissal of his appeal in the federal court; but, in our opinion, he could not begin the second proceeding while the first was still pending.

It is ordered that the writ of prohibition issue as prayed for.

We concur: MARKS, J.; JENNINGS, J.



12 Cal.App.2d 437
**CALIFORNIA PAC. TITLE & TRUST CO. v.
BANK OF AMERICA NAT. TRUST
& SAVINGS ASS'N.**
Civ. 9801.

District Court of Appeal, First District, Division 2, California.
March 13, 1936.

Hearing Denied by Supreme Court
May 4, 1936.

1. Fraud ⇐20

Assignee of mortgagee who had lent money secured by forged trust deed held not entitled to recover on ground of fraud from defendant who was paid portion of such loan pursuant to forger's instructions to reimburse defendant for loan previously made by defendant and secured by another forged trust deed, where mortgagee had not relied

to his damage upon any claimed representation regarding first loan transaction.

2. Money paid ☞1

Assignee of mortgagee who had lent money secured by forged trust deed held not entitled to recover that portion of such money paid to defendant pursuant to forger's instructions to reimburse defendant for loan previously made by defendant and secured by similar forged trust deed, on ground that such money was paid under mistake of fact, since mortgagee's loss was occasioned solely by forgery in second loan transaction.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by the California Pacific Title & Trust Company against the Bank of America National Trust & Savings Association. Judgment for plaintiff, and defendant appeals.

Reversed.

Hearing denied by Supreme Court; CURTIS, J., dissenting.

Louis Ferrari, W. E. Johnson, T. J. Bricca, Stoney, Rouleau, Stoney & Palmer, and Royal E. Handlos, all of San Francisco, for appellant.

Henry E. Monroe and Robert A. Woodyard, both of San Francisco, for respondent.

SPENCE, Justice.

Plaintiff sued defendant on common counts for money had and received in the sum of \$1,376.98. From a judgment in favor of plaintiff, defendant appeals.

This litigation arose out of two loan transactions on real property located in Mill Valley belonging to Anita Hodgkin. Both transactions were consummated without the knowledge of said Anita Hodgkin and involved forgeries by J. J. MacArthur, a real estate broker.

In 1930 defendant loaned the sum of \$2,500 on a note secured by a deed of trust on said property. These instruments purported to be executed by said Anita Hodgkin. In 1931 defendant was advised that Anita Hodgkin had not executed said instruments and defendant interviewed said MacArthur who had handled the transaction. MacArthur admitted the forgeries and agreed to reimburse defendant. As a result of this interview and on March 25, 1931, defendant sent a reconveyance and other instruments connected with the transaction to the San Rafael Land & Title

Company (hereinafter called the escrow company) with instructions to surrender them upon payment of approximately \$2,150 plus interest, which was the balance then due upon said loan. Thereafter MacArthur paid the sum of \$800 directly to defendant and a second letter was sent by defendant to the escrow title company on April 23, 1931, advising it of said payment and of the amount then remaining due. The defendant had no further transactions with the escrow title company or any of the parties except that thereafter and on April 28, 1931, it received from the escrow title company the balance due out of the proceeds of the Smith loan to which reference is hereinafter made.

In the meantime and on March 27, 1931, MacArthur had ordered a preliminary report from the escrow title company covering the record title to said property. On April 25, 1931, MacArthur first met Eugene N. Smith and interested him in loaning money secured by a deed of trust on said property. Smith inspected the property, agreed to make the loan thereon and deposited the necessary money with the City Title Insurance Company of San Francisco. His instructions to the last-mentioned company were to deliver the money upon "recordation deed of trust and note, Harry Roland, an unmarried man, to Eugene N. Smith for \$2500 * * * covering property as shown in report of San Rafael Land Title Company No. 7817. * * *" No instruction was given by Smith regarding the payment of defendant's loan. Without the knowledge of any of the parties, MacArthur had forged a deed from Anita Hodgkin to Harry Roland, a fictitious person, and had executed a note and deed of trust in favor of Smith, signing the name Harry Roland. Upon instructions from MacArthur and from the City Title Insurance Company, the escrow title company consummated the transaction, paying the sum of \$1,376.98 to defendant and issuing a check to Harry Roland for \$898.52, the balance of the proceeds of the Smith loan. This check was cashed by MacArthur by indorsing the name of Harry Roland thereon.

The escrow title company, as agent of plaintiff title insurance company and in accordance with a working agreement between the two companies, issued a policy of title insurance in the name of the plaintiff company insuring the validity of the

Smith deed of trust. The discovering of MacArthur's forgery in the Smith loan transaction came in the following year, and plaintiff thereafter paid Smith the sum of \$2,209.28 to cover his loss. Pursuant to the provisions of the title insurance policy, plaintiff took an assignment from Smith of all of his rights. Plaintiff also took an assignment of all the rights of the escrow title company. It then brought this action without making any demand on defendant.

In the first count, plaintiff alleged that on April 29, 1931, defendant became indebted to plaintiff in the sum of \$1,376.98 for money had and received for the use and benefit of plaintiff and which sum defendant promised to pay on demand. It further alleged that demand had been made, but no part of said sum had been paid. In the second count, the allegations were similar except that it was alleged that on said date, defendant became indebted to Eugene N. Smith in the same sum and that said Eugene N. Smith had assigned his claim to plaintiff. In the third count, the allegations were similar except that it was alleged that on said date defendant became indebted to the escrow title company in the same sum and that said escrow title company had assigned its claim to plaintiff. The prayer of the complaint was for the sum of \$1,376.98 plus interest. Defendant denied all of the principal allegations of the complaint, set forth certain affirmative allegations concerning the facts above set forth and further alleged that plaintiff's loss was sustained solely by reason of the execution of its policy of title insurance insuring the validity of the Smith deed of trust. The trial court made extensive findings of fact including findings on all three counts of the complaint, as well as upon the facts not appearing in the pleadings, and concluded "that the equities of the plaintiff are greater than the equities of the defendant and that the plaintiff is entitled to judgment in the amount of \$1,376.98. * * *" Judgment was entered accordingly.

[1] Appellant makes numerous attacks upon the judgment in its briefs. Respondent does not discuss all of the points raised by appellant and frankly concedes such failure, stating "it is apparent these points are completely overshadowed by the element of fraud." It bases its claim of fraud upon the finding of the trial court "That Chas. H. Huntoon (the branch man-

ager of defendant) knew that the defendant bank was being reimbursed on the Anita A. Hodgkin forged deed of trust by the said J. J. MacArthur out of the proceeds of a second forged loan procured by said MacArthur upon the same property." Respondent argues that appellant impliedly represented that the first forged deed of trust was valid. There are many answers to respondent's claim of fraud, but we need mention but two. In the first place, there is not a particle of evidence to sustain the finding that Huntoon knew that defendant was to be reimbursed out of a second loan, forged or genuine. Appellant merely placed its instruments in escrow to be surrendered upon payment of the amount which was admittedly owing by MacArthur to appellant as a result of the first loan transaction. This was long before MacArthur first met Smith, and it does not appear that any representative of appellant had any knowledge of the Smith loan transaction or of any plan which MacArthur may have had for the payment of the first loan. In the second place, even assuming that it may be said that there was an implied representation regarding the validity of the first loan transaction, there is neither evidence nor finding that Smith or any one else relied upon such representation to his damage. In fact, the testimony of Smith, who was a witness for respondent, is to the contrary. He testified that he supposed he was loaning money to Harry Roland; that he had no transactions with appellant; that he had "no control of or interest in as to where the money that was loaned was to go or to whom it was to be paid"; and that he was "only interested in getting a valid deed of trust upon the property and a policy of title insurance." It is therefore apparent that Smith was concerned only with the validity of the second loan transaction; that he would have consummated said transaction and paid out the same amount of money regardless of the existence of the first loan transaction; and that he did not rely to his damage upon any claimed representation regarding the first loan transaction. We are therefore of the opinion that there was no showing of actionable fraud, or any fraud upon the part of appellant, and that the judgment may not be sustained upon that theory.

[2] The only other theory urged by respondent in support of the judgment is that the money was paid to appellant by Smith

under a mistake of fact. Our attention has not been called to any authority precisely on all fours with the present case, but several cases involving somewhat similar facts have been cited. These authorities, however, are not harmonious. Appellant cites and relies upon *Walker v. Conant*, 69 Mich. 321, 37 N.W. 292, 294, 13 Am.St.Rep. 391, and *Russell v. Richard & Thalheimer*, 6 Ala.App. 73, 60 So. 411, certiorari denied *Ex parte Richard & Thalheimer*, 180 Ala. 580, 61 So. 819, while respondent cites and relies upon *Grand Lodge v. Towne*, 136 Minn. 72, 161 N.W. 403, 404, L.R.A.1917E, 344, and *Strauss v. Hensey*, 9 App.D.C. 541.

In *Walker v. Conant*, supra, the second lender, Walker, paid off the first lender, Mrs. Conant, by paying the necessary money directly to her after accepting the new loan papers from the forger. In the course of the opinion, the court said on pages 294 and 295 of 37 N.W.: "But by no act of Mrs. Conant has the plaintiff been put in any worse condition than he would have been had she not been concerned in the transaction. * * * I think the money paid to Mrs. Conant * * * was in reality paid to her or her agent by Edgar Van Riper,—the man who borrowed or obtained it from her, and who honestly owed it to her,—and not by the plaintiff or his agent. * * * It is the same, in fact and in legal effect, in my opinion, as if the \$3,000 had been paid direct to Van Riper by Walker, and he had taken the money away, and out of it afterwards paid the debt to Mrs. Conant, and received the note and mortgage direct from her hands. In such case, it seems to me, under all the authorities, that the fact that the plaintiff or his agent supposed his bond and mortgage to be genuine, and the Conant mortgage to be a valid lien upon the premises, cuts no figure in the case. It is not a case where he has purchased the Conant mortgage as an investment, believing it to be valid. It is not a case where he has parted with his money, and received a void security which he would not have bought had he known it to be false and forged. But in the present case he was loaning the \$3,000 upon an \$8,000 farm, and, as he supposed, upon good security. This was the main and absorbing transaction. The payment and discharge of the Conant mortgage was but an incident of his dealing. If the mortgage had not been in existence, Van Riper would have obtained the same sum, \$3,000,

upon the bond and mortgage delivered to E. C. Walker. Being in existence, and preventing, until discharged, a first mortgage upon the premises, Walker stipulated that this mortgage should be released out of the funds paid by him to Van Riper upon the loan. Walker would have been equally satisfied, no doubt, if Van Riper had paid the Conant mortgage before receiving any money upon the mortgage executed to Helen M. Dudley, and assigned to plaintiff, or if he had taken the money after it was paid to him and procured the release of Mrs. Conant. The plaintiff was not buying or paying off the Conant mortgage; he was loaning \$3,000 to Van Riper's father, as he supposed, upon good security."

In *Russell v. Richard & Thalheimer*, supra, the second lender paid the entire proceeds of the loan to the attorney for the forger with instructions to pay off the first loan. Recovery was denied to the second lender as against the first lender. The court said on page 414, of 60 So.: "The evidence, as we construe it, would seem to bear out the contention that the swindler, and not the plaintiffs, was the payor, in legal contemplation." The court cited *Walker v. Conant*, supra, in support of its decision, but stated "we do not desire to be understood as approving the holdings or agreeing with the reasoning in that case, further than our direct expression, as set out in this opinion, agrees with what is there said." It is apparent that the court was distinguishing *Walker v. Conant*, supra, upon the ground that the money was paid in that case directly by the second lender to the first lender. The court also distinguished the case of *Strauss v. Hensey*, supra, "in that the plaintiff in his own proper person, and not the borrower, paid the money to the defendant in that case."

In *Grand Lodge v. Towne*, supra, the second lender, through its own attorney, paid the money directly to the first lender. The trial court denied recovery, but the cause was reversed, with directions to enter judgment in favor of plaintiff. The court conceded that "the questions are very interesting," but decided that the second lender was entitled to recover from the first lender. The court discussed *Walker v. Conant*, supra, but stated "we cannot follow it." It also discussed *Russell v. Richard & Thalheimer*, supra, and said with respect thereto, "The facts that plaintiff paid the money to the swindler, and that

the latter, acting through his attorney, paid it to defendant, perhaps justified the decision that it was the swindler's money, and distinguishes the case from the one at bar, from the Michigan case [Walker v. Conant, supra], and from Strauss v. Hensey, 9 App. D.C. 541."

Some of the reasoning in the foregoing authorities does not appear to be wholly satisfactory. In each instance, the main transaction in which the second lender was involved was the second loan transaction. He parted with the entire proceeds of the second loan under the belief that the instruments evidencing the second loan were genuine and not forged. The use of any part of the proceeds of the second loan for the purpose of payment of the first loan was merely an incidental and collateral matter. It would therefore seem that no distinction should be drawn between those cases where the money is paid directly by the second lender to the first lender and those cases where the money is paid by the second lender to the forger or his agent for payment to the first lender. If such a distinction is proper, we believe this case falls within the rule of Russell v. Richard & Thalheimer, supra, and that the second lender was not entitled to recover from the first lender.

But we prefer to rest our decision in the present case upon the ground which is suggested in the opinion in Walker v. Conant, supra. Both Smith and appellant were the innocent victims of the forger. Neither was chargeable with fraud. As the result of the first forged loan transaction, there was a just debt owing from the forger to appellant. The summary of Smith's testimony, which is given above, affirmatively shows that he would have parted with the entire proceeds of the second loan transaction regardless of the use which was to be made of the proceeds of the loan. In other words, Smith was not buying an existing loan upon the premises, but was making a separate and independent loan thereon, and no act upon the part of appellant and no mistake of fact regarding the validity of the first loan resulted in any loss to Smith. If the forger had paid appellant's loan immediately before making the Smith loan, and had then received the entire proceeds of the Smith loan, it would not have been suggested that Smith would have then had any claim against appellant. Should the mere fact that appellant was

paid out of the proceeds of the Smith loan at the direction of the forger, give to Smith any rights which he would not have otherwise had? We think not. Smith's loss was occasioned solely by the forgery in the second loan transaction. This loss would have been sustained regardless of whether the first loan was or was not in existence at the time and also regardless of whether the first loan transaction was forged or genuine. Smith had his legal remedy against the forger, the notary and the surety on the notary's bond, and, under the circumstances, we know of no reason for permitting him to invoke the equitable principles underlying the action for money had and received in support of an action against appellant. 17 Cal.Jur. 602, § 1. If Smith could not maintain an action for money had and received against appellant, then respondent, as Smith's assignee, could not maintain such an action.

Appellant makes the further contention that the absence of a demand was fatal to respondent's recovery under the facts before us. There may be merit in appellant's contention, but we do not discuss it in view of the conclusions which we have reached.

The judgment is reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.



12 Cal.App.2d 374

In re TAYLOR'S ESTATE.

TAYLOR v. POPPIC.
Civ. 10706.

District Court of Appeal, Second District,
Division 1, California.
March 11, 1936.

1. Executors and administrators ⇨176

Widow's allowance out of decedent's estate for her maintenance during settlement thereof is favored by law (Probate Code, § 680).

2. Executors and administrators ⇨178

Rule that law favors widow's allowance out of decedent's estate must be applied according to trial court's discretion when order

granting it is made or modified (Probate Code, § 680).

3. Executors and administrators *§* 194(6)

Probate court may modify its order, granting widow allowance out of decedent's estate, under changed circumstances, even if made after inventory (Probate Code, § 680).

4. Executors and administrators *§* 194(6)

Probate court's discontinuance of widow's allowance after making of changes in estate in establishment of probate homestead held not abuse of discretion (Probate Code, § 680).

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

In the matter of the estate of George T. Taylor, deceased. From an order discontinuing an allowance to Lillian K. Taylor, deceased's widow, on the petition of Florence Taylor Poppic, the widow appeals.

Affirmed.

Botsford & Hurtt, of Los Angeles, for appellant.

Charles F. Blackstock, of Oxnard, for respondent.

DESMOND, Justice pro tem.

This is an appeal from an order in probate, discontinuing a widow's allowance which had been granted in the sum of \$175 per month by orders made June 4, 1934, before filing of the inventory, and August 16, 1934, after such filing.

When the allowance had been paid for approximately a year, the daughter of deceased by a former marriage sought "an order modifying the order for a family allowance and reducing the allowance to an amount which the court may deem to be reasonable under the circumstances." The same petition also requested, among other things, an order "requiring the administratrix (the widow) to close the administration of said estate."

Upon the hearing this latter request was denied, because a renewal mortgage executed by the administratrix on December 27, 1934, was still unpaid; the court, at the same time, ordering the allowance of \$175 to be discontinued in toto.

Section 680, Probate Code, provides in part as follows: "Right to allowance. * * * The widow and minor children are entitled to such reasonable allowance out of the estate as shall be necessary for

their maintenance according to their circumstances, during the progress of the settlement of the estate, which, in case of an insolvent estate, must not continue longer than one year after granting letters." In the instant case the court found "that the estate is, and has been at all times during the progress of administration, solvent," so there must have been some reason other than insolvency to prompt the court to terminate the allowance, while the settlement of the estate was still in progress. It appears that after the second order granting the allowance was made, a probate homestead was set aside, September 24, 1934, to the widow for her lifetime, the property being valued at \$5,500, subject to an encumbrance amounting, at the date of the order, to \$4,700; also, that an order was made November 23, 1934, authorizing the widow, as administratrix, "to apply the general assets of the estate towards the payment of said encumbrance on said homestead." It also developed at the hearing that the widow was rendering special services to the estate in the care of an apartment house which, in the opinion of the court, entitled her to compensation in the sum of \$75 per month. The court declined to vacate the order authorizing application of the general assets of the estate to reduction of the debt on the homestead property although requested by the daughter to do so.

The situation at the end of a year's administration was as follows: The widow had received from an estate appraised at \$33,206.96, an allowance of \$2,100 paid at the rate of \$175 per month, and in addition had received a probate homestead for life with full authority to clear the encumbrance upon it by drawing upon the assets of the estate; had also received certain exempt personal property appraised at \$100; and was in position to derive income from the estate, as caretaker, in the sum of \$75 per month. Possibly the court would be entitled to consider also that the widow, acting as administratrix, would earn fees by that service, and when the estate is closed, will take her share of the property that belonged to her husband; the daughter, respondent here, being the only other heir. Since section 680 of the Probate Code contemplates "such reasonable allowance out of the estate as shall be necessary for their maintenance according to their circumstances," we are inclined to the belief that the trial judge,

considering all the circumstances, decided that reasonable provision was made for the widow by his final order supplementing the former favorable orders in regard to the probate homestead and exempt property.

[1-4] We recognize the propriety and humanity of the rule that has long made a widow's allowance favored of the law. 11 Cal.Jur. 507. We realize, also, that the rule must be applied according to the discretion of the trial court (11a Cal.Jur. 527), when the order is made or later when modified. As to the right of the court, under changed circumstances, to modify a former order, even an order made after inventory, we entertain no doubt (Estate of Boselly, 179 Cal. 218, 176 P. 45), and since it appeared that, following the second order granting the allowance, certain changes had taken place in the estate, not by way of reduction or disposal of its assets, perhaps, but in the establishment of a probate homestead, we do not consider that the action of the trial court in this case constituted an abuse of discretion. Estate of Nelson, 167 Cal. 321, 325, 139 P. 692. Estate of Levy, 141 Cal. 646, 653, 75 P. 301, 99 Am.St.Rep. 92, presents a case where the allowance was discontinued upon the granting of a probate homestead.

The order is affirmed.

We concur: YORK, Acting P. J.;
DORAN, J.



12 Cal.App.2d 272

MAZMAN v. BROWN et al.
Civ. 10108.

District Court of Appeal, Second District,
Division 1, California.

March 4, 1936.

1. Husband and wife ⚭265

Husband has right to give away one-half of community property, and he may do it by valid gift to take effect upon his death as by way of insurance policy as well as by will (Probate Code, § 201).

2. Insurance ⚭586

Designation of beneficiary in life policy initiates in beneficiary's favor an inchoate gift of proceeds of policy, which, if not re-

voked by insured prior to his death, vests in beneficiary at time of insured's death.

3. Husband and wife ⚭265

Insured husband could not make valid gift of proceeds of life policy purchased with community funds in excess of 50 per cent. thereof without wife's written consent (Civ. Code, § 172).

4. Husband and wife ⚭273(3)

Where husband makes gift of proceeds of life policy purchased with community funds in excess of 50 per cent. thereof and wife is named as partial beneficiary, if she takes under policy, she makes an election and waives right to exercise power of revocation as to that portion of gift in excess of 50 per cent. (Civ.Code, § 172).

5. Husband and wife ⚭273(3)

Where husband makes gift of proceeds of life policy purchased with community funds in excess of 50 per cent. thereof and names wife as partial beneficiary, wife electing to stand on community rights is entitled to 50 per cent. of proceeds in lieu of portion given and remaining 50 per cent. goes to other beneficiaries (Civ.Code, § 172).

6. Husband and wife ⚭265

Husband's gift of community property in excess of 50 per cent. does not invalidate entire disposition, but gift is invalid only as to excess on wife's complaint (Civ.Code, § 172).

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Thelma Mazman against E. A. Brown and others. From the judgment, plaintiff appeals.

Affirmed.

Elmer I. Moody and A. M. Astor, both of Los Angeles, for appellant.

Mott, Vallee & Grant and Hooper & Miller, all of Los Angeles, for respondent.

ROTH, Justice pro tem.

Samuel Mazman, in his lifetime while married to Thelma Mazman, plaintiff and appellant herein, took out a policy of insurance in the State Life Company of Indianapolis, Ind., on his life in the sum of \$5,000, and up to the time of his accidental death paid all premiums thereon with community funds. The policy contained a provision for payment of double benefits in case of death by accident, by reason of which \$10,000 was distributed by the insurance company to the beneficiaries named in the policy, to wit, one-third to

Thelma, his wife, and two-thirds to one E. A. Brown, as trustee for the parents of the insured. The trust under which Brown received the two-thirds provided that, in the event either parent predeceased the other, the survivor was to have the full benefit of the trust. The father of the insured predeceased the insured, and the mother of insured died shortly after the accidental death of the insured. Brown, as trustee of two-thirds of the insurance money for the parents, pursuant to order of the probate court, was ordered to pay and distribute the corpus of the trust to one George Logian, administrator of the estate of Neshkoon Mazmanian, deceased, which was the name and is the estate of the insured's mother. Brown, pursuant to said order, delivered to Logian the net sum of \$6,708.26, which comprised \$6,666.66 of insurance money, plus interest thereon, less \$332.25, which latter sum was allowed to Brown and his attorney by the probate court as trustee's and attorney's fees in the sums of \$100 and \$200, respectively, and \$32.25 costs incurred by Brown as trustee.

While Brown, as trustee of the insurance proceeds, was in the possession of the same, the instant action was instituted by plaintiff wife to enforce her demand for one-half of the trust estate. Said action, by reason of the facts outlined, has resolved itself into a claim against Logian, as administrator, for one-half of the \$6,708.26, which became part of the estate of the insured's mother. Plaintiff predicates her demand on the theory that the insurance was bought and paid for with community funds, and that her husband, the insured, could give away no more than one-half of the proceeds thereof. This is undoubtedly the law. *New York Life Ins. Co. v. Bank of Italy*, 60 Cal.App. 602, 214 P. 61; *Modern Woodmen of America v. Gray*, 113 Cal.App. 729, 733, 299 P. 754; *Union Mutual Life Ins. Co. v. Broderick*, 196 Cal. 497, 238 P. 1034; *Blethen v. Pacific Mutual Life Ins. Co.*, 198 Cal. 91, 243 P. 431; *Travelers' Ins. Co. v. Fancher*, 219 Cal. 351, 26 P.(2d) 482; 3 Cal.Jur.Supp. 509. Logian, the administrator, conceded the soundness of the legal principle urged by appellant, but differed as to its application, and contended in the trial court, as he does here, that appellant was entitled to one-half of the face of the policy, to wit, \$5,000 in the aggregate, and not to one-third of the policy, pursuant to its terms, and one-half of the remaining two-thirds.

The trial court decreed that the administrator's position was the correct one, and, since by stipulation of counsel it appeared that Logian had already paid to plaintiff \$1,650, which, added to the one-third of the face of the policy already received by her, to-wit, \$3,333.34, aggregated \$4,983.34, the trial court gave judgment for \$16.66 in favor of plaintiff, from which judgment she takes this appeal.

[1-6] If the insured in this case had made his parents the sole beneficiaries of the policy in question, then, upon the facts as here outlined and under the law as settled by the authorities cited, appellant would be entitled to no more than one-half of the proceeds of the policy. The difficulty which is created by the facts of this case is caused by the solicitude which the deceased showed for his wife by making her even a partial beneficiary. A husband undoubtedly has a right to give away his one-half of the community property (Civ. Code, § 1401, now § 201, Probate Code); and he may do it by valid gift to take effect upon his death as by way of an insurance policy, as well as by a will. *Blethen v. Pacific Mutual Life Ins. Co.*, 198 Cal. 91, 100, 243 P. 431; *Travelers' Ins. Co. v. Fancher*, 219 Cal. 351, 355, 26 P.(2d) 482. It has been determined that "the designation of a beneficiary in a policy of life insurance initiates in favor of the beneficiary an inchoate gift of the proceeds of the policy, which, if not revoked by the insured prior to his death, vests in the beneficiary at the time of his death." *Fancher Case*, supra, 219 Cal. 351, at page 353, 26 P.(2d) 482, 483; *Blethen v. Pacific Mutual Life Ins. Co.*, supra. The failure of plaintiff to distinguish between an inchoate gift and a completed gift is, we believe, the source of confusion in this case. To illustrate, if, during the lifetime of a husband and wife, the spouses have \$10,000 in a bank and the husband by agreement makes a completed gift of one-third of that amount to his wife, the one-third thus given becomes the separate property of the wife, and the two-thirds remaining continues to be community property to the extent of 100 per cent. thereof. 3 Cal.Jur.Supp. 649; *In re Estate of Fingland*, 129 Cal.App. 395, 18 P.(2d) 747. If, prior to such gift, or after the consummation of such a gift, the husband by will disposed of the whole of said bank account and bequeathed one-third to his spouse and the remaining two-thirds to

his parents, there is no doubt that all that would be disposed of by the will would be the remaining two-thirds in the bank account and not the original whole. This remaining two-thirds, being community property, would unquestionably be subject to the claim of the surviving wife for 50 per cent. thereof, *if she elected* to enforce her community rights instead of taking under the will. If the facts of the instant case were analogous to those of the illustration given, appellant would undoubtedly be correct in her contention in the case at bar. Here, however, there is no completed gift, and there could be none under the circumstances and facts of this case until the death of the insured. At the time of the insured's death, the dispositions made by the insured of the insurance proceeds vested simultaneously to the extent and in the amounts that such gifts could be validly made. Under the law as it has been settled in this state, the insured could not make a valid gift of the proceeds of insurance purchased with community funds in excess of 50 per cent. thereof, without the written consent of the wife. Civ.Code, § 172; Travelers' Ins. Co. v. Fancher, 219 Cal. 351, 354, 26 P.(2d) 482; Blethen v. Pacific Mutual Life Ins. Co., 198 Cal. 91, 99, 243 P. 431. If a gift of insurance proceeds in excess of 50 per cent. is made to some one other than the wife, and the wife herself is named as a partial beneficiary in the insurance policy, the wife is confronted with the same election which she is bound to make if community property were similarly disposed of by will; that is to say, she must decide to take under the policy, or to stand on her community rights as to the proceeds of such policy. If she takes under the policy, she thereby makes an election and waives her right to exercise her power of revocation as to that portion of the gift in excess of 50 per cent. Fancher Case, supra, 219 Cal. 351, 26 P. (2d) 482; Blethen v. Pacific Mutual Life Ins. Co., 198 Cal. 91, 100, 243 P. 431; Jenkins v. Jenkins, 112 Cal.App. 402, 297 P. 56. If, however, she elects to stand on her community rights, then she is entitled to her 50 per cent. in lieu of the one-third given, and the remaining 50 per cent. would go to the other beneficiaries named, since it is settled that the gift by the husband of community property in excess of 50 per cent. does not invalidate the entire disposition, but is invalid only as to the excess on complaint of the wife. Travelers' Ins. Co. v. Fancher, 219 Cal. 351, 352, 26 P.(2d) 482; Spreckels v. Spreckels, 172 Cal. 775, 158 P. 537; Dargie v. Patterson, 176 Cal. 714, 169 P. 360; Trimble v. Trimble, 219 Cal. 340, 343, 26 P.(2d) 477. "If, after the gift is made, the wife gives her consent, the requirements of the statute are fulfilled, and no further action is required to make it a valid and effective gift." Blethen v. Pacific Mutual Life Ins. Co., 198 Cal. 91, 99, 243 P. 431, 434.

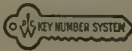
In the Blethen Case, supra, 198 Cal. 91, at page 101, 243 P. 431, 435, the court uses language applicable to, and, in our opinion, decisive of, the question here presented: "An attempted disposition by will by the husband of more than his half of the community property vests the property in the donee subject to being avoided at her election. If this be true, it necessarily follows that a gift initiated during the life of the husband, but not completed and consummated until his death, must be said to take effect, vesting the property in the donee subject to being avoided by the wife at her option. Although it is true that a wife cannot be deprived of her half of the community property without her consent, yet, under the reasoning of Spreckels v. Spreckels, 172 Cal. 775, 158 P. 537, until she does declare her intention of refusing to acquiesce in the husband's gift, the property vests in the donee or beneficiary under the will. * * * The rule that the gift of a husband of community property is valid until avoided by the wife, applicable to community property in general, *is applicable to the proceeds of an insurance policy, the premiums on which have been paid out of community funds.* It follows that a gift by a husband of an insurance policy to a beneficiary, other than his wife, is a good and valid gift until avoided by the wife by an assertion of her right to one-half of the proceeds, and the insurance company, until it has been made aware of the wife's claim, is justified in delivering to the beneficiary, as the person rightfully entitled thereto, the proceeds of the policy upon the death of the insured husband." (Italics ours.) We are satisfied that the logic and justice of the situation here presented impel the conclusion that the surviving wife is bound to make the election suggested. In the instant case, so far as the record shows, the wife did elect to take under the policy; subsequently, and after her election had been completed, she made a demand for one-half

of the two-thirds which was earmarked for her parents-in-law. Her demand was conceded to the extent that she was entitled to one-half of the face of the policy, and by virtue of the judgment entered she received the difference between what she took under the policy, the amount she received from the executor of her deceased mother-in-law in partial compliance with her demand, and one-half of the policy.

The executor, who is the defendant and respondent here, does not complain of the judgment and does not appeal therefrom. As we view the situation, appellant received all and more than she was legally entitled to.

The judgment is affirmed.

We concur: YORK, Acting P. J.;
DORAN, J.



12 Cal.App.2d 195

TOLLE v. DOAK.
Civ. 10162.

District Court of Appeal, Second District,
Division 1, California.
Feb. 28, 1936.

Hearing Denied by Supreme Court
April 27, 1936.

1. Judgment ⇨855(1)

Superior court has power to order issuance of execution on judgment which became final more than five years before application for issuance, upon issuing personal service on judgment debtor (Code Civ.Proc. § 685, as amended by St.1933, p. 2499).

2. Judgment ⇨855(1)

Procedure authorized by statute for enforcement of judgment after five years constitutes neither "action" nor "special proceeding" of civil nature, but is mere subsequent step in action or special proceeding already commenced which is governed so far as time within which step may be taken is concerned, by provisions of statute specially relating thereto (Code Civ.Proc. § 685, as amended by St.1933, p. 2499).

[Ed. Note.—For other definitions of "Action; Action at Law" and "Special Proceeding," see Words & Phrases.]

3. Appearance ⇨9(8)

Executor's motion to vacate order directing issuance of execution against estate in favor of testator's judgment creditor, on ground that executor had not been substituted in original action and that court was without jurisdiction, constituted "general appearance."

[Ed. Note.—For other definitions of "General Appearance," see Words & Phrases.]

4. Executors and administrators ⇨454

Order allowing judgment creditor to issue execution against judgment debtor's estate more than five years after rendition of judgment would not be reversed notwithstanding there was no formal order of substitution of executor for judgment debtor, where executor made general appearance and had opportunity to present facts showing that creditor should not have requested relief (Code Civ.Proc. § 685, as amended by St.1933, p. 2499).

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by H. A. Tolle against William C. Doak. From orders, Edward H. Page, executor of the last will of William C. Doak, deceased, appeals.

Affirmed.

Ivan Miller, of Los Angeles, for appellant.

C. J. Enking and W. H. Sprague, both of Los Angeles, for respondent.

EDMONDS, Justice pro tem.

The procedure required to be taken by a judgment creditor, more than five years after the judgment is entered, to secure the allowance of the judgment against the estate of the judgment debtor, who died in the meantime, is the sole question for consideration in this case.

In 1923 H. A. Tolle secured a judgment against William C. Doak. In the same year execution was issued upon this judgment and returned nulla bona. In 1933 the defendant died testate and Edward H. Page was appointed and qualified as the executor of his will. In the following year the plaintiff served and filed upon the attorney of record for the executor his notice of motion "for an order under section 685, C.C.P., for the issuance of execution after

the period of five years and/or for an order enabling the plaintiff to file his claim against the Estate of William C. Doak, deceased, * * * and for such other and further relief as to the Court may seem just."

The motion came on regularly for hearing, and was granted. Thereafter the executor, by his attorney, served upon plaintiff's counsel a notice of motion for an order vacating and setting aside the previous order of the court. Upon the hearing of this motion it was denied, and the executor has appealed from each order.

The position of the appellant is that no order can be made under the provisions of section 685 of the Code of Civil Procedure after the death of the judgment debtor without the substitution of the executor as the defendant in the action in which the judgment was entered, and, further, that notice to the attorney for the executor does not comply with the requirements of that section without such substitution.

[1] It has been the law of this state since 1861 that the superior court has power to order the issuance of execution on a judgment which became final more than five years before the application therefor. Prior to 1933 such an application could be made *ex parte*. In that year (St.1933, p. 2499) section 685 of the Code of Civil Procedure was amended to add to the provision that a judgment "may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion," the requirement "and after due notice to the judgment debtor." The Legislature unquestionably has the power to impose such a condition (*Harrier v. Bassford*, 145 Cal. 529, 78 P. 1038), and as the statute is silent as to the manner of giving the notice, personal service is required. *Long v. Chronicle Publishing Co.*, 68 Cal.App. 171, 179, 228 P. 873.

[2] The procedure authorized in section 685 of the Code of Civil Procedure "constitutes neither an 'action' nor a 'special proceeding of a civil nature' within the meaning of those terms, nor is it in the nature of either." *Murphy v. Davids*, 55 Cal.App. 416, 203 P. 802, 804. "It is a mere subsequent step in an action or special proceeding already commenced, which is governed entirely, so far as the time within

which the same may be taken is concerned, by the provisions of the statute specially relating thereto." *Doehla v. Phillips*, 151 Cal. 488, 91 P. 330, 332.

The record before us shows several appearances by counsel for the executor. The minutes of the court at the first hearing include the appearance of counsel for the executor. By a later order these minutes were corrected by striking out the language reciting such appearance and finding that counsel did not make a general appearance at that time. The minutes at the time of a second hearing show counsel for the executor "appearing specially for defendant and complaining there has been no due notice." Upon this hearing the motion was submitted and thereafter granted.

Subsequently, counsel for the executor filed a notice of motion to vacate the order previously made directing that execution issue. One of the grounds for that motion was: "That said order was irregularly and erroneously made in that William C. Doak, defendant in the above entitled matter, died testate on December 23, 1933; that Edward H. Page, your moving party herein, was on or about February 1, 1934 appointed executor of the estate of said William C. Doak, deceased, thereafter qualified as such executor, and ever since has been, and now is, the duly appointed, qualified and acting executor of said estate; and that at the time said order herein complained of was made, to wit, on July 30, 1934, the said Edward H. Page, or other personal representative of said deceased defendant, had not been substituted in the place and stead of said deceased as defendant herein."

Another ground was: "That the court was without power or jurisdiction on the 30th day of July, 1934 to make said order, or any order, in the proceedings then pending in the name of said William C. Doak in that said William C. Doak died on or about December 23, 1933 and that Edward H. Page, the moving party herein, was appointed as the executor of the estate of said deceased defendant on or about February 1, 1934, and ever since has been and still is, the duly appointed, qualified and acting executor of said estate; that as such executor, said Edward H. Page was entitled to be substituted in the place and stead of said William C. Doak as defendant in the above entitled matter before any motion

should have been entertained by said court and before any order was made herein."

It may also be noted that in a brief filed by counsel for the executor supporting his motion he stated that when the motion for the issuance of execution first came before the court, he "called the attention of said court to the fact that said motion was not supported by an affidavit as required by section 685 of the Code of Civil Procedure, whereupon said court dismissed the motion."

[3] With these facts before us, the following language from the case of *Taylor v. Superior Court*, 93 Cal.App. 445, 447, 269 P. 727, 728, applies; the court there said: "We have emphasized by quoting the exact language of their ground for dismissal because it therein appears, as it does from their argument, that they not only claim that this court has no jurisdiction over the parties, but also has no jurisdiction over the subject-matter, i. e., 'no jurisdiction to issue the writ.' Under these circumstances we are constrained by a long line of authorities to hold that they have made a general appearance and have submitted to the jurisdiction of the court."

[4] Having made a general appearance, reason and justice both require that the creditor should be allowed execution upon his judgment. The attorney for the executor had actual notice of the proceedings. He made a general appearance and had every opportunity to present any facts tending to show that the creditor should not have the relief asked. Although there was no formal order of substitution, under the circumstances shown in this case, this should not require a reversal of the order. *Mooney v. Superior Court*, 183 Cal. 705, 192 P. 542.

In deciding this matter we are not passing upon or considering the question as to whether the court was precluded from making the order for the issuance of the execution by the latter portion of section 685 of the Code of Civil Procedure as it was passed in 1933, as this question is not raised or discussed by any party to this proceeding.

Each order appealed from is therefore affirmed.

We concur: HOUSER, P. J.; YORK, J.

12 Cal.App.2d 377

NATIONAL AUTOMOBILE INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION

et al.

Civ. 10775.

District Court of Appeal, Second District,
Division 2, California.

March 11, 1936.

1. Master and servant ☞416

Finding that at time of compensation claimant's injury he was employed by M. T., who was doing business under the name of N. N., under which name he carried insurance, *held* erroneous as not within issues, where pleading alleged that claimant's employer was N. N. and it was admitted that M. T. and N. N. were distinct individuals.

2. Master and servant ☞417(9)

In compensation proceeding, where findings of fact were not within issues, rehearing was required, where findings of fact upon which award was based were part of decision itself, and not grounds for decision as contemplated by rule requiring appellate court to affirm order if record shows any ground upon which order is justified.

Proceeding under the Workmen's Compensation Act by C. E. Riley, claimant, opposed by Nick Nickoliades, employer, and the National Automobile Insurance Company, insurance carrier. To review an award of the Industrial Accident Commission, the insurance carrier filed a petition for writ of review.

Award annulled, without prejudice.

C. W. Bowers, of Los Angeles, for petitioner.

Everett A. Corten and Emmet J. Seawell, both of San Francisco, for respondent Industrial Accident Commission.

CRAIL, Presiding Justice.

This proceeding is a review of an award by the Industrial Accident Commission. The award was in favor of C. E. Riley and against the petitioner herein.

[1] The application for adjustment of claim before the respondent, which is the equivalent of a complaint in a civil action, alleged that the employer of Riley was Nick Nickoliades and that the petitioner was the insurance carrier of the said Nickoliades. The findings of fact upon which the award of the Commission was based

were as follows: "At the time of his [Riley's] injury he was employed by Mike Tsimckles who was doing business under the name of Nick Nickoliades and under such name carried his compensation insurance with National Automobile Insurance Company, a corporation." It is admitted that Mike Tsimckles and Nick Nickoliades are separate and distinct individuals and that neither name is a fictitious name. Obviously the findings of the commission that Mike Tsimckles was the employer of Riley and that petitioner was the insurance carrier of Mike Tsimckles were not within the issues. Furthermore, there is no evidence in the record that petitioner was the insurance carrier of Mike Tsimckles, and the award may not be sustained.

The respondent in its answer says: "We will at the outset state that we admit that the Commission erred in finding that Riley was the employee of Mike Tsimckles. Upon a review of the record in this case it appears to be undisputed that Riley was an employee of Nick Nickoliades." After quoting the evidence at considerable length, respondent says: "We submit that the above quoted testimony establishes beyond any reasonable doubt that Riley was an employee of Nickoliades at the date of injury." However, this court is not a fact finder, and the case is not before us for trial. The award must be annulled.

[2] Respondent contends that no useful purpose would be served by granting a rehearing, and quotes 2 California Jurisprudence, 808, as follows: "When an order granting relief is general in its terms, the appellate court will examine the entire record upon which the order is based, and affirm it, if it finds therein any ground upon which the order is justified. In other words, the order will be affirmed if it can be sustained upon any of the assigned grounds, for it will be presumed that the order was made upon that ground. This rule has been applied to orders sustaining demurrers, orders striking out pleadings, orders granting nonsuits, and orders granting new trials." This law has no application to the situation confronting us. Findings of fact upon which a judgment or award are based do not constitute "grounds upon which the order is justified." The findings are a part of the decision itself and not the grounds for the decision. 2 Cal.Jur. 716, and cases cited.

The award is annulled without prejudice to further proceedings before the commission.

We concur: WOOD, J.; McCOMB, Justice pro tem.



12 Cal.App.2d 414

**LOS ANGELES COUNTY v. CENTRAL
SURETY & INSURANCE COR-
PORATION et al.**
Civ. 10725.

District Court of Appeal, Second District,
Division 2, California.

March 12, 1936.

Rehearing Denied April 3, 1936.

Hearing Denied by Supreme Court
May 4, 1936.

1. Municipal corporations Ⓒ43

County could sue principal and surety on bond executed pursuant to Subdivision Map Act, although county tax collector had sold land to state for delinquent taxes covered by bond (Gen.Laws 1931, Act 4578, §§ 23, 24; Pol. Code, § 3771, as amended by St.1933, p. 1135; § 4003, subd. 1).

2. Municipal corporations Ⓒ43

Statute prohibiting bringing of suit against owner of real property to recover taxes or assessments thereon *held* not to preclude action on bond executed pursuant to Subdivision Map Act (Gen.Laws 1931, Act 4578, §§ 23, 24; Pol.Code, § 3771, as amended by St. 1933, p. 1135; § 4003, subd. 1).

Appeal from Superior Court, Los Angeles County; William D. Dehy, Judge.

Action by the County of Los Angeles against the Central Surety & Insurance Corporation and others. Judgment for defendants, and plaintiff appeals.

Reversed.

Everett W. Mattoon, Co. Counsel, and J. F. Moroney, Deputy Co. Counsel, both of Los Angeles, for appellant.

Mathes & Sheppard and W. C. Mathes, all of Los Angeles (Joseph S. Dubin, of Los Angeles, of counsel), for respondent Central Surety & Insurance Corporation.

Richard L. North, of Los Angeles, for for respondents Patten & Menzing.

McCOMB, Justice pro tem.

This is an appeal on the judgment roll alone from a judgment in favor of defendants after a trial before a court without a jury.

The conceded facts are:

July 1, 1931, defendants, Patten and Menzing as principals and Central Surety & Insurance Corporation as surety, executed and delivered to the board of supervisors of Los Angeles county two surety bonds, one in the penal sum of \$1,200 and the other in the penal sum of \$1,100, in each of which they jointly and severally agreed to pay, or cause to be paid when due, all taxes which at the time of filing of two subdivision maps were liens against the land described in said maps or any part thereof.

Thereafter on August 8 and August 12, respectively, the maps were duly filed and placed of record. At the time of filing the first map, city and county taxes for the fiscal year 1931-32 in the sum of \$1,089.46 were a lien upon all of the real property described in said map, and on the date of filing the second map, city and county taxes for the fiscal year 1931-32 in the sum of \$1,082.79 were a lien upon all of the real property described in the second map. The aforesaid taxes became delinquent and have never been paid. June 30, 1932, the tax collector of Los Angeles county sold both tracts of land to the state of California to cover the unpaid taxes for the fiscal year 1931-32. August 17, 1934, plaintiff commenced this action to recover the principal sum of the bonds which defendants had furnished to plaintiff.

Defendants rely for affirmance of the lower court's judgment on the following propositions:

First: When real property has been sold to the state of California for delinquent taxes a county may not thereafter maintain an action on a bond executed and delivered pursuant to section 23 of Act 4578, commonly known as the Subdivision

Map Act (vol. 2, Deering's General Laws of California 1931, p. 2198).

Second: The 1933 amendment (St.1933, p. 1135) of section 3771 of the Political Code, which provides that no suits shall be brought against the owner of real property to recover taxes assessed against such property, precluded plaintiff from bringing a suit in August, 1934, to enforce the provisions of a bond delivered to it in accordance with the provisions of section 23 of Act 4578, supra.

[1] The first proposition is untenable as to the defendant Central Surety & Insurance Corporation. If taxes secured by a bond given pursuant to section 23 of the Subdivision Map Act are allowed to become delinquent, the county may recover from the surety the principal sum of the bond without proof of loss. Section 24, Act 4578, vol. 2, Deering's Gen.Laws of Cal.1931, p. 2198.

Neither is this proposition applicable to the defendants Patten and Menzing, because this action is not a suit to recover taxes, but is predicated upon an express contract, and therefore the plaintiff county has the right to maintain a suit to recover for the breach of the defendants' express contractual obligation. Section 4003, subd. 1, Pol.Code.

[2] The second postulate is unavailable to the defendants for the reason that section 3771 of the Political Code as amended in 1933 (St.1933, p. 1135, Deering's 1933 Supplement, Codes, Laws, and Constitutional Amendments, p. 505) prohibits only bringing of a suit against the owner or person in possession of real property to recover taxes, assessments, etc. The present action is not of such character. It is as heretofore explained one to recover for breach of an express contract to pay a sum of money, and is therefore not affected by the provisions of section 3771 of the Political Code.

The judgment is reversed.

We concur: CRAIL, P. J.; WOOD, J.

TREAT et al. v. MURDOCK et al. *
Civ. 5313.

District Court of Appeal, Third District,
California.
Feb. 28, 1936.

Hearing Granted by Supreme Court
April 27, 1936.

1. Appeal and error ⇨843(4)

In action against alleged mining partners on open account, on appeal from judgment for plaintiff by two of defendants who denied partnership with codefendants, allegations and findings concerning mining partnership were immaterial, determinative question being whether evidence sustained finding that appellants became indebted jointly to plaintiff on account.

2. Appeal and error ⇨994(3)

Credit and weight of testimony is within province of trial court, whose finding denying testimony credence cannot be controlled by reviewing court, unless it appears that there are no circumstances impairing accuracy of testimony.

3. Mines and minerals ⇨97

"Mining partnership" is formed where one in possession of mine under option contract transfers to another an interest therein, in consideration of being furnished capital to be used in its development, and continues in possession and actual working of mine (Civ.Code, §§ 2511, 2512).

[Ed. Note.—For other definitions of "Mining Partnership," see Words & Phrases.]

4. Mines and minerals ⇨101

In action against alleged mining partners on open account for goods sold and cash advanced for use in mining operations, evidence supported implied finding that defendants were engaged in joint adventure, so as to make them all liable to plaintiff, as against contention that some of defendants, in supplying codefendants actually working mine with money, were acting merely as lenders.

5. Joint adventures ⇨1

Loan, made with understanding that money be repaid whether venture financed proves success or failure, usually creates relationship of borrower and lender, but where person receiving money assumes no obligation for its return and money is subject to risks of business, relationship of "joint adventurers" is created, notwithstanding contract provides that money be returned with interest before net profits are divided or that person furnishing money receive note or lien as security.

[Ed. Note.—For other definitions of "Joint Adventurer," see Words & Phrases.]

6. Joint adventures ⇨7

Liability of members of joint adventure extends to all contracts reasonably necessary to carry on, and within scope of, business in which joint adventure is engaged.

Appeal from Superior Court, Calaveras County; J. A. Smith, Judge.

Action by William T. Treat and Mary M. Treat, as copartners doing business under the firm name and style of Treat Bros., against James A. Murdock and others. From a judgment for plaintiffs, defendants Roger and Connie Moreno appeal.

Affirmed.

Andrew J. Copp, Jr., of Los Angeles, for appellants.

Charles P. Snyder, of San Andreas, for respondents.

Mr. Justice pro tem. LEMMON delivered the opinion of the court.

Plaintiffs brought this action against five defendants to recover upon an open book account for goods, wares, and merchandise sold and delivered, and cash advanced. Three of the defendants defaulted. The remaining two defendants, Roger Moreno and Connie Moreno, answered, denying the allegations of the complaint. From a judgment in favor of plaintiffs as prayed for, the Morenos prosecute this appeal.

One James A. Murdock, on June 22, 1933, had by an assignment a 36¼ per cent. interest in an option to operate a mine in Calaveras county on a royalty basis. On August 12, 1933, an additional 36½ per cent. interest in the option was assigned to him. It appears that Murdock also had an option upon the remaining undivided interest in the option contract, but the date when such option was acquired does not appear.

Appellants operated a fruit market in Los Angeles. During the period between July, 1933, and December, 1933, appellants advanced to Murdock various sums of money at different times and which aggregated a sum in excess of \$6,000. They contend that the evidence established that these advances were personal loans to Murdock, and that they were not interested in the working of the mine either as general partners, mining partners, or joint adventurers. Admittedly, the goods furnished by plain-

tiffs were used in the mining operations at the mine, and the cash advanced expended in paying the laborers engaged in working the mine.

The first item in plaintiff's account, the subject of the action, is dated July 28, 1933, and the last item is of December 20 of the same year. On July, 1933, the Morenos advanced to Murdock sums aggregating \$1,500. A promissory note was executed to them by Murdock for that amount. Additional sums were thereafter advanced, and on September 30 the total advances amounted to the sum of \$4,550. Roger Moreno journeyed to San Andreas to obtain, as he asserts, security for the repayment of this sum. At that time Murdock executed and handed to Roger a promissory note in the sum of \$4,550, together with a document which purported to assign to Morenos "a proportional interest in and to" the option held by Murdock and under which he was operating the mine. Roger returned to Los Angeles with the note and document. The assignment was rejected by the Morenos, apparently, on account of its indefiniteness. The following month Murdock journeyed to Los Angeles, and on October 29, 1933, in the office of the attorney for the Morenos, an agreement was prepared and executed between Murdock and the Morenos, in which it was agreed that the \$4,550 note and the assignment dated September 30th be canceled, and that a new note in the sum of \$6,193 be executed by Murdock to the Morenos to evidence the then-existing indebtedness, and to be paid by applying thereon, monthly, 14 per cent. of the net proceeds from the production of the mine. Murdock agreed also to form a corporation, in which 50 per cent. of the capital stock would be retained as treasury stock to be disposed of to obtain additional working capital, and 10 per cent. of the stock would be issued to the Morenos. Murdock further agreed that in the event he failed to incorporate the corporation, he would continue to pay monthly 14 per cent. of the net proceeds of the production of the mine so long as the mine would be operated and "notwithstanding the fact that such 14 per cent. of the net production of said mine may exceed the amount of said note, to-wit, \$6,193, plus accrued interest thereon." The execution of this agreement was preceded by a general discussion, joined in by the appellants and other parties, who had either contributed money or services in the working

of the mine, concerning the interest in the mine to be allotted to each.

Murdock had been, prior to July, 1933, a tenant of the Morenos in Los Angeles, and had owed them for five or six months rent which, however, he paid up later in one payment. Appellants neither knew anything concerning, nor made any investigation of Murdock's financial standing or resources before they began to advance money to Murdock. They admitted that they were aware Murdock was interested in a mine and that the money they were advancing was being used in furthering the mining operations thereon. Roger Moreno first visited the mine about July 4, 1933, and made three other trips from Los Angeles to the mine on subsequent dates in the same year. Connie Moreno made but one visit to the mine, but in September he personally bought and sent to the mine a water tank for use there. Murdock was not a witness at the trial, although one of the Morenos testified that he had seen him in Los Angeles two or three weeks before the trial. On July 17th both of the Morenos went to the place of business of a mechanic in Los Angeles to examine certain machinery which was there being overhauled preparatory to being shipped to the mine.

On July 3d, Roger Moreno and his wife, joined in a discussion at the mine as to the necessity of erecting bunkhouses to house the workmen; and both of the Morenos were shown at other times the results of "runs" which were made while they were at the mine.

The first advance of money to Murdock was made after the trip made by Roger to the mine on July 3d. The plaintiff Wm. T. Treat had a conversation with Roger in San Andreas on October 19, 1933, concerning the indebtedness owing to the plaintiffs, in which Roger stated that within three days after his return to Los Angeles, plaintiffs' bill would be paid.

[1] The complaint alleges, and the answer denies that the five defendants were, during all the time mentioned in the complaint, copartners and engaged in the business of mining. The findings in accordance with plaintiffs' allegations in this regard are attacked as being wholly unsupported by the evidence. The gist of the cause of action is that the defendants became indebted to the plaintiffs upon an open book account. The defendants were

declared against as joint debtors. The allegations concerning the mining partnership, and the denial thereof, did not raise a material issue. *Shannon v. Calmus*, 70 Cal. App. 652, 234 P. 107. It follows that the finding thereon was likewise immaterial and the important question then is whether there is any evidence to sustain the finding that the defendants became indebted jointly to the plaintiffs upon the account.

[2] We have set forth the evidence upon which the trial court based its decision. Much of this testimony was denied by the appellants while they were on the stand. They exhibited a lack of candor and a degree of hedging under cross-examination. One of them changed his testimony upon a material inquiry when prompted by his counsel. There are frequently many factors available to a trial court in determining the credibility of a witness which the record before a reviewing court does not divulge. Suffice it to observe that the trial court placed no credence in the testimony of appellants upon this important question as to reasons for, and the understanding had by them with Murdock in the advancements made by them to Murdock. "The most positive testimony of a witness may be contradicted by inherent improbabilities as to its accuracy contained in the witness' own statement of the transaction, or there may be circumstances in evidence in connection with the matter, which satisfy the court of its falsity. The manner of the witness in testifying may impress the court with a doubt as to the accuracy of his statement, and influence it to disregard his positive testimony as to a particular fact, and, as it is within the province of the trial court to determine what credit and weight shall be given to the testimony of any witness, this court cannot control its finding or conclusion denying the testimony credence, unless it appears that there are no matters or circumstances which at all impair its accuracy." *Davis v. Judson*, 159 Cal. 121, 113 P. 147, 150.

The evidence above detailed evinces circumstances which cast doubt upon the testimony of the two appellants. It is improbable that two business men would loan such large sums of money without any security to one about whose financial standing and ability to repay they had made no investigation, and with knowledge that the money was to be used in the highly speculative venture of developing a mine. The

interest displayed by the appellants in visiting the mine, buying the tank for use there, discussing the need of bunkhouses, watching clean-ups, examining machinery which was to be sent to the mine, all show a special attention which, with all the other facts and circumstances, indicate an understanding between them and Murdock that the mine was being worked for their joint profit. The promise to pay plaintiffs' account, though made too late to raise an estoppel, was made at a time when the mining venture was discouraging. Such a promise would more likely be made by one interested as an owner and responsible for this indebtedness, than by one creditor to another creditor of the mine.

[3] Section 2511 of the Civil Code provides: "A mining partnership exists when two or more persons who own or acquire a mining claim for the purpose of working it and extracting the mineral therefrom actually engage in working the same." Section 2512 of the same Code provides that an express agreement to become partners or share the profits and losses is not necessary to the formation and existence of a mining partnership. It is not essential that each partner shall actually perform physical work, and one who supplies money to be used in working the mine is as much a partner as one who devotes his own labor. A mining partnership is formed where one in possession of a mine under an option contract, transfers to another an interest therein, in consideration of the latter furnishing capital to be used in its development, and the former continues in possession and the actual working thereof. *Harper v. Sloan*, 177 Cal. 174, 169 P. 1043, 181 P. 775. Appellants, however, contend that there was no transfer to them of an interest in the mine, because the assignment of September 30th was not accepted, and was too indefinite to convey any interest; and the contract of October 27th amounts to no more than an agreement by which appellants were to receive an interest in the net proceeds in return for money loaned, and that this falls short of the requirement of ownership of an interest in the mine, to constitute the owners co-partners.

[4, 5] Concluding, as we do, that the finding of the trial court upon the question of the mining partnership is immaterial, the judgment must be affirmed if there is evi-

dence supporting the finding that the appellants became indebted to respondents upon any theory. If it is conceded, as urged by appellants, that the defendants did not constitute a partnership in the full and generally accepted sense, or a mining partnership within the qualifications of the Code sections, nevertheless, the evidence supports the implied finding that they were engaged in a joint adventure. If money is loaned by one to another with the understanding that it is to be repaid whether the venture in which the money is to be used proves a success or a failure, the relationship is usually construed to be that of borrower and lender. "But if the person receiving the money assumes no obligation for its return, and it is subject to the risks of the business, the partners have usually been held to be joint adventurers, notwithstanding the contract provides that the money is to be returned with interest before the net profits are divided, or that the lender is to receive notes as security for the money invested, or is to be given a lien upon the property put into the venture." 33 C.J. 843.

The inference can reasonably be drawn from the evidence detailed that appellants, although protecting themselves to the extent of securing notes to represent advances, and at times insisting upon security for the repayment of their contributions, by agreement either express or implied, had a present interest in the mine as well as to future recoveries therefrom.

[6] The liability of the members of a joint adventure extends to all contracts reasonably necessary to carry on and within the scope of the business in which the joint adventure is engaged. The item of cash loaned included in plaintiffs' account was borrowed by a Mr. Pohl, the superintendent of the mine, for the purpose of, and was expended in paying the wages due the workmen at the mine. From the start of the enterprise Pohl had been the superintendent of the operations, and this was at all times known to appellants. The evidence shows that the borrowing of the money for the purpose mentioned was both reasonably necessary and within the scope of the business of the joint adventure.

The judgment is affirmed.

We concur: THOMPSON, J.; PULLEN, P. J.

District Court of Appeal, First District, Division 1, California.

March 2, 1936.

Rehearing Denied April 1, 1936.

Hearing Denied by Supreme Court April 30, 1936.

1. Appeal and error ⇨207

Objection to counsel's conduct cannot be entertained on appeal, where no assignment of error was made at time or at any time during trial.

2. Appeal and error ⇨978(2)

Trial court's decision against party moving for new trial on ground of opposing counsel's misconduct will not be disturbed on appeal, unless plain abuse of discretion is shown.

3. Appeal and error ⇨207

Defendants, not complaining of alleged misconduct of plaintiffs' counsel in cross-examining defendants' witness and questioning plaintiffs' rebuttal witness for impeachment purposes during trial, at which questions to such witnesses were stricken out on request of plaintiffs' counsel and jury was admonished by court not to consider them, *held* in no position to raise such point on appeal.

4. Appeal and error ⇨1032(1)

Alleged misconduct of plaintiffs' counsel in cross-examining defendants' witness and questioning plaintiffs' rebuttal witness for impeachment purposes *held* not ground for reversal of judgment for plaintiffs, in absence of showing that plaintiffs' counsel acted in bad faith in introducing and subsequently striking out rebuttal witness' testimony or that defendants were prejudiced thereby.

5. Appeal and error ⇨230

Court's questions to jury foreman reporting jury's inability to agree, as to number of ballots taken, numerical division of jury, and probability of agreement, *held* not ground for reversal of judgment on verdict for plaintiffs, where defendants' counsel made no protest or objection before verdict was rendered, but first raised point that court erred in asking such questions on motion for new trial, and made no claim on appeal that court's action amounted to coercion.

6. Appeal and error ⇨981

Granting or refusal of motion for new trial on ground of newly discovered evidence is so far within trial court's discretion that its action will not be disturbed on appeal, except for manifest abuse of discretion.

7. New trial ⇨105

Newly discovered evidence, designed merely to impeach or contradict witnesses'

testimony or having only that effect, does not require granting of new trial.

8. New trial ☞105

New trial will not be granted because of newly discovered evidence merely tending to impair credibility of evidence given or contradict witness or of value only as impeaching evidence.

9. New trial ☞99

Motion for new trial on ground of newly discovered evidence is regarded with distrust and disfavor, and such evidence is looked upon with suspicion.

10. New trial ☞105

Denial of defendants' motion for new trial on ground of newly discovered evidence discrediting and impeaching testimony of one of plaintiffs' witnesses held not abuse of trial court's discretion.



Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by Tony Pandolfo and others, by and through their guardian ad litem, Gabriel Pandolfo, and others, against Minnie D. Jackson, the Morris Goldman Manufacturing Company, and another. From a judgment against named defendants, they appeal.

Affirmed.

Weinmann, Quayle & Berry, of Oakland, for appellants.

Jesse E. Nichols, D. W. Brobst, and Elliott Johnson, all of Oakland, for respondents.

KNIGHT, Justice.

An automobile owned by the defendant Morris Goldman Manufacturing Company and driven by the defendant Minnie D. Jackson struck Nickolas Pandolfo while he was walking across the street near the intersection of Seventh and Linden streets in Oakland, and he died the same day as a result of his injuries. On account of his death his heirs brought this action for damages, and the jury before which it was tried rendered a verdict against both defendants above named (a dismissal having been entered as to the defendant Morris Goldman individually), the amount of which was subsequently reduced as to Morris Goldman Manufacturing Company, the owner of the automobile, to conform to the provisions of section 1714¼ of the Civil Code. From the judgment as finally entered the defendants have

appealed, contending as grounds for reversal that counsel for plaintiff was guilty of misconduct, that the trial court erred in making certain inquiries of the jury after the cause was submitted to it and before it rendered a verdict as to the probability of an agreement and how the jury stood numerically, and abused its discretion in denying defendants' motion for new trial grounded on averments of surprise and newly discovered evidence. We find no merit in any of the points urged.

[1-4] A number of persons witnessed the accident, and their testimony as to the manner in which it happened was conflicting. One of several witnesses produced by defendants was a man named Gordon, whose testimony plaintiffs sought to impeach by showing that between the date of the accident and the trial of the action he made certain statements to two persons, named Clark and Nickerson, indicating he had a financial motive in giving testimony favorable to the driver of the automobile. Gordon denied having made such statements, and in rebuttal plaintiffs produced Clark and Nickerson as witnesses to contradict him. The former fully substantiated plaintiffs' claim that Gordon told him the day after the coroner's inquest that he (Gordon) "was going to get a good sum of money for testifying in the case." He further testified that Gordon's reputation for truth, honesty, and integrity was bad. With respect to Nickerson's testimony, the record shows that the statement Gordon made to him was slightly different from the one about which Gordon had been interrogated on cross-examination. In this regard Gordon was asked in substance if he had not told Nickerson that he was going to buy a secondhand store and was going to get the money for such purpose "from the lady that killed the old man a couple of weeks before * * * for helping her out in the accident"; whereas, Nickerson was asked if Gordon had told him "that he was going to get enough money out of testifying for a lady that killed a man, to set himself up in business," and Nickerson replied, "Well, he didn't say exactly who it was, but he said he was going to get enough money to start up in business"; that Gordon did not say that he was going to get the money "out of this case." Thereupon the following occurred:

"Mr. Nichols [counsel for plaintiffs]: Now, your Honor, those questions I asked of Mr. Gordon based on conversation with

this witness I ask be stricken from the record. There were three or four impeaching questions I asked yesterday as to conversation had with Nickerson and I ask that those be stricken from the record.

"The Court: Very well. They will be stricken out and the jury will not consider them for any purpose * * *."

And in its charge to the jury the trial court again admonished the jury that it should not consider as evidence anything that had been stricken out by the court. Evidently at the time the incident occurred counsel for defendants was entirely satisfied with plaintiffs' voluntary action in striking out the evidence relating to Gordon's impeachment by Nickerson, and with the trial court's voluntary admonition to the jury concerning the same because no criticism whatever of counsel's conduct was made at that time, nor afterwards during trial. It was not until the case was decided against defendants and they made their motion for new trial that they first complained. It is well settled that on appeal an objection to the conduct of opposing counsel cannot be entertained where no assignment of error was made at the time the incident occurred or at any time during trial. *Anderson v. United Stages, Inc.*, 192 Cal. 250, 219 P. 748; *Ballard v. Krug*, 111 Cal.App. 555, 295 P. 871; *Imlay v. California Cab Co.*, 124 Cal. App. 68, 11 P.(2d) 1116. Furthermore, as said in *Alberts v. Lytle*, 1 Cal.App.(2d) 682, 37 P.(2d) 705, the trend of recent decisions seems definitely to indicate that when counsel's conduct is urged as one of the grounds of motion for new trial and the motion is decided adversely to the moving party, the trial court's decision will not be disturbed on appeal except where a plain abuse of discretion is shown. Manifestly no such showing has been made in the present case. But entirely aside from the fact that defendants are not in a position to raise the point on appeal, there is nothing in the record, so far as our attention has been called, which would justify the conclusion that counsel for plaintiffs acted in bad faith in introducing and subsequently striking out the Nickerson impeachment testimony or that defendant suffered any prejudice by reason thereof.

[5] With respect to the defendants' second point, the record shows that the jury retired about 4 o'clock in the afternoon and, after deliberating for approximately three hours without reaching a verdict, was returned into court, and in response to questions put by the court the foreman stated

that the jury had not been able to agree upon a verdict. The court then inquired how many ballots had been taken, and how the jury stood numerically, adding that the foreman "need not say for whom." The foreman replied that four ballots had been taken, that the first ballot stood six to six, and the last eight to four; and he stated further in response to the court's inquiry that he thought there was no probability of an agreement. The court then informed the jury that it could be sent out for dinner if it so desired. The foreman replied, "I think we are all hungry," and the other jurors signified their desire to be sent out for dinner; whereupon, after first retiring to the jury room for the purpose of taking another ballot, the jury was taken to dinner by the bailiff. Later that night, about 10 o'clock, it returned a verdict. No protest or objection of any kind was made by defendants' counsel at any time before the verdict was rendered. The point was raised for the first time on motion for new trial, and no claim is made now that the action of the court in thus interrogating the foreman of the jury amounted to coercion. But in support of their contention that it was error for the court to ask the jury any questions at all, they rely on the rule which they claim is followed in the federal jurisdiction. Evidently, however, if such be the rule in the federal jurisdiction, it does not prevail in the state courts; at least no case so holding has been cited; and on the contrary, in the case of *Pisani v. Martini*, 132 Cal.App. 269, 22 P.(2d) 804, wherein the court asked substantially the same questions, it was expressly held that there was no ground for reversal.

[6-10] In support of their motion for new trial, defendants produced affidavits setting forth what they claimed was newly discovered evidence, the effect and purpose of which was to discredit and impeach the testimony of one of plaintiff's witnesses. It is well established, however, that the granting or refusing of a motion for new trial on the ground of newly discovered evidence is so far within the discretion of the trial court that its action will not be disturbed except for a manifest abuse of discretion (2 Cal.Jur. 906); that newly discovered evidence designed merely to impeach or contradict testimony of adverse witnesses or which has only that effect is not of a character which demands the granting of a new trial; nor will a new trial be granted because of the discovery of new evidence which, if produced, would only tend to im-

pair the credibility of the evidence given or to contradict a witness of the opposing party, or where the only value of the newly discovered testimony is as impeaching evidence. *Sawyer v. Nelson*, 115 Cal.App. 490, 1 P.(2d) 1068. Moreover, it has been said in this respect that after defeat a motion for new trial upon the grounds mentioned is regarded with distrust and disfavor, and that such proffered newly discovered evidence is looked upon with suspicion. *Mad-dux v. Mora*, 99 Cal.App. 695, 279 P. 467. Applying the foregoing rules to the present situation, there is no ground upon which it may be held that the trial court abused its discretion in denying defendants' motion for a new trial.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.



12 Cal.App.2d 200

EDGINGTON v. SOUTHERN PAC. CO.

Civ. 9844.

District Court of Appeal, First District, Division 1, California.

Feb. 29, 1936.

Hearing Denied by Supreme Court
April 27, 1936.

1. Master and servant ☞110

Term "in the service to which the same are put," in Federal Boiler Inspection Act, respecting safety of locomotive and its appurtenances, means the service for which the appliance is designed or to which it is put with employer's knowledge and acquiescence (Federal Boiler Inspection Act § 2, as amended, 45 U.S.C.A. § 23).

2. Master and servant ☞110

Maintenance of defective placard board on water car by railroad resulting in injuries to brakeman, who grasped board to balance himself, held to render railroad liable under Boiler Inspection Act forbidding use of locomotive tender unless parts and appurtenances thereof are safe to operate, where jury found that placard board was used by brakeman for purpose for which it was customarily used with knowledge and consent of railroad (Federal Employers' Liability Act, 45 U.S.C.A. §§ 51-59; Federal Boiler Inspection Act § 2, as amended, 45 U.S.C.A. § 23).

3. Master and servant ☞293(6)

In brakeman's action for injuries, instruction that only negligence claimed was violation of "Federal Safety Appliance Acts" did not preclude recovery under Federal Boiler Inspection Act and Federal Employers' Liability Act, where it appeared that court intended to include the three acts, and case was tried on theory that all three acts were involved (Federal Employers' Liability Act, 45 U.S.C.A. §§ 51-59; Federal Safety Appliance Act, 45 U.S.C.A. § 1 et seq.; Federal Boiler Inspection Act, 45 U.S.C.A. § 22 et seq.).

4. Trial ☞330(5)

Where action is based on alleged violation of several statutes, general verdict rendered for plaintiff will be sustained if it appears that any one of the statutes was violated.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Fred Edgington against the Southern Pacific Company. From an adverse judgment, the defendant appeals.

Affirmed.

Elliott Johnson, of Oakland, for appellant.

Clifton Hildebrand and Louis E. Goodman, both of San Francisco (Louis H. Brownstone, of San Francisco, of counsel), for respondent.

KNIGHT, Justice.

The defendant, Southern Pacific Company, appeals from a judgment for \$7,500 entered in plaintiff's favor after trial by a jury. The action was one for damages on account of personal injuries sustained by plaintiff during the course of his employment with defendant as a brakeman on a freight train engaged in interstate commerce. The jury was called upon to render three verdicts, two special and one general. The interrogatory embodied in the first special verdict was answered in defendant's favor, and the one embodied in the second special verdict was answered in plaintiff's favor. Stated briefly, the grounds urged by defendant for reversal are that inasmuch as the first special verdict was in its favor, the general verdict and the judgment also should have been in its favor; furthermore, that the trial court erroneously instructed the jury.

The accident happened in the railroad yards at Carlin, Nev. After the train pulled into the yards the engine was un-

coupled from the cars and backed slowly toward a lead track running to the roundhouse. Attached to the regular engine tender was an auxiliary water car, used to supply the engine with water. After throwing the switch to let the engine take the lead track, plaintiff boarded the extreme right-hand front end of the auxiliary water car in the direction in which the engine was moving. He stood in an iron stirrup extending below the side of the sill of the water car, and balanced himself by grasping with his right hand a grabiron attached to the side of the auxiliary water car and with his left hand a placard board fastened to the end of the said car. He alleged in his complaint and testified at the trial that while riding in this position the grabiron loosened and the placard board broke, causing him to fall to the ground, and that as a result of the fall he suffered an injury to his knee which he claimed was permanent. The grabiron which he grasped with his right hand was attached to a steel strap binding the tank of the auxiliary water car to the frame thereof; and the placard board was constructed of a solid piece of straight grain pine, approximately an inch and a quarter thick and twelve inches square, and was fastened by iron brackets three-eighths of an inch thick and two bolts to the end of the car. The primary purpose of these placard boards is to display thereon labels of one sort or another; but as will hereinafter appear, plaintiff claimed, and the jury found, that they were used also with the knowledge of the defendant company, customarily and in general practice, as handholds by railway switchmen in the performance of their work.

The complaint as amended set forth two causes of action. In the first it was alleged that the action was brought under the authority of three federal acts, namely, the Federal Employers' Liability Act (45 U.S.C.A. §§ 51-59), the Federal Safety Appliance Act (45 U.S.C.A. § 1 et seq.), and the Federal Boiler Inspection Act (45 U.S.C.A. § 22 et seq.); and after setting forth the circumstances under which plaintiff claimed he was injured, he alleged that the use of the placard board as a handhold was in accordance with the prevailing, well-recognized, and acknowledged practice and custom on all the Southern Pacific Company's lines; that the grabiron and placard board were so negligently kept and maintained that they became loose and broke and thereby plaintiff was thrown to the ground and

injured. The second cause of action included all the allegations set forth in the first cause of action except those to the effect that the action was brought under the authority of the federal acts above mentioned, and it was also alleged therein that the placard board was part and appurtenance of the auxiliary water car and was not safe to operate in the service to which it was put. The answer denied the allegations concerning the defective condition of the grabiron and placard board; also, that the latter was customarily used as a handhold; and as special defenses the answer set up assumption of risk, that plaintiff voluntarily chose the place to work knowing the conditions, contributory negligence, and unavoidable accident.

The maintenance of secure grabirons on cars operated in interstate commerce is admittedly one of the requirements of the Federal Safety Appliance Act. In this regard said act (section 4 [45 U.S.C.A. § 4]) provides and the trial court instructed the jury that, "Until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grabirons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars"; and with respect to the question of whether the defendant complied with the foregoing provisions the court instructed the jury that the evidence in the case showed affirmatively without conflict that the auxiliary water car at the time of the accident was equipped with all the grabirons and handholds located thereon in conformity with the orders of the Interstate Commerce Commission of the United States, which orders have the force and effect of law, but that there was a conflict in the evidence which was for the jury to decide whether or not the handhold located on the strap around the tank, which plaintiff was using, was maintained in a safe condition. In order to have the foregoing issue of fact specifically decided by the jury, the court submitted as special verdict No. 1 the following interrogatory: "Did the grabiron or handhold located on the strap of the car in question which Mr. Edgington was holding on to, break or become detached or insecure in any manner, directly or indirectly contributing to the accident in question?" The jury's answer was: "No."

In view of the foregoing finding on this particular issue of fact, it is apparent that no violation of the provisions of the

Safety Appliance Act was established, and it may be granted, therefore, that if the alleged violation of that act alone presented the sole determinative issue in the case, defendant was entitled to a general verdict and judgment in its favor. But that is not the situation. As shown, plaintiff's right of recovery was based also on two additional federal acts, namely, the Federal Employers' Liability Act and the Federal Boiler Inspection Act, it being claimed by plaintiff in this connection that the breaking of the alleged defective placard board which he was grasping also, so he claimed, at the time he fell, constituted a violation of the provisions of the acts last mentioned.

[1,2] In this regard the Federal Employers' Liability Act (section 1 [45 U.S.C.A. § 51]) provides and the jury was instructed to the effect that a common carrier engaged in interstate commerce is liable in damages for the injury to or death of its employees, "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track," etc.; also, that in any action for damages brought under the authority of said act the employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier "of any statute enacted for the safety of employees contributed to the injury or death of such employee." The Federal Boiler Inspection Act (section 2, as amended [45 U.S.C.A. § 23]) provides and the jury was instructed to the effect that, "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb." And it has been held, and the jury in the present case was instructed, that the phrase "in the service to which the same are put," as contained in section 2 of the Federal Boiler Inspection Act, must be taken to mean the service for which the appliance is designed, or to which it is put with the employer's knowledge and acquiescence. *Chicago, B. & Q. Ry. Co. v. Murray*, 40 Wyo. 324, 277 P. 703, citing many authorities. Plaintiff alleged in his complaint and introduced evidence to prove that although these placard boards were designed primarily for the dis-

play of labels, they were used also as handholds by railroad employees, customarily and in accordance with prevailing practice, and with the knowledge, consent, and acquiescence of the defendant. Those allegations were denied by defendant, and evidence was introduced in support of such denials; and upon the issue thus presented the court gave a number of instructions, several of which were proposed by the defendant, to the effect that it was only the duty of the railroad to maintain the placard board in such condition that it would be safe for the purposes for which it was designed and installed or for which it was customarily used with its knowledge and acquiescence; and that if the jury believed from the evidence that the accident was due solely to the breaking of the placard board and that said board was caused to break on account of its use by plaintiff for a purpose for which it was not designed, intended, or customarily used, then there was no negligence on the part of the railroad company and the jury should so find. Therefore, in order to have this contested issue specifically decided by the jury, the court submitted its second special verdict embodying the following interrogatory: "At the time of the accident in question was the placard board being used by Mr. Edgington for any purpose for which it was customarily used with the knowledge and consent of the Southern Pacific Company?" The jury's answer was, "Yes." That being so, such finding was legally sufficient in our opinion to support the conclusion that the maintenance of the defective placard board under the circumstances found by the jury amounted to a violation of the provisions of the Federal Boiler Inspection Act forbidding the use of any locomotive tender unless all parts and appurtenances thereof are in a proper condition and safe to operate in the service to which they are put (*Chicago, B. & Q. Ry. Co. v. Murray*, supra); and of those provisions of the Federal Employers' Liability Act which hold an employer liable in damages for injuries to or death of any employee resulting in whole or in part by reason of any defects or insufficiency due to the employer's negligence, in its cars, engines, appurtenances, etc.

[3,4] Defendant further contends, however, that the Federal Boiler Inspection Act was eliminated from the case entirely by a portion of one of the trial court's instructions, and that therefore the court erred in giving any instructions as to the

provisions of that act. In furtherance of such contention defendant has stated repeatedly throughout its brief that "the only negligence claimed by the plaintiff was an alleged violation of the provisions of the Federal Safety Appliance Act and the jury was so instructed." The contention and statements thus made are evidently based upon an erroneous reading and misinterpretation of the words of the first sentence of instruction XXVII, given at plaintiff's request. The sentence reads: "In this case the only negligence claimed by plaintiff is an alleged violation of one of the provisions of the Federal Safety Appliance *Acts* by an interstate carrier." The remainder of the instruction reads: "A violation of *one* of the Federal Safety Appliance *Acts* by an interstate carrier is in itself negligence and if such violation proximately contributes to the injury to the employee, this violation of the Safety Appliance Act renders the railroad company liable under the Federal Employers' Liability Act as being the result of a 'defect or insufficiency, due to its negligence, in its cars, engine, appliances * * * or other equipment,' within the meaning of the Federal Employers' Liability Act." (Italics ours.) As will be noted, in the first sentence of said instruction the court used the plural "*Acts*," and in the second sentence declared that a violation of one of the Federal Safety Appliance Acts, etc. It is apparent therefrom as well as from the instruction as a whole that in referring to the Federal Safety Appliance "*Acts*" the court intended to and did include the group of federal acts which plaintiff charged were violated, and which are often referred to in the decisions as the Federal Safety Appliance Acts because their purpose is to relieve trainmen as far as possible of dangerous working conditions. Moreover, the pleadings, the evidence, the instructions proposed by defendant and given by the court, and the interrogatories embodied in the special verdicts, all show that the case was tried upon the theory that all three federal acts were involved; and it is well settled that where an action is based on the alleged violation of several statutes, and a general verdict is rendered in favor of the plaintiff, such verdict will be sustained if it appears that any one of said statutes was violated. *Walton v. Southern Pacific Co.* (Cal.App.) 48 P.(2d) 108.

The judgment is therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

12 Cal.App.2d 410

PEOPLE v. LEVINE et al.

Cr. 2830.

District Court of Appeal, Second District,
Division 1, California.

March 12, 1936.

1. Criminal law ☞543(2)

Issuance of subpoena about 10 days prior to date of trial which was not served because witness had left state and could not be located by inquiry among her friends and at former addresses held exercise of sufficient diligence in attempting to find witness to authorize witness' testimony, given on preliminary hearing, to be read at trial (Pen.Code, § 686).

2. Robbery ☞24(1)

Evidence held to sustain conviction for second degree robbery.

3. Criminal law ☞1037(1)

Defendant could not complain on appeal of alleged misconduct of prosecuting attorney, which was not charged nor made subject of assignment of error during trial.

4. Criminal law ☞1171(1)

Alleged misconduct of district attorney in robbery prosecution, in cross-examining defendant relative to a drinking party, held not to warrant reversal, where no miscarriage of justice resulted.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Jack Levine was convicted of second degree robbery, and he appeals.

Affirmed.

John F. Groene, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Walter L. Bowers, Deputy Atty. Gen., for the People.

DESMOND, Justice pro tem.

[1] The appellant was convicted by a jury of second degree robbery. His appeal from the judgment of conviction, "the verdict of the jury," and from order of the trial court denying him a new trial rests upon three grounds: Insufficiency of the evidence to sustain a conviction; misconduct of the district attorney; error of the court in permitting to be read to the jury testimony given by a witness at the preliminary hearing, said witness not being present at the jury trial. Since this testimony formed part of the people's case,

we pass first upon the objection to its admission. Jean Mitchell, a companion of defendant at or about the time the complaining witness was robbed and severely beaten, testified at the preliminary hearing that shortly after she left a room in the Edison Hotel, where she had been in the company of the defendants and the complaining witness, both defendants came to her room in a neighboring hotel, Burns with blood all over his hands and with spots of blood on his shoulders, and Levine with little spots of blood on his hands. She further testified that when they went up stairs there was a sum of money "around \$19.00 and some cents" on the bed, and the two men were dividing it. At the close of Miss Mitchell's testimony, the magistrate inquired whether either defendant Burns or Levine wanted to ask any questions of the witness. They were not represented by counsel at the hearing, and each answered, "No." Jean Mitchell was not produced as a witness upon the trial of this cause; an investigator attached to the office of the district attorney testifying that he was unable to serve her within the state of California, for the reason that she had gone to Seattle on October 21st and had not returned so far as could be determined by inquiry among her friends and at former addresses in Los Angeles. On October 28, 1935, the cause had been set for trial on the 15th of November, and about ten or eleven days before the latter date the investigator had received his subpoena for service. The trial court held that due diligence had been exercised in the premises, and, in view of the provisions of section 686 of the Penal Code and the wide discretion vested in the court in such a situation, we are in no way inclined to disturb the findings upon this point; on the contrary, we believe the testimony was properly admitted. See *People v. Land*, 137 Cal.App. 196, 198, 30 P.(2d) 433; *People v. James*, 133 Cal.App. 751, 753, 24 P.(2d) 859; *People v. Noone*, 132 Cal.App. 89, 95, 22 P.(2d) 284; *People v. Tiracorda* (Cal.App.) 48 P.(2d) 116, 117.

[2] Passing now to the contention of appellant that the evidence adduced in this case was insufficient to sustain a conviction, we have read the entire transcript of the testimony and have noted the typewritten confessions signed by this defendant and by his partner, as well as other incriminating testimony; we have also noted

the attempted repudiation of these confessions by both defendants at the time of trial. The verdict of the jury shows conclusively that they did not believe these defendants as witnesses, but preferred to accept the testimony produced by the people pointing to their guilt; testimony which, as has been indicated, was amply sufficient.

[3] The district attorney in cross-examining the appellant asked certain questions relating to his association with one of the women members of the drinking party in which all these characters were involved on October 1, 1935, the night of the robbery. Objections were made to these questions and sustained by the court except as to one. That question was as to who used the appellant's room in the Edison Hotel on the night in question. This seems to us a pertinent inquiry, and one that affords no basis for a charge of misconduct. In this connection, we call attention to the fact that misconduct was not charged, nor was there any assignment of error upon that ground during the trial; consequently, under the circumstances presented here, such a charge made for the first time upon appeal has no weight. *People v. Russo*, 133 Cal.App. 468, 474, 24 P.(2d) 580; *People v. Wilson*, 76 Cal.App. 688, 701, 245 P. 781; *People v. Wong Toy*, 189 Cal. 587, 595, 209 P. 543; *People v. Sieber*, 201 Cal. 341, 356, 257 P. 64; *People v. Babcock*, 160 Cal. 537, 545, 117 P. 549; *People v. MacDonald*, 167 Cal. 545, 551, 140 P. 256, 259.

[4] We are not unmindful of the rule stated in *People v. MacDonald*, supra, "The want of an assignment * * * should not affect appellant's rights, where such assignment could not have led to the curing of the harm done," but in our opinion this is not such a case. If the questions characterized as improper were calculated in the opinion of counsel to raise a prejudice unjustifiably against his client, we believe that the trial court, upon request made at that time, could and would have given the jury such appropriate and effective instructions as to cause them to disregard the questions. Finally, even if it be conceded that misconduct was committed, we still have a case in which, in our opinion, no miscarriage of justice resulted. Under such circumstances, misconduct does not warrant reversal. *People v. Phelan*, 123 Cal. 551, 570, 56 P. 424; 8 Cal.Jur. 626.

Judgment and order are affirmed. Since no appeal lies from "the verdict of the jury," the attempted appeal therefrom is dismissed.

We concur: HOUSER, P. J.; DORAN, J.



12 Cal.App.2d 464

Ex parte HEEGSTRA.

Cr. 1883.

District Court of Appeal, First District, Division 2, California.

March 16, 1936.

Habeas corpus $\Rightarrow$ 85(3)

On habeas corpus, where recitals in order of commitment for contempt in nonpayment of alimony were at variance with claim of petitioner, recitals in order were conclusive and claims to the contrary were not considered.

Application of H. Walton Heegstra for a writ of habeas corpus, directed to the Sheriff of the City and County of San Francisco, to secure the release of petitioner from custody under a judgment of contempt.

Writ denied.

McEnerney, Morris, Gillen & McEnerney and Leslie C. Gillen, all of San Francisco, for petitioner.

Raymond D. Williamson and Albert Picard, both of San Francisco, for respondent.

STURTEVANT, Justice.

The petitioner has applied for a writ of habeas corpus. In his petition he claims that he was adjudged guilty of contempt for failure to make a payment of maintenance to Grace Mildred Heegstra, his former wife, and that such order was made without any proof that he had not made such payment.

After the writ issued, the sheriff of the city and county of San Francisco made a return in which he set forth the commitment. Among other things, said commitment sets forth the following:

"Whereas, on May 9, 1934, a final judgment of divorce was entered in the above-entitled action, wherein it was decreed that H. Walton Heegstra, defendant above-named, should pay to Grace Mildred Heegstra, said plaintiff, the sum of one hundred twenty-five (125) dollars per month as and for the maintenance and support of said plaintiff, commencing on the 15th day of May, 1934, and payable on the 15th day of each and every month thereafter until the death or remarriage of said plaintiff; and

"Whereas, said plaintiff thereafter filed in said Court her affidavit charging said defendant with being in contempt of Court for failure to make payments as in said decree provided, and said Court duly made its order requiring said defendant to show cause why he should not be punished for contempt of Court for failing to make payments as in said decree provided, and said order to show cause having been regularly heard on various occasions to and including the 7th day of January, 1936, and evidence having been introduced and the matter submitted, said Court found that said defendant had failed to make payment to said plaintiff of the sum of two thousand two hundred eighty-two and 50/100 (\$2,282.50) dollars, said sum being parts of monthly installments which fell due on the 15th days of the various months during said period, and that said defendant had at all times since the entry of said final decree and has the ability to comply with said final decree and to make the payments therein provided to be paid, and said Court having on the 3rd day of January, 1936, ordered that said defendant pay to said plaintiff the sum of seventy-five (75) dollars on or before the hour of 9:00 o'clock A. M. of the 7th day of January, 1936, and the said defendant having failed and refused to pay said amount or any part thereof; and said Court did thereupon adjudge and decree that the failure of said defendant to make said payments was and is wilful and constituted a contempt of Court, and did order, adjudge and decree that said defendant be confined in the County Jail of the City and County of San Francisco for five (5) days and for such further period of time thereafter until he should have complied with the orders of said Court. * * *." (Italics ours.)

Although no stipulation to that effect was made on the hearing in this court, the peti-

tion was treated as a traverse to the return. In the petition it is alleged that on the 3d day of January, 1936, the judge before whom the hearing on the subject of delinquent payments arose " * * * directed petitioner to make payment of the sum of seventy-five (75) dollars prior to the hour of 9 o'clock A. M. of the 7th day of January, 1936, this sum which was so ordered to be paid prior to the hour of 9 o'clock A. M. on the 7th day of January, 1936, represented a portion of the amount for which the petitioner was delinquent in payment under the order contained in the aforesaid final judgment of divorce filed on the 9th day of May, 1934. * * *" It is also alleged that " * * * on the 7th day of January, 1936, there was no affidavit or other record showing a failure or refusal on the part of petitioner to comply with the order of January 3, 1936. * * *" Again it is alleged "that the cause out of which the alleged contempt of petitioner arose was never submitted to the court for adjudication by petitioner or petitioner's counsel. * * *"

That the \$75 specified in the order dated January 3, 1936, was a part and portion of the larger sum \$2,282.50 found to be due on January 7, 1936, may be accepted as a fact as the commitment for contempt contains no recital to the contrary.

The claim that, prior to the making of the order of commitment for contempt, no affidavit or other record showing a failure or refusal on the part of petitioner to comply with the order of January 3, 1936, was presented to the trial court may not be sustained. That claim is at variance with the recitals contained in the said order of commitment. In this proceeding every recital contained in said order is conclusive. *Ex parte Sterns*, 77 Cal. 156, 163, 19 P. 275, 11 Am. St.Rep. 251; *Ex parte Ah Men*, 77 Cal. 198, 203, 19 P. 380, 11 Am.St.Rep. 263; *In re Selowsky*, 189 Cal. 331, 332, 208 P. 99. And, for the same reasons, this court may not inquire into the allegation that the hearing on the delinquent payments was never submitted to the trial court.

The principal contention of the petitioner is that he was committed for failure to comply with the order dated January 3, 1936, that said order was an independent order, and that no hearing was had on the subject of his compliance or noncompliance therewith. *In re McCarty*, 154 Cal. 534, 98 P. 540. However, that contention may not be sustained. An examination of the order of

commitment discloses that it was based on noncompliance with the provision contained in the final judgment dated May 9, 1934. The most that can be said is that it contains some language to the effect that it is based on noncompliance with the judgment order dated May 9, 1934, and also on noncompliance with the order dated January 3, 1936. In that connection it should be noted that the time limit for complying with the order dated January 3, 1936, expired at the hour of 9 o'clock a. m. on January 7, 1936. Presumably court did not convene on that date until 10 o'clock. The order of commitment expressly recites that the hearing on the nonpayments was had " * * * on various occasions to and including the 7th day of January, 1936. * * *" In support of the judgment we must assume that further hearings were had after 9 o'clock on the 7th day of January, 1936.

It follows that the application should be denied and the petitioner remanded. It is so ordered.

We concur: NOURSE, P. J.; SPENCE, J.



12 Cal.App.2d 424

Ex parte BOEHME.

Cr. 1871.

District Court of Appeal, First District, Division 1, California.

March 13, 1936.

1. Constitutional law ☞81

Statute designed to promote safety, health, or general welfare of public is valid, although its enforcement results in curtailing rights otherwise guaranteed by Constitution.

2. Statutes ☞76(1)

Law is "general" and uniform in operation within constitutional prohibition of enactment of special law where "general" law can be made applicable, where it applies equally to all persons within class to which it is addressed, provided such class is made upon some natural, intrinsic, or constitutional distinction between persons composing it and others not embraced therein (Const. art. 4, § 25, subs. 2, 33).

[Ed. Note.—For other definitions of "General Law," see Words & Phrases.]

3. Constitutional law ☞81

Restriction of competition among owners of barber shops is not within police power of state.

4. Constitutional law ☞275(1)

Statutes ☞76(1)

Sunday ☞2

Statute making it unlawful for any person to operate barber shop or college for more than six days in week held violative of constitutional provisions guaranteeing right of citizens to pursue lawful calling and forbidding enactment of "special law" where one general in character can be made applicable (St.1893, p. 54, § 1; St.1935, p. 1603, § 23 (j); Const.U.S. Amend. 14, § 1; Const.Cal. art. 1, §§ 1, 21; art. 4, § 25, subds. 2, 33).

[Ed. Note.—For other definitions of "Special Law," see Words & Phrases.]

Proceeding in the matter of the petition of Nick J. Boehme for a writ of habeas corpus.

Petitioner discharged from custody.

Leo A. Sullivan, John G. Robertson, and A. K. Whitton, all of Oakland, for petitioner.

U. S. Webb, Atty. Gen., Darwin Bryan, Deputy Atty. Gen., Earl Warren, Dist. Atty., R. H. Chamberlain, Deputy Dist. Atty., F. Bert Fernhoff, City Atty., and Homer W. Buckley, Asst. City Atty., all of Oakland, for respondents.

Raymond D. Williamson and William E. Barden, both of San Francisco, amici curiæ for California State Assn. of Journeymen Barbers and California State Master Barbers' Assn.

PER CURIAM.

The petitioner was convicted of violating section 23 of the Barber Shop Law (St. 1927, p. 1755), as amended by adding thereto subdivision (j) (c. 526, p. 1603, Stats. 1935), making it unlawful for any person to "operate or keep open any barber shop or college for more than six days in any one calendar week," and sentenced to imprisonment in the city prison of Oakland in the county of Alameda. Claiming that said imprisonment is unlawful, he sought his freedom by writ of habeas corpus in the superior court of that county, and after a hearing upon the writ he was remanded to custody. He now makes application to this court for the same relief and upon the same grounds, namely, that

the provision of the law in question is unconstitutional and void as a violation of rights secured to a citizen by section 1 of the Fourteenth Amendment to the Federal Constitution, and sections 1 and 21 of article 1 and subdivisions 2 and 33 of section 25 of article 4 of the State Constitution.

The provision of the Federal Constitution referred to is to the effect that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"; and the provisions of the State Constitution invoked are those declaring the right of a citizen to acquire property, forbidding the granting of privileges or immunities to any citizen or class of citizens which upon the same terms shall not be granted to all citizens, or the passing of local or special laws for the punishment of crimes or misdemeanors, or, in any case, where a general law can be made applicable.

[1] It is generally held, and, indeed, it is not contended otherwise by the petitioner, that a legislative enactment designed to promote the safety, health, or general welfare of the public is valid, although its enforcement results in curtailing rights otherwise guaranteed by the Constitution, but the petitioner contends that the provision of the Barber Shop Law here in question is not of that character.

[2, 3] The precise question involved was before the Supreme Court of the state in the case of *Ex parte Jentzsch*, 112 Cal. 468, 44 P. 803, 804, 32 L.R.A. 664, the only difference being that there the hours of the day during which barber shops may be kept open were restricted, while here it is the number of days in the week. The court there held that while the right of a citizen to freely pursue any lawful calling was protected from legislative interference by one or other of the provisions cited, the Legislature was nevertheless empowered, under what is commonly referred to as the police power of the state, to limit that right in the interest of the safety, health, and general welfare of the community, although in doing so it must observe relevant provisions of the Constitution forbidding discrimination between citizens or classes of citizens, or

requiring that in every case where applicable such limitation must be by general law. The court also pointed out that in case of the establishment of a class of citizens the classification must be based upon some natural or intrinsic or constitutional distinction. It was there said: "While the police power is one whose proper use makes most potently for good, in its undefined scope and inordinate exercise lurks no small danger to the republic; for the difficulty which is experienced in defining its just limits and bounds affords a temptation to the legislature to encroach upon the rights of citizens with experimental laws none the less dangerous because well meant. * * * A man's constitutional liberty means more than his personal freedom. It means, with many other rights, his right freely to labor and to own the fruits of his toil. It is a curious law for the protection of labor which punishes the laborer for working. Yet that is precisely what this law does. The laboring barber, engaged in a most respectable, useful, and cleanly pursuit, is singled out from the thousands of his fellows in other employments, and told that, willy nilly, he shall not work on holidays and Sundays after 12 o'clock noon. His wishes, tastes, or necessities are not consulted. If he labors, he is a criminal. Such protection to labor, carried a little further, would send him from the jail to the poorhouse. * * * Whether or not a general law to promote rest from labor in all business vocations may be upheld as within the due exercise of the police power as imposing for its welfare a needed period of repose upon the whole community, a law such as this certainly cannot. A law is not always general because it operates upon all within a class. There must be back of that a substantial reason why it is made to operate only upon a class, and not generally upon all. As was said in *Pasadena v. Stimson*, 91 Cal. 238, 27 P. 604: 'The conclusion is that, although a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction, it is not general or constitutional if it confers particular privileges or imposes peculiar disabilities or burdensome conditions in the exercise of a common right upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law.'

A somewhat similar question was involved in the case of *In re Sumida*, 177 Cal. 388, 170 P. 823. There the court upheld an ordinance compelling all business to be closed on Sunday with certain exceptions, but emphasized the requirement that the classification be founded upon a real difference. And in *Re Miller*, 162 Cal. 667, 698, 124 P. 427, 430, the same principle is stated in these words: "A law is general and uniform in its operation when it applies equally to all persons embraced within the class to which it is addressed, provided such class is made upon some natural, intrinsic, or constitutional distinction between the persons composing it and others not embraced in it. * * * The difference on which the classification is based must be such as, in some reasonable degree, will account for or justify the peculiar legislation."

It is strongly urged by respondent that the persons engaged in the trade of barbering do in fact constitute a class sufficiently distinct from the general community to require or justify legislation applying solely to them. This may be conceded, but the necessity still remains that the particular legislation be peculiarly appropriate to the persons engaged in that trade. In urging his contention, the respondent points out that the entire act known as the Barber Shop Law (St.1927, p. 1748, as amended) is designed to promote the public health by means of the regulations therein contained of a sanitary nature. That is undoubtedly true, and those regulations are not here called into question. But obviously a provision placing an arbitrary limitation on the number of days their shops shall be kept open for the accommodation of the public has not the remotest connection with a law enacted for the purpose of standardizing competency of barbers, requiring that they be persons of moral character, and including a number of sanitary regulations calculated to protect their patrons from the danger of contracting communicable diseases while undergoing their ministrations.

It is suggested in a brief permitted to be filed by amici curiæ that the measure should be sustained as a public health regulation because closing a shop on one day a week affords an opportunity to thoroughly clean it, such cleaning not being practicable otherwise owing to the long hours of operation prevailing in the busi-

ness. This suggestion, we think, is met by pointing out that the sanitary practices prescribed by the Barber Shop Law are such as to require continuous observance, and that the general cleaning of the premises (which is not mentioned in the act), such as sweeping or scrubbing, could hardly be left to be done on one day a week, any more than it could with respect to other places of business patronized by the public.

What are known as Sunday laws are upheld, against the objection that they obstruct the constitutional right to freely labor, upon the ground that one day of rest in seven is necessary for the good health of the community. That ground, however, is not available to the respondent in the present case, for we have in this state a general statute limiting the number of days per week that any employee may work, which reads: "Every person employed in any occupation of labor shall be entitled to one day's rest therefrom in seven" (Stats.1893, p. 54, § 1), and the violation of the statute is made a misdemeanor. The petitioner here, however, is not charged with such a violation; and it is obvious that he could keep his establishment open every day of the year and still not require his employees (if any) to work more than six days a week, or even five. It seems apparent to us that the real object in view in enacting subdivision (j) of section 23 of the Barber Shop Law was not to prescribe one day of rest in seven for barbers, but plainly to restrict competition among the owners of the shops. Such an object is certainly not within the police power under our Constitution.

A number of cases from the courts of other states are cited in respondent's brief in which legislation somewhat analogous to that here involved has been upheld upon the ground that it was conducive to the public health and welfare. As to this, it may be said that the conditions with which such legislation dealt were not identical with those we have here; that since many of them were rendered, the general conditions surrounding the subject have been changed by the rapid growth of activities restricting hours of labor in all kinds of business. Nor is the reasoning of those cases so persuasive as to warrant this court in abandoning the rule established in this state by the decisions of our own Supreme Court.

[4] It is our conclusion that subdivision (j) of section 23 of the Barber Shop Law is repugnant to that provision of both the Federal and State Constitutions guaranteeing the right of a citizen to pursue a lawful calling, and also to that provision of the latter forbidding the enactment of a special law where one general in its character can be made applicable.

It is ordered that the petitioner be discharged from custody.



12 Cal.App.2d 399

RUSSELL et al. v. SMITH.

Civ. 9633.

District Court of Appeal, Second District,
Division 1, California.

March 12, 1936.

1. Trial ⇐165

Nonsuit may be granted only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled and indulging in every legitimate inference which may be drawn from the evidence, result is a determination that there is not evidence of sufficient substantiality to support verdict for plaintiff.

2. Automobiles ⇐226(1)

State motorcycle police officer who in nighttime and without sounding siren was pursuing at rate of 60 to 65 miles per hour two speeding automobiles when he collided with approaching automobile which was attempting to make turn across highway into side road *held* contributorily negligent as matter of law, precluding recovery for his death (Code Civ.Proc. § 377; Gen.Laws 1931, Act 5128, §§ 120, 129, 130, 132 (b)).

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Maude Russell and another against Robert S. Smith. Judgment for defendant, and plaintiffs appeal.

Affirmed.

R. A. Dunnigan, of Los Angeles, for appellants.

Joseph A. Spray, of Los Angeles (W. H. Abrams, of Los Angeles, of counsel), for respondent.

WHITE, Justice pro tem.

This is an appeal by plaintiffs from a judgment entered in favor of defendant after an order granting his motion for nonsuit. Plaintiffs are the surviving widow and minor daughter of Floyd A. Russell, a state motorcycle police officer, and bring this action under the provisions of section 377 of the Code of Civil Procedure to recover damages for the death of said Floyd A. Russell, which occurred as the result of a collision between a motorcycle operated by him and an automobile driven by defendant. The accident occurred after dark, about 6:45 p. m., January 4, 1933, in a sparsely settled district on Pomona boulevard, also known as Valley boulevard, at a point near the extreme easterly entrance to what is known as "Pacific Colony," a state institution. Valley boulevard is a four-lane highway running in a general easterly and westerly direction. The roadway leading into the grounds of Pacific Colony runs south from said highway and joins Valley boulevard in the shape of a "T." The entrance leading from the grounds of Pacific Colony to Valley boulevard is 124 feet in width, until it reaches a point about 75 feet south of the boulevard, at which point it fans out to the east and to the west, so that where the entrance actually joins Valley boulevard it is approximately 220 feet in width. This entrance is divided into three sections, an east and west driveway, on which driveways the traffic proceeds, and a center portion used as a parkway.

The defendant was driving his automobile in a westerly direction on Valley boulevard, and was making a left turn in a southerly direction off the highway onto the easterly driveway, which is 20 feet in width, when the motorcycle operated by the deceased officer, and going in an easterly direction, collided with defendant's automobile. The deceased motorcycle officer and a fellow officer had been pursuing, for a distance of about four miles, two speeding automobiles in an effort to apprehend the drivers of said automobiles and arrest them for violation of the California Vehicle Act.

Appellants assail the judgment on the ground that the trial court fell into error in holding as a matter of law that the deceased was guilty of negligence and that his negligence proximately contributed to the collision, and assert that the evidence is such as to warrant a reasonable deduction and conclusion that defendant was guilty of negligence in failing to proceed to the right

of and beyond the center portion of the intersection before making a left turn; also in failing to see that such left turn could be made in safety (sections 129, 130, California Vehicle Act, Gen.Laws 1931, Act 5128); further, that defendant was guilty of contributory negligence in not yielding the right of way to the authorized emergency vehicle operated by the deceased officer on official business (subdivision (b), § 132, California Vehicle Act); and that such negligence was the sole proximate cause of the accident.

[1] In order to determine the question as to whether the record herein contains competent evidence of such a substantial nature that it might reasonably be inferred therefrom that the negligence of the defendant automobile driver was the sole proximate cause of the accident, we deem it advisable to epitomize the testimony adduced at the trial, for it is now the settled law of this state that a nonsuit may be granted only when, disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from the evidence, the result is a determination that there is not evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given. *Estate of Flood*, 217 Cal. 763, 768, 21 P.(2d) 579.

[2] Without conflict, the evidence showed that the deceased motorcycle officer, in company with another officer, was traveling along Valley boulevard for a distance of four miles at the rate of from 60 to 65 miles per hour, in an attempt to apprehend two law violators. The white headlight and the red light of decedent's motorcycle were lighted, but at no time did either officer sound the siren on his vehicle. The deceased was riding about 200 feet ahead of his fellow officer, and the latter testified that when deceased got past the center line of the entrance to Pacific Colony the defendant's automobile made a left-hand turn in front of officer Russell, with the resultant collision.

Respondent contends that even conceding that he was negligent as claimed, nevertheless appellants cannot recover, because the deceased motorcycle officer was himself guilty of negligence which proximately contributed to the accident; and we are of the opinion that this claim of respondent must be upheld, for the evidence established the fact that the 60 to 65-mile speed of the

deceased motorcycle officer contributed proximately, at least in some degree, to the fatal collision. Section 120 of the California Vehicle Act, in effect at the time this accident occurred, exempted police officers operating vehicles in the chase or apprehension of law violators from the provisions of the act regulating speed, but the defendant automobile driver's duty to yield the right of way to the deceased motorcycle officer was determined by the provisions of subdivision (b) of section 132 of the Vehicle Act, which provides that the driver of a vehicle upon a public highway shall yield the right of way to any authorized emergency vehicle when the latter are operated upon official business and the drivers of such emergency vehicles sound audible signal by siren. In the instant case the evidence shows without conflict that the siren was not sounded at any time by the officers. Both the aforesaid sections, however, further provide that in no instance shall the drivers of emergency vehicles be absolved of the duty to drive with due regard for the safety of all persons using the highway.

The decedent in this case was not entitled to any more consideration from fellow motorists in the matter of yielding the right of way than was due to the driver of any private vehicle, because decedent failed to claim his superior right to the use of the highway by sounding an audible signal with his siren.

Had this case been the ordinary one between two private vehicles, the evidence adduced by plaintiffs would have convicted the decedent of contributory negligence. An ordinary motorcycle driver would have no excuse for driving on the highway at nighttime between 60 and 65 miles per hour, when, by reason of darkness, drivers of other vehicles would be unable to see and determine the speed at which such motorcycle was being driven; and while a police motorcycle officer on official business cannot be held to the same duty as to speed, still he cannot demand a yielding of the highway by another motorist unless he complies with the statutory requirement and sounds an audible signal by siren. And if the failure of the driver of the emergency vehicle to sound a siren, coupled with the rate of speed at which he was traveling, constituted negligence which contributed proximately to the accident, then the driver of such emergency vehicle, being himself guilty of negligence, is barred from recov-

ering damages for his injuries, and his surviving wife and children are thereby barred from recovering damages for the death of a husband and father.

Disregarding conflicting evidence in the record before us, and giving the plaintiffs' evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, we are of the opinion that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiffs if such a verdict were given, irrespective of the negligence of the defendant, for the reason that the decedent was himself guilty of negligence which contributed directly and proximately to the accident.

For the foregoing reasons, the judgment appealed from is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.



12 Cal.App.2d 38

BRUGGER et al. v. LEE YIM et al.

Civ. 1598.

District Court of Appeal, Fourth District,
California.

Feb. 20, 1936.

Hearing Denied by Supreme Court
April 20, 1936.

1. Mines and minerals ☞38(14)

Burden rested on plaintiffs, alleging in complaint and contending on trial of action in trespass that there was within exterior boundaries of their mining claim a vein of gold-bearing ore having its apex within such boundaries and extending in its downward course beneath surface of adjoining land within exterior boundaries of defendants' claim, to establish existence of such vein on plaintiffs' claim (30 U.S.C.A. § 26).

2. Appeal and error ☞1011(1)

Trial court's fact findings on conflicting evidence cannot be disturbed on appeal as not supported by sufficient evidence.

3. Evidence ☞596(1)

Plaintiffs must establish proof of affirmative allegations in complaint by satisfactory evidence.

4. Mines and minerals ☞38(14)

Legal owner of surface of land is presumed to own all beneath it.

5. Mines and minerals ⚡31(2)

Mineral claimant, passing beyond vertical plane of side line of his claim and taking ore from beneath surface of adjoining claim, is *prima facie* a trespasser, unless he shows that he reached point from which ore was taken by following vein, having its apex within surface lines of his claim, on its dip.

6. Mines and minerals ⚡38(14)

Presumption that owner of surface of land owns all beneath it, including minerals, may be overcome by proof that minerals are part of vein or lode having its apex within another claim.

7. Mines and minerals ⚡38(18)

Person entering within side lines of another's mining claim for purpose of mining it is *prima facie* a trespasser.

8. Mines and minerals ⚡38(18)

Grounds, on which claimants of junior mining location assert right to interfere with ore deposits under surface of senior location, should be made very clear.

9. Mines and minerals ⚡31(1)

"Strike" or course of ore vein or lode is direction thereof across or through country and determined by horizontal line drawn between its extremities at depth at which it attains its greatest longitudinal extent.

[Ed. Note.—For other definitions of "Strike," see Words & Phrases.]

10. Mines and minerals ⚡31(1)

Term "dip" is miners' word synonymous with expression, "downward course" in mining act, and means direction of ore vein or lode in its descent into earth at right angles to its strike or course (30 U.S.C.A. § 26).

[Ed. Note.—For other definitions of "Dip" and "Downward Course," see Words & Phrases.]

11. Mines and minerals ⚡30

"Apex" of ore vein or lode is ascent along line of its dip or outcropping, beyond which it extends no further to surface of land.

[Ed. Note.—For other definitions of "Apex," see Words & Phrases.]

12. Trial ⚡375

Facts ascertained by court's view of property involved in action must be considered as in evidence and given due weight in reaching conclusion.

13. Evidence ⚡571(6)

Expert witnesses' testimony, illustrated by numerous maps and diagrams in evidence as exhibits, as to directions of strike and dip of gold lode, and impressions received by court on view of land involved in action of trespass, *held* sufficient to support his finding

that direction of strike was as defendants contended (30 U.S.C.A. § 26).

14. Mines and minerals ⚡30

Course of gold vein should be regarded as that indicated by surface outcrop or explorations and workings, whether surface be level or inclined, in determining whether apex of lode is within mining claim of parties asserting right to penetrate beneath surface of adjoining claim (30 U.S.C.A. § 26).

15. Mines and minerals ⚡38(18)

Evidence in action of trespass by lessees of mining claim against owners of adjoining claim *held* sufficient to support trial court's finding that apex of gold lode was not on plaintiffs' claim as against contention that witnesses' testimony as to strike and dip of vein or lode was contrary to mathematical computation based on data included in areal map introduced as exhibit (30 U.S.C.A. § 26).

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action in trespass by A. E. Brugger and others against Lee Yim and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Ogden & Steelman, William B. Ogden, and Samuel Steelman, all of Los Angeles, and Fred A. Wilson, of San Bernardino, for appellants.

Swing & Swing, of San Bernardino, for respondents.

JENNINGS, Justice.

The plaintiffs, who are lessees in possession of a mining claim known as the Old Pete Extension claim instituted this action in trespass against the defendants who are owners of an adjoining claim known as the Old Pete claim. The complaint alleges that plaintiffs are entitled to the possession of a certain vein or lode known as "The Old Pete Extension" which has its apex within the exterior boundaries of their claim and which departs from the side lines of said claim in its downward course or dip. It is further alleged that plaintiffs have the right to occupy, mine, and extract mineral from said lode throughout its entire downward course or dip. The pleading also alleges that while plaintiffs were in possession and entitled to possession of the said lode having its apex in their claim, the defendants entered upon and into the lode on its downward dip, and wrongfully mined, extracted, and removed from the vein, ores and minerals

of value in excess of \$100,000 and that on April 26, 1934, the defendants destroyed a shaft which plaintiffs had sunk upon the aforesaid vein for the purpose of extracting mineral therefrom which damaged plaintiffs in a specified amount. It is further alleged that defendants threaten to continue to mine, extract, and remove minerals from said vein or lode, that the sole value of said vein and mining claim is contingent upon the mineral content thereof which has been devastated and will continue to be devastated by the acts of the defendants, and thereby plaintiffs will be subjected to irreparable injury and loss which is not susceptible of correct estimate, for which reason adequate pecuniary compensation therefor cannot be made. The prayer of the complaint is for a money judgment in the amount designated in the body of the pleading and that defendants be permanently restrained from interfering with said lode or vein and with the operations of plaintiffs thereon, and from mining in or upon said lode or vein.

To the above-described complaint the defendants filed an answer wherein it is alleged that said defendants entered upon and discovered the Old Pete claim and other designated claims on a specified date and located said claims after discovering therein a vein or lode of goldbearing ore and have been in possession of said claims ever since said discovery and location; that the vein or lode on the Old Pete claim runs in a northerly and southerly direction and is exposed at various places along its strike; that the apex of said vein is wholly within the exterior boundaries of the Old Pete claim; that subsequent to the location of their claims defendants made further explorations on the Old Pete claim and developed the fact that the ore vein was of commercial value and carried high value in gold; that on a specified date plaintiffs' predecessors in interest entered upon certain ground lying south of the Old Pete claim and purported to locate a mining claim known as the Old Pete Extension claim south of the south end line of the Old Pete claim on which no vein or lode of ore has been discovered, which has its apex within the exterior boundaries thereof or which dips or extends downward under the Old Pete claim; that the discovery and location of the Old Pete claim by defendants antedated the alleged discovery and location of the Old Pete extension claim. It is further alleged that on a stated date the plaintiffs began the

construction of a shaft which is the shaft mentioned in plaintiffs' complaint at a point about six feet south of the south end line of the Old Pete claim, and caused it to pass beyond the exterior boundaries of the Old Pete Extension claim and to run into and under the Old Pete claim at a point about 20 feet below the surface; that said shaft was not sunk or run upon any vein which has its apex within the exterior boundaries of the Old Pete Extension claim. The prayer of the answer is that plaintiffs take nothing by their action and that defendants be awarded their costs incurred in defending the suit.

The action was tried on the issues raised by the above described pleadings and resulted in the entry of a judgment in favor of the defendants. From the judgment thus rendered, the plaintiffs have prosecuted this appeal.

[1] It is apparent that the cause of action alleged in the complaint is based on the extra-lateral right of the locator of a mining claim to follow a lode or vein of mineral-bearing ore on its downward course, which is granted by the provisions of section 2322 of the Revised Statutes of the United States (30 U.S.C.A. § 26). This statute is in the following language: "The locators of all mining locations heretofore made or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface-lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end-lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges."

And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another."

As indicated by the aforesaid allegations of the complaint, it was contended by appellants during the trial of the cause that there is within the exterior boundaries of their claim, known as the Old Pete Extension, a vein or lode of gold-bearing ore which has its top or apex within the exterior boundaries of said claim, and which in its downward course extends outside the north side line of said claim and beneath the surface of the adjoining land lying to the north, which is within the exterior boundaries of the Old Pete claim owned by respondents. It is therefore evident that, upon the trial of the action, the burden rested upon appellants to establish that there is on the Old Pete Extension claim a vein of gold-bearing ore which has its top or apex within the exterior boundaries of said claim and which in its downward course extends beyond the vertical north side line of the surface location of said claim.

It is the contention of appellants on this appeal that certain findings of the trial court are lacking in evidentiary support. The particular findings which are thus attacked are those wherein the court found that there is within the Old Pete claim a vein or lode called the Old Pete lode, which has its top or apex within the exterior boundaries of said claim and which extends in its onward course from a designated point north of the south end line of the Old Pete claim northerly to a point beyond the Gulch cut on said Old Pete claim; that the said vein reaches the surface at various points along the line of its course as above described and its top or apex is along said line; that said vein or lode on its downward course into the earth dips easterly; that along the south line of the Old Pete claim there is a fault which extends in an east-west direction along and near said south line of said claim, which fault cuts off the onward course of said vein or lode, and beyond and south of which fault the vein or lode does not extend; that in certain workings on the Old Pete Extension claim which are adjacent to the south end of the Old Pete claim a contact between two different rock strata known as rhyolite and dacite is exposed, but that such contact is not the top or

apex of the Old Pete lode or vein, nor is it the apex of any lode or vein within the Old Pete claim, nor does said Old Pete lode or vein, which is the same lode referred to in the complaint as the "Old Pete Extension lode or vein," have its top or apex within the boundary lines of the Old Pete Extension claim; that the aforesaid contact between rhyolite and dacite is not exposed along the onward course or strike of the Old Pete vein or lode; that appellants are in possession of all veins or lodes, if there are any, which have their tops or apices within the Old Pete Extension claim, but that none of such veins on its downward course or dip enters the Old Pete claim; that appellants, in sinking the shaft referred to in the pleadings, which is called the Randall shaft, passed over and into the Old Pete claim and after such entry took ore and mineral from the Old Pete vein within the exterior boundaries of the Old Pete claim; that respondents have not at any time entered upon any vein or lode or taken or extracted any ore or mineral from any vein which has its apex within the Old Pete Extension claim; and that all ore and mineral heretofore taken and extracted by respondents was removed from the Old Pete vein or lode. In other words, it is the contention of appellants that the evidence adduced during the trial of the action established the existence of a vein or lode which has its top or apex within the exterior boundaries of their claim; that the onward course or strike of such vein is east and west, and that the dip of said vein is to the north; and that appellants consequently have the right granted to them by the above quoted statute to pursue the vein on its dip outside the vertical north side line of their claim underneath the surface of the Old Pete claim owned by respondents.

A clearer understanding of the problem here presented may be had by a general description of the terrain whereon the mining claims of the opposing parties are located. It is a low-lying desert hill situated about six miles south of Ludlow in San Bernardino county. Its shape resembles roughly the base of a cone whose top has been cut off by a plane sloping downward from south to north. On the top of the truncated cone a layer of rock known as rhyolite has been superimposed. The depth of this rhyolite capping varies from a few feet to upwards of 20 feet. Beneath the rhyolite and forming the base of the cone is a body of rock known as

dacite. On the western edge of the north slope of the hill the overlying rhyolite is broken off abruptly and at certain places forms a low cliff or escarpment. On the eastern edge of the north slope the rhyolite has been eroded down to the level of the dacite and the contact between rhyolite and dacite is not so marked. At the crest of the hill the rhyolite capping extends in a southerly direction for a short distance and disappears, having evidently been removed by erosion. On the north at the base of the north slope of the hill the rhyolite disappears in a wash. The evidence relating to the origin of the rhyolite indicates that it is the remains of a volcanic flow which originally descended from some higher source, and that the hill and its capping of rhyolite has resulted from the effects of erosion on the surrounding area, leaving the particular mass comprehended in the hill upraised above the surface of the area by which it is surrounded, due possibly to the fact that it is harder than the surrounding area by reason of the presence of a greater amount of quartz in its composition.

Appellants are the lessees in possession of the Old Pete Extension lode mining claim which extends in an east-west direction across the crest of the above-described hill. Respondents are the owners of the Old Pete lode mining claim which is located in a north-south direction on the north slope of the hill. The claims are adjoining and the south end line of respondents' claim coincides with the north side line of appellants' claim.

The vein or lode which forms the subject of this controversy is exposed along the west side of the north slope of the hill and has been opened up by several shallow workings at different places along the exposure which is generally denominated as the "escarpment." This escarpment and exposure of the mineral-bearing vein extends in a general north and south direction.

The above-described hill has been the subject of exploration by numerous prospectors of mining claims for a considerable period of time and numerous references to locations that were made prior to the dates of locations here involved occur in the testimony of witnesses. None of such prior locations is of importance, however, in this proceeding. In the month of December, 1932, the respondents, Wheelock and Yim, sunk a pre-existing shaft a few

feet deeper and discovered a body of commercial ore. Further excavation of the ore body developed the particular working known as the "Glory Hole" from which about 25 carloads of ore were mined and shipped to a smelter.

In the month of January, 1933, J. Dorn, who had formerly unsuccessfully prospected the hill, located three claims on land adjoining respondents' claims and lying to the south of said claims. Dorn named William Maher as colocator of the three claims which he then located. At this time the three claims located by Dorn extended in a north-south direction corresponding to the location of respondents' claims. At a subsequent date Dorn and Maher entered into an option and working agreement with appellant A. E. Brugger, who later conveyed interests in the property to the appellants Fay and May. After appellants had become lessees of the property and were in possession as such lessees, they engaged in certain exploratory work on the claims originally located by Dorn and arrived at the conclusion that the vein or lode of ore which was exposed along the west side of the north slope of the hill did not strike in a north-south direction, but that the strike of the vein was in an east-west direction and dipped to the north, and that the apex or top edge of this vein was on their claims. They thereupon caused to be filed an amended notice of location by which they so altered the original location of the claims in which they were interested that the side lines of said claims ran in an east-west direction and the end lines thereof in a north-south direction. The effect of this action was to make the Old Pete Extension claim the most northerly of the three claims and the north side line of said claim to coincide with the south end line of respondents' Old Pete claim. Appellants thereupon proceeded to sink an incline shaft which proceeded from a point about 12 feet south of the monument which marks the center of the south end line of respondents' Old Pete claim in a northerly direction for a distance of approximately 49 feet from its point of beginning. This incline shaft which is called the "Randall incline" passed beneath the south end line of the Old Pete claim as said line was marked on the surface and entered ground which lay below the surface of the Old Pete claim. Respondents blew up and destroyed this shaft after it had entered upon

the ground lying beneath the surface of their claim. This action in trespass was thereupon instituted.

[2] Appellants concede that, upon the trial of the cause, it was incumbent upon them to establish the existence on their property of a lode of mineralized rock which has its apex on their land and which dips in a general northerly direction, thus giving them the right to pursue the vein on its dip beyond their north side line and beneath the surface of respondents' Old Pete claim. It is their contention that they successfully sustained this burden and that the findings of the trial court to the contrary are wholly unsupported by the evidence. In giving consideration to the contention of evidentiary insufficiency, the familiar rule which precludes the disturbance of findings when the evidence is conflicting is applicable.

Analysis of the findings discloses that there are two which are here singled out for particular attack. These are: First, the finding that the Old Pete lode has its apex on the Old Pete claim of respondents and not on the Old Pete Extension claim of appellants; and, second, that the Old Pete lode is cut off on the south by a fault, and that the lode does not extend beyond the south end line of the Old Pete claim. It must be conceded that if either of these findings finds support in the evidence, this appeal must fail. It is obvious that if the first of the above-mentioned findings has evidentiary support the appeal must be unsuccessful, since the existence of the apex of the particular lode or vein known as the Old Pete lode on their land was the all-important fact which appellants were required to establish to support their claim of extralateral right. It is equally apparent that, if the trial court's finding respecting the existence of a fault near the south end line of the Old Pete claim, which cut off the progress of the vein, has evidentiary support, the judgment must stand. This must be true because even though the court may have erred in its findings regarding the strike and dip of the vein, appellants could have suffered no prejudice thereby if the finding as to the existence of the fault has some evidentiary support. Obviously, if the Old Pete lode which admittedly exists on the Old Pete claim and has there been exposed was cut off near the south end line of said claim, appellants could have no basis for their claim of ex-

tralateral right to pursue this particular vein on its alleged dip to the north.

The contention of appellants that the trial court's finding that the apex of the Old Pete lode is on the Old Pete claim is lacking in evidentiary support will herein be first considered.

[3-8] In giving consideration to this contention, the situations of the respective parties to this action must be borne in mind with regard to certain principles which are clearly established by the law relating to the subject of conflicting lode claimants. It must be observed that, not only were appellants the plaintiffs in this action and, as heretofore pointed out, required by a familiar and fundamental rule of law to establish by satisfactory evidence the truth of the affirmative allegations of their complaint, but they were also claiming a right which is in direct derogation of the presumption of ownership of all beneath the surface by the legal owner of the surface. They were asserting the right to proceed below the surface of land owned by others. In section 393 of American Mining Law by Ricketts it is pointed out that "Where a mineral claimant passes beyond the vertical plane of a side line of his claim and extracts and removes ore from beneath the surface of an adjoining claim, the presumption is against him. Prima facie he is a trespasser unless and until he makes it appear that he reached the point from which the ore was taken by following on its dip a vein or lode having its apex within the surface lines of his claim. The presumption of ownership of all beneath the surface, including minerals, may be overcome by proof showing that such mineral is a part of a vein or lode apexing within the claim of another." The text is supported by the following decisions: *Stewart Min. Co. v. Ontario Min. Co.*, 237 U.S. 350, 35 S.Ct. 610, 59 L.Ed. 989; *Cheesman v. Shreeve (C.C.)* 40 F. 787; *Barker v. Condon*, 53 Mont. 585, 165 P. 909; *Red Wing Gold Min. Co. v. Clays*, 30 Utah, 242, 83 P. 841. Again in section 681 of the same treatise the learned author makes the following statement: "A person entering within the side lines of the mining claim of another for the purpose of mining the same is prima facie a trespasser." The following authorities support the declaration: *Flagstaff Silver Min. Co. v. Tarbet*, 98 U.S. 463, 467, 25 L.Ed. 253; *St. Louis Min. & Mill. Co. v.*

Montana Min. Co., 194 U.S. 235, 24 S.Ct. 654, 48 L.Ed. 953; Wakeman v. Norton, 24 Colo. 192, 49 P. 283; Tom Reed Gold Mines Co. v. United Eastern Min. Co., 24 Ariz. 269, 209 P. 283. The statement continues in the following language: "The presumptive trespass may be justified by showing the existence of a vein or lode having its apex within the boundaries of a valid lode location; that such vein or lode departs from the side lines of such location on its downward course between the planes of its parallel end lines and penetrates the ground in controversy." Two California cases are cited in support of the last quoted language, viz.: Central Eureka Min. Co. v. East Central Eureka Min. Co., 146 Cal. 147, 79 P. 834, 9 L.R.A.(N.S.) 940, and Daggett v. Yreka Min. & Mill. Co., 149 Cal. 357, 86 P. 968. Certain language used by the Supreme Court of Idaho in the case of Stewart Min. Co. v. Ontario Min. Co., 23 Idaho, 724, 132 P. 787, indicates that the burden which rests upon one who claims an extralateral right to penetrate beneath the surface of land owned by another in pursuit of a mineral lode is by no means inconsequential. At page 794 of 132 P. the court said: "This brings us to a principle of law which has been recognized, or in some respect adverted to, in some of the extralateral rights cases, to the effect that one who claims such a right, and seeks to take ore bodies from beneath the surface boundaries of another location, must prove clearly and satisfactorily that he has the apex of the vein or lode within the surface boundaries of his location, and that he is pursuing the vein on its 'downward course.' Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. (C.C.) 63 F. 540; St. Louis Min. & Mill. Co. v. Montana Min. Co., 194 U. S. 235, 24 S.Ct. 654, 48 L.Ed. 953; Duggan v. Davey, 4 Dak. 110, 26 N.W. 887. Where the evidence is doubtful and uncertain, the court ought to decline its aid to one who is invoking its decree in order to enable him to pass beyond his own side lines and remove ore bodies from beneath the location of another. Here, too, the Ontario is the senior location by many years, and before a junior location may interfere with ore deposits under the surface of the senior location the grounds on which the right is asserted ought to be made very clear."

It may be observed that the last sentence of the above-quoted language has peculiar application to the instant case, since it is undisputed that the location of their claims

by respondents antedated by a short period of time the location of the Old Pete Extension group of claims by those through whom appellants claim an interest therein.

We do not understand that appellants deprecate the unquestioned burden of proof which they were required to sustain in their assertion as claimants under junior locators of the extralateral right to pursue the lode on its dip beyond the north side line of their claim and beneath the surface of the adjoining claim. It is their position that they successfully sustained the burden and that the evidence which they produced during the trial clearly showed that the apex of the Old Pete lode or vein is within the exterior boundaries of the Old Pete Extension claim, that the strike of the lode is east and west and that the dip is to the north beneath the surface of the Old Pete claim.

[9,10] Some definition of the terms "apex," "strike," and "dip" is desirable at this point for a proper appreciation of appellants' contention. In volume I of Lindley on Mines (3d Ed.), section 318, at page 718, the term "strike" is defined in the language of Judge W. H. Beatty as follows: "The strike or course of a vein is determined by a horizontal line drawn between its extremities at that depth at which it attains its greatest longitudinal extent." In section 173 of Ricketts American Mining Law, the term is defined in the following language: "The course or strike of a vein or lode is the direction of the vein or lode across or through the country." In section 177 of the last-mentioned treatise, it is stated that the term "dip" is a miner's word not found in the mining act which uses the expression "downward course." The latter expression is said by the author to be synonymous with the term "dip," and dip is there defined as the direction of the vein or lode in its descent into the earth. In the above-mentioned section of Lindley on Mines, the following language used by Judge Beatty is quoted: "The dip of a vein, its 'course downward' (Rev.Stats. § 2322; Comp.Stats. 1901, p. 1425; 5 Fed.Stats. Ann. 13 [30 U.S.C.A. § 26]), is at right angles to its strike; or, in other words, if a vein is cut by a vertical plane at right angles to its course, the line of section will be the line of its dip. * * *"

[11] Definition of the term "apex" is not free from difficulty. Ricketts defines it in section 169 of his treatise as follows:

"The highest point in a vein or lode is the ascent along the line of its dip or outcroppings, and beyond which the vein or lode extends no further, so that it is the end or reversely the beginning of the vein or lode." In the following section (sec. 170) the author states: "It must be the top or terminal edge of the vein on the surface, or the nearest point to the surface, and it must be the top of the vein proper, rather than of a spur or feeder, just as the highest point in the roof of a house would be taken to be the apex of the house and not the chimney or flagstaff. Again an apex is a point from which the vein has a dip, as well as strike, or course, else it confers no extralateral right." If we accept the definition of "apex" of the vein as the ascent along the line of its dip beyond which the vein extends no further to the surface, it is apparent that the dip is a determinative factor in the location of the apex. It is also apparent from the above-quoted definition of Judge Beatty that there is a fixed formula for determining the "dip" of a vein if its strike or course is known. Since this is true, it is obvious that, in a controversy of this character, the correct location of the strike of the lode is an important feature.

[12,13] Appellants recognize that the location of the strike of the Old Pete lode is a highly important feature of the case and have devoted much of their argument to an effort to demonstrate that the trial court's finding that the strike of the lode is north and south is lacking in evidentiary support. It may not successfully be urged that the finding as to the direction of the strike has not support in the evidence. Examination of the record demonstrates that a number of witnesses produced by respondents who were properly qualified by training and experience testified that the direction of the strike is as the court found it to be. These witnesses also testified that the dip of the lode was in a general easterly direction. Moreover, the record shows that, during the trial of the cause, the court, accompanied by counsel for the respective parties, visited the property involved in the action and with the assistance of counsel personally inspected the ground and various points and locations thereon which were indicated on certain maps introduced as exhibits in the case and which were taken and consulted by court and counsel on the

visit. The effect of this inspection by the court was, as stated by counsel for appellants during the trial, to place the hill in evidence. It is pointed out by Ricketts in his treatise to which reference has heretofore been made (sec. 398) that, "by the weight of authority, the facts ascertained by a view are to be considered as in evidence and given due weight in reaching a conclusion." That this is the rule in California is not open to doubt. *People v. Milner*, 122 Cal. 171, 54 P. 833; *People v. Pompa*, 192 Cal. 412, 423, 221 P. 198; *Ethel D. Co. v. Industrial Accident Commission*, 219 Cal. 699, 704, 28 P.(2d) 919; *Hatton v. Gregg*, 4 Cal.App. 537, 88 P. 592; *City of Oakland v. Adams*, 37 Cal.App. 614, 174 P. 947; *Vaughan v. County of Tulare*, 56 Cal.App. 261, 205 P. 21; *Gray v. Magee*, 133 Cal.App. 653, 658, 24 P.(2d) 948; *Wade v. Thorsen*, 5 Cal.App.(2d) 706, 712, 43 P.(2d) 592. It must therefore be conceded that the findings of the trial court respecting the strike and the dip of the Old Pete lode are amply supported, not only by the testimony of expert witnesses illustrated by numerous maps and diagrams which were admitted in evidence as exhibits, but also by the impressions which the trial court received on its view of the land and the various workings then present on the claims of the opposing parties.

[14,15] However, appellants contend on this appeal that the testimony of all witnesses as to their conclusions respecting the strike and dip of the vein or lode which is contrary to mathematical computation based on data included in a certain exhibit introduced during the trial must be disregarded. The exhibit which forms the foundation for this argument is an areal map of those portions of the claims of the parties which are involved in this proceeding. On this map contour lines appear showing elevations above sea level on the hill. The map was prepared as a result of a survey of the hill. For the purpose of the survey, the highest point of the hill which is near the south end center of the Old Pete claim of respondents was given an assumed elevation of 2,000 feet above sea level. The contours were then run by the surveyor at levels of 10 feet descending from the highest point of the hill to the lowest. Tracing the contour lines of the map makes it possible to determine the elevation of any point on the map with relation to the altitude of other points.

The next step in appellants' argument is that various workings on the Old Pete claim disclosed the presence of the contact between the rock strata known as rhyolite and dacite which the trial court found to be the hanging wall of the vein; that the evidence showed that the contact was exposed at an elevation of 1910.5 feet in a certain working known as the John Suter cut which is located on respondents' Old Pete Claim No. 1 which adjoins the Old Pete claim on the east some distance east of the east side line of the last-mentioned claim; that the evidence disclosed that the contact was also exposed at the upper edge of the working known as the Glory Hole located on the Old Pete claim; that an examination of a table of levels of various workings on the Old Pete claim and the Old Pete Extension claim of appellants prepared from the contour map together with reference to a certain model prepared by appellant A. E. Brugger and received in evidence shows at once that a horizontal plane which is passed through the contact at the John Suter cut at an elevation of 1910.5 feet would also pass through the contact at a point near the upper edge of the Glory Hole; that the line where this horizontal plane cuts the contact between rhyolite and dacite is the true strike or "onward course" of the hanging wall of the vein, and, consequently, of the vein; that such a line bears approximately south 72 degrees, 30 minutes east, or 17 degrees, 30 minutes south of east and is the course or strike of the vein; that the true dip is always at right angles to the strike and is therefore north 17 degrees, 30 minutes east, which is 14 degrees, 32 minutes below the horizontal in the direction last noted. It should here be noted that a necessary element of the above-stated reasoning is the definition of the strike of a vein as being determined by a horizontal line drawn between its extremities at that depth at which it attains its greatest longitudinal extent. Appellants concede that the contact was exposed in five different workings on the Old Pete claim which are located along the line which the trial court found to be the course of the vein. Beginning on the north, these workings are: First, the Glory Hole; second, a shallow pit approximately 100 feet south from the Glory Hole; third, a cut located about 75 feet south from the shallow pit; fourth, the workings known as Overton No. 2; fifth, the workings known

as Overton No. 1, the most southerly of respondents' workings. The horizontal distance between the Glory Hole on the north and the Overton No. 1 workings is approximately 360 feet. Inspection of the contour map fails to disclose thereon the location of the Suter cut, hence the horizontal distance between the exposure of contact in the Glory Hole and that which occurs in the Suter cut may not be determined with that degree of accuracy which is desirable. The location of the Suter cut is, however, shown on an extension to a reduced copy of the contour map which is attached to appellants' opening brief. It is not possible accurately to transpose the location of the Suter cut from the reduced map accompanying the brief to the contour map so that the horizontal distance between the two points may be accurately determined. Appellants have neither stated the distance nor have they referred to any place in the lengthy transcript where the distance is given. It is, however, obvious that the horizontal distance is a matter of some importance, since by the method for determination of the strike of a vein approved by appellants the longitudinal extent of the vein is an important factor. In any event, it is apparent that the horizontal distance between the two points of contact which appellants emphasize is at least 50 feet less than the horizontal distance between the Glory Hole on the north and Overton No. 1 workings on the south. Appellants, therefore, are insisting upon selecting a horizontal distance east and west between two points of contact which is obviously less than the horizontal distance north and south between two other points of contact along a line which contains three additional points of contact because they maintain that the elevation of the different points of contact is the all-important factor in arriving at a correct determination of the strike of the vein since the method of determination approved by them provides for drawing a horizontal line between the extremities of a vein at that depth at which it attains its greatest longitudinal extent. It is pointed out that the elevation of the two points of contact which they select as indicative of the strike of the vein in an east-west direction is approximately identical, whereas the elevation of the contact at Overton No. 1 workings on the south is 90 feet higher than the elevation of the contact in the pit at the

Glory Hole. It is further pointed out that the elevation of each point of contact proceeding south from the Glory Hole along the line which the court found to be the strike of the vein is successively higher than the elevation of the contact in the Glory Hole. It may be remarked at this point that, under the facts disclosed by the evidence it could hardly be otherwise, since the line from north to south proceeds up the north slope of a hill whose crest on the south is approximately 100 feet higher than the elevation of the Glory Hole on the north. In other words, the contention that the exposure of contact at two points of approximately equal elevation is determinative of the strike of the vein entirely eliminates any consideration of the topography of the hill. It should be observed that Dr. Frederick L. Ransome, an expert witness called by appellants who is described by appellants as "a man of such eminent qualifications, so far superior to those of any other witness on the case, a man of such eminent reputation and standing, certainly should have his testimony accepted as practically final in a case of this kind," refused point-blank to consider a difference in elevation between two points of contact exposure as indicative of the dip of the vein because, as he pointed out: "You would have to take into consideration the topography as well as those two points." If it is necessary to take into consideration the topography of the hill in attempting to discover the dip of the vein, it would seem reasonable that the factor of topography would likewise be an essential feature in determining the strike. Another expert witness called by appellants, H. R. Van Wagenen, in referring to the workings on the Old Pete claim known as Overton No. 1 and the Suter cut on Old Pete Claim No. 1 said that "of course we have never been interested in establishing what the dip is between here and this hole because those two points are on neither the strike nor the dip." It may here be remarked that intelligent reading of the voluminous record has been rendered difficult by the very frequent use of the words "here" and "there" by witnesses in testimony wherein reference was being made to maps and other exhibits. In the above-quoted testimony it may not with certainty be declared just what two points the witness had in mind from the language "between here and this hole," but from the context it would appear that one of the points was

the Suter cut which the witness testified was "on neither the dip nor the strike."

Finally, it must be borne in mind, in giving consideration to appellants' above-stated contention, that the correct location of the strike and dip of the lode was not the final problem which was presented to the trial court for its determination. The essential and necessary fact which the court had to determine was whether or not appellants had satisfactorily proven that the apex of the Old Pete lode was within the exterior boundaries of the Old Pete Extension claim of which appellants were in possession as lessees. Respondents are making no claim of right to proceed beyond the lines of their claims. Appellants, on the other hand, are making such claim, and their insistence upon the right to proceed beyond the south end line of an adjoining claim owned by respondents and to penetrate beneath the surface of such claim imposed upon them the burden of establishing by clear and convincing evidence that the apex of the lode was located on their land. With reference to the "course" of a vein, it is declared by the learned author of Lindley on Mines (3d Ed.), in section 318 at page 723, that "The 'course' of the vein, for the purpose of guiding the miners in making their location, is therefore not the 'technical true strike of the engineer, the line which would be cut by a horizontal plane. Such a requirement would be in many cases impracticable.' The true method of determination is found in the rule laid down by the Supreme Court of the United States in the Flagstaff Case, and followed by Judge Beatty in the North Star Case [Carson City Gold & Silver Min. Co. v. North Star Min. Co. (C.C.) 73 F. 597], that the workings nearest the surface are better guides to the course of the apex than those far below." As was said in Flagstaff Silver Min. Co. v. Tarbet, supra: "The most practicable rule is to regard the course of the vein as that which is indicated by surface outcrop, or surface explorations and workings. It is on this line that claims will naturally be laid, whatever be the character of the surface, whether level or inclined." The above language was quoted with approval in the leading case of Duggan v. Davy, 4 Dak. 110, 26 N.W. 887. In section 173 of American Mining Law by Ricketts the author uses the language of the Flagstaff Case.

In the instant case it is apparent that, at the time of trial, no very extensive workings had been made on either of the two claims which are here involved. Greater development had certainly been effected on the Old Pete claim of respondents than on the Old Pete Extension claim of appellants. On the former claim the most extensive operations had centered about the Glory Hole, from which 25 carloads of ore had been removed and shipped to the smelter. About two carloads of ore had been taken from the Overton No. 1 workings near the south end line of the claim. No ore had been taken from any workings on the Old Pete Extension claim. The various workings on the latter claim consisted entirely of a few exploratory shafts and cuts which had evidently been sunk in the hope that they would disclose the existence of the apex of the Old Pete lode on said claim, and thereby give appellants the right to proceed beyond the north side line and to penetrate beneath the surface of the Old Pete claim. Admittedly, however, shallow workings on the last-mentioned claim had disclosed the contact between rhyolite and dacite comparatively near the surface on a line extending from the Gulch cut on the north to the Dorn cut on the south. The Old Pete claim had been located lengthwise of this line on the assumption that it indicated the course of the lode. The trial court evidently applied the "most practicable" rule announced by the Supreme Court of the United States in the Flagstaff Case and selected this line as indicative of the course of the vein in the absence of sufficient exploration by appellants to demonstrate that the course of the lode is in an entirely different direction. Examination of the entire record impels the conclusion that the findings of the trial court, particularly the finding that the apex of the Old Pete lode is not located on the Old Pete Extension claim, are not so lacking in evidentiary support as to require their disturbance. The contention of appellants in this regard must therefore be rejected.

The conclusion that the trial court's findings respecting the strike, dip, and apex of the Old Pete lode may not properly be disturbed renders it unnecessary to give consideration to the contention that the finding regarding the existence of a fault near the south end line of the Old

Pete claim is likewise lacking in evidentiary support. Obviously, if it must be declared that a finding that the apex of the lode is not within the boundaries of the Old Pete Extension claim is sustainable, the finding that there is a fault near the south end line of the former claim which cuts off the progress of the vein toward the south becomes relatively unimportant. The latter finding would be important in the event it should appear that the former finding is entirely lacking in evidentiary support, since it would then be necessary for appellants to demonstrate that the finding that no ore exists to the south of the south end line of the Old Pete claim because of the interference of the fault is unsupported by the evidence. However, it may here properly be observed that examination of the record impels the conclusion that the court's finding respecting the existence of a fault and its effect on the Old Pete lode likewise has evidentiary support.

For the reasons stated, the judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.



12 Cal.App.2d 172

ROSS et ux. v. McDUGAL et ux.

Civ. 1584.

District Court of Appeal, Fourth District,
California.

Feb. 27, 1936.

Hearing Denied by Supreme Court
April 27, 1936.

1. Vendor and purchaser ⇨316

Where insurance money received on destruction of dwelling covered by conditional sales contract was applied on mortgage debt which vendors had agreed to pay, vendors held entitled to recover only balance remaining due on unpaid installment of principal and accrued interest after applying insurance to such obligations (Civ.Code, § 1479).

2. Vendor and purchaser ⇨107

Where conditional sales contract provided that purchasers should carry insurance on dwelling on property, purchasers held not entitled to rescind contract because of destruction of dwelling by fire, where, by agreement, insurance money received upon loss of

dwelling was to be in lieu of dwelling and equal to it in value (Civ.Code, § 1689).

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by J. Edgar Ross and wife against W. T. McDougal and wife, wherein defendants filed a cross-complaint. Judgment for defendants, and plaintiffs appeal.

Reversed.

J. Edgar Ross and Anna M. Ross, in pro. per.

Albert H. Ford, of Riverside, for respondents.

MARKS, Justice.

Plaintiffs brought this action to recover \$600 principal and \$139.82 interest, alleged to be due and unpaid on a conditional sales contract of real property. Besides answering, defendants filed a cross-complaint seeking to rescind the contract because of a partial failure of consideration. Judgment was rendered for defendants and plaintiffs have appealed.

Under date of July 21, 1930, plaintiffs and defendants executed an executory contract for the sale and purchase of real property in Riverside county for the sum of \$3,500, payable \$100 in cash, \$500 on or before August 1, 1930, \$600 on or before each August 1 of 1931, 1932, 1933, and 1934, and \$500 on or before August 1, 1935, deferred payments to draw interest at the rate of 8 per cent. per annum, payable quarterly. The property was encumbered with a mortgage for \$1,000 which plaintiffs agreed to pay and have released. It was also provided that defendants should keep the dwelling on the property insured in the sum of \$1,200.

During the month of May, 1931, the dwelling burned without fault of either party. Defendants had been given possession, but were away at the time of the fire. Insurance in the sum of \$700 was paid to the mortgagee upon the written consent of the parties. Plaintiffs asked defendants' consent to credit the insurance on the last installments of the contract. Although defendants did not consent to this being done, plaintiffs proceeded to make the credit in that manner.

This action was brought on February 26, 1932, for the installment of the principal

falling due August 1, 1931, and for the accrued interest. After the fire the parties negotiated for almost a year in an endeavor to settle the controversy as to who would bear the loss occasioned by the fire. These negotiations continued until about the time summons was served upon defendants, which was the first information they had of the pendency of the action. Upon this evidence the trial court quite properly held that defendants were not guilty of laches in not having rescinded more promptly.

Two questions are presented for our decision: (1) What, if anything, was due plaintiffs under the terms of the conditional sales contract? and (2) Under the circumstances of this case could defendants rescind?

[1] The answer to the first question depends upon the proper application on the debt of the \$700 paid by the insurance carrier. Under the facts of this case, section 1479 of the Civil Code requires the payments to be credited (1) on the interest due at the time of the payment, and (2) on "the obligation earliest in date of maturity." The payment should have been applied, first, on any interest due and unpaid; second, on the \$600 payment of principal falling due August 1, 1931; and third, on obligations next in maturity which would be installments of interest next accruing. While we are not able to compute the exact amount of the payment to be credited on interest, it is evident that the entire payment of the principal due August 1, 1931, and nearly all, if not all, of the interest accrued at the time the suit was filed would have been paid if the proper credit of the \$700 had been made.

We meet more difficulties when we approach the question of the right of defendants to rescind the executory contract of sale under the facts before us. The decisions of the Supreme and Appellate Courts of the state are in such a condition on the question of the rights of vendees in possession under an executory contract to rescind the contract because of a partial failure of the consideration caused by a destruction of part of the property without fault of the vendee that a brief review of some of them seems necessary.

Where plaintiffs give defendant a note and mortgage to pay the cost of constructing a dwelling on their property according to definite specifications, they are entitled to cancellation of the note and

mortgage for partial failure of consideration if the house be not completed substantially according to specifications. *Perry v. Quackenbush*, 105 Cal. 299, 38 P. 740. See, also, *Van Buren v. Green*, 120 Cal.App. 461, 7 P.(2d) 1079.

Hattie O. and Jos. L. Cooper were in possession of two lots in a subdivision under a contract of purchase for \$3,500, of which the initial payment and several installments had been paid. The soil on about four of the ten acres of the land was washed away by a flood. The Supreme Court was of the opinion that this amounted to such a partial failure of consideration that the Coopers were entitled to rescind the contract of purchase. *Cooper v. Huntington*, 178 Cal. 160, 172 P. 591. See, also, *Wilson v. Beazley*, 186 Cal. 437, 199 P. 772.

In *Potts Drug Co. v. Benedict*, 156 Cal. 322, 104 P. 432, 25 L.R.A.(N.S.) 609, the plaintiff was the lessee of real property in San Francisco. The leasehold was sold to defendants for \$1,500 in cash and \$15,000 to be paid at a future date. The day after the sale was made the leased premises were destroyed by fire. Plaintiff brought suit for the \$15,000 and the Supreme Court held it should recover, as the sale had been consummated and the loss should follow the title.

In *Smith v. Phoenix Insurance Co.*, 91 Cal. 323, 27 P. 738, 13 L.R.A. 475, 25 Am. St.Rep. 191, it appears that plaintiff was the owner of a hotel building which was leased to one Stewart for a term of years with an agreement to sell and buy at a stated price at the end of that term. The Phoenix Insurance Company was the insurer of the building which was destroyed by fire. Smith brought suit under the insurance policy and the company defended upon the ground, among others, that the contract of sale and purchase was a change of title not disclosed to it. The case largely turned upon the question of whether Stewart could be held to pay the purchase price after the building was destroyed, or, in other words, whether the loss of the building should fall on Smith, the owner, or Stewart, the tenant and prospective purchaser. The Supreme Court held that the loss should fall on Smith and not on Stewart, as Stewart was in possession under his lease and not under the contract of purchase. It is there stated that no case had been found in which a vendor not in possession under an executory contract for

the sale of property had been held for the loss occasioned by the partial destruction of the property. See *Finkbohner v. Glen Falls Ins. Co.*, 6 Cal.App. 379, 92 P. 318; *Higbie v. Shields*, 27 Cal.App. 536, 150 P. 801.

The case of *Kirtley v. Perham*, 176 Cal. 333, 168 P. 351, 352, involved a conditional sales contract of personal property which was particularly destroyed without fault of either party while the seller retained title and the buyer was in possession. The Supreme Court said: "Mr. Williston, in his treatise on Sales, says that where goods sold are delivered to the buyer, but title is retained by the seller until the price is paid, inasmuch as the buyer has the immediate use of the goods, he must stand the loss from subsequent ordinary deteriorations, and that 'it seems properly to follow that, if the goods are accidentally destroyed or injured, the buyer must stand the loss; that is, he must pay the price in full at the time agreed. The decisions upon the point are in conflict, but the weight of authority sustains the view here expressed.' Williston on Sales, § 304. The defendants rely on this doctrine.

"We need not review the authorities said to be in conflict, or examine into the merits of the diverse arguments therein. In this state the question is settled in favor of the plaintiff and in accordance with the decision of the court below. Discussing the case of a sale of personal property to be delivered in the future, where the property, without fault of the vendor, has perished in the interval, the court in *Potts Drug Co. v. Benedict*, 156 Cal. [322] 334, 104 P. 432, 25 L.R.A.(N.S.) 609, says: 'The liability to pay the price in such a case, notwithstanding failure to deliver possession, rests upon the fact that the purchaser was the owner of the property at the time of its destruction. It is elementary in the law of sales that, in the absence of special agreement to the contrary, the risk accompanies the title, and that when a present unconditional sale is actually consummated, and the title has passed, the property is thenceforth at the risk of the buyer, so far as accidental destruction by fire, etc., is concerned, even though possession thereof has not been delivered.' (Citing cases.) 'Where there is a mere agreement to sell, and title therefore has not passed, the loss falls on the vendor for the same reason. In such a case the ven-

dor is excused from the performance of his contract under the rule we have discussed by reason of the destruction of the thing, but he cannot retain money already paid on account of the proposed purchase, or recover moneys remaining unpaid.' The decisions in *Smith v. Phoenix Ins. Co.*, 91 Cal. 323, 27 P. 738, 13 L.R.A. 475, 25 Am.St.Rep. 191; *Tyson v. Wells*, 2 Cal. 122; *Hewlet v. Flint*, 7 Cal. [264] 265; *Girdner v. Beswick*, 69 Cal. [112] 118, 10 P. 278; *Conlin v. Osborn*, 161 Cal. [659] 666, 120 P. 755; *Peatland Realty Co. v. Edwards*, 23 Cal.App. [402] 405, 138 P. 357; and *Waltz v. Silveria*, 25 Cal.App. [717] 719, 145 P. 169, are to the same effect. The text-books state the same rule. 35 Cyc. 343; 24 Am.&Eng.Ency. of Law 1045; 2 Mechem on Sales, § 1413; 3 Page on Contracts, § 1370. And Mr. Williston himself in section 301 states the general rule to be that the loss in such cases falls on him who has the title at the time. And in section 164, on the same subject, he says: 'If the property is destroyed or injured before the time when it was agreed the title should pass, the buyer cannot be compelled to pay the price, and if he has paid the price in advance it may be recovered.'

The case of *McCarty v. Wilson*, 184 Cal. 194, 193 P. 578, 581, was an action by an executor to recover the purchase price of property sold to the defendant under an order of sale in a probate proceeding. The defendant went into possession of the property and did considerable grading. After the order confirming the sale was made and before the purchase price was paid the property suffered a 10 per cent. damage from a flood which furnished one of the grounds of defense. In its main opinion the Supreme Court reached the conclusion that the defendant was in equity the owner of the land and in rightful possession and the loss from the flood should fall upon him. In denying a petition for rehearing, the court explained this statement as follows: "We desire to say that, in regard to the claimed depreciation in value by reason of flood, the fact that upon the confirmation of the sale the whole purchase price at once became due and payable, at least upon the original tender and deposit of the deed by the executor, distinguishes the case from the cases relied upon by petitioner."

In *Conlin v. Osborn*, 161 Cal. 659, 120 P. 755, the question there litigated was

whether the vendee under an uncompleted contract for the sale of real estate could recover his deposit on the purchase price where the buildings on the property had been destroyed by fire prior to the time the balance of the purchase price became due. The court upheld his right of recovery on the ground that there was a partial failure of consideration in a material respect as to the vendee, and, therefore, the loss must follow the title and fall upon the vendor. It does not appear that the vendee was in possession of the property at the time of the fire.

In the case of *Lubarsky v. Richardson*, 218 Cal. 27, 21 P.(2d) 557, the plaintiff sought to recover the payments which she had made under an executory contract for the sale of real and personal property where the buildings on the land were destroyed by fire after she went into possession. The Supreme Court affirmed a judgment rescinding the contract and permitting a recovery of the amount paid less profits made by plaintiff while in possession. The buildings on the property were insured for \$3,000, which was collected by defendant. She refused to credit plaintiff with any portion of this money. It was conceded by defendant that the destruction of the dwelling amounted to such partial failure of consideration that plaintiff was entitled to rescind the contract.

In the case of *Wong Ah Sure v. Ty Fook*, 37 Cal.App. 465, 174 P. 64, in which a hearing in the Supreme Court was denied, the principal question involved was whether the vendor or vendee under an executory contract of sale of real property should bear the loss occasioned by the partial destruction by fire of a building on the premises, which occurred without fault of either party, before the purchase price was fully paid and while the vendee was in possession. It was held that the loss must follow the title and fall on the vendor. See, also, *La Chance v. Brown*, 41 Cal.App. 500, 183 P. 216.

In *Lubarsky v. Chavis*, 99 Cal.App. 610, 279 P. 205, in which a hearing was denied by the Supreme Court, it was held that where plaintiff and defendant entered into an executory contract for the sale of real and personal property and a dwelling on the property was destroyed by fire while the vendee was in possession and without her fault, there was a failure of consideration in a material respect which would entitle the vendee to rescind the contract as

the loss should follow the title and fall on the vendor.

The case of *Kelly v. Smith*, 218 Cal. 543, 24 P.(2d) 471, 476, requires careful consideration. Kelly and his wife, by an executory contract, agreed to sell to Smith real property on which there were buildings. Smith entered into possession of the property, and while it was in her possession one of the buildings was destroyed by fire. The contract of sale provided that Smith insure the improvements "in the sum of \$4,000, loss, if any, payable to the parties hereto as their interests may appear." The burned building had been insured in the sum of \$2,000 with the loss payable to the parties and the Bank of Italy Savings & Trust Association as their interests might appear. The principal question in the case was upon whom the loss occasioned by the fire should fall. The court summed up its conclusions as follows: "Some differences of opinion will be found to exist with respect to those cases where the vendee is not in possession, but where the vendee is in possession, enjoying the entire beneficial use of the property, having acquired an estate which he may convey or incumber, and which to all intents and purposes is his; the great majority of opinion holds that the loss should fall upon him, such being the manifest intent of the parties where title is retained solely as security. And, in view of the insurance provision in this case, it should be particularly true. And this result is arrived at not by the *legerdemain* involved in the doctrine of equitable conversion so much as it is by the contract and the manifest purpose of the parties. By which we conclude that appellant was not entitled to rescind, by reason of the partial destruction of the premises by fire." Some mention is made of section 1742 of the Civil Code as adopted in 1931. This section is contained in that part of the Code relating to sales of personal property and was not in effect at the time the buildings involved were burned in 1929.

The case of *Cocores v. Assimopoulos*, 47 P.(2d) 699, 700, also deserves attention as it is the last pronouncement of the Supreme Court on the question before us. In that case the plaintiff and Helen Assimopoulos entered into a conditional sales contract for the sale of a lease, stock in trade, furniture, fixtures, equipment, and good will of a confectionery store in Gil-

roy. The contract was silent on the question of insurance. Defendant, assignee of Helen Assimopoulos, insured the property and part of it was destroyed by fire in August, 1929. The Supreme Court stated the main question to be decided, and its conclusions as follows: "The main questions on the appeal relate to the sufficiency of the evidence to support the findings of the trial court which involve the right of the defendant Anthony to claim the property described in the cross-complaint and adjudged to belong to him. The answers to the main contentions are resolved by an investigation into the propriety of the trial court's construction of the conditional sales contract and the rights of Anthony, the assignee thereof. Also involved is the question of the law as to which of the parties should bear the loss resulting from the destruction of a part of the subject-matter of the contract. The property affected by the contract of sale was divisible in its nature, and the parties themselves still considered the contract in force after the fire which destroyed a part thereof on August 21, 1929. Therefore, the problems discussed by the plaintiff as to what should be the solution when there is a partial as distinguished from a total destruction are not pertinent. At the time here in question, section 1742 of the Civil Code, added by St.1931, p. 2242, was not the law. The law applicable to this case is stated in *Kirtley v. Perham*, 176 Cal. 333, 168 P. 351, and in 22 Cal.Jur., p. 942 et seq. and 1104 et seq., to the effect that in the absence of any special agreement between the parties, and here there is none, as to who should bear the loss in the event of destruction of the goods without the fault of either party, the loss must fall upon the person, here the plaintiff, in whom title was vested. In this and in other respects concerning the depletion and loss of the property in the ordinary course of business without the fault of the defendants, the court correctly construed and applied the provisions of the contract."

It is thus apparent that in the two last decisions of the Supreme Court upon the question we are considering we have conflicting conclusions announced unless there can be found in the facts of those cases some reasonable differences which may serve as a basis upon which they may be harmonized. The only differences which a study of the decisions disclose are (1)

that in the Kelly Case the contract of sale dealt principally with real property, while in the Cocores Case personal property was sold; and (2) that in the Kelly Case the contract of sale provided that the buildings should be insured in a fixed amount, while in the Cocores Case the contract was silent on the question of insurance.

Because one dealt principally with real estate while the other was concerned with personal property, furnishes no logical ground upon which they may be harmonized. Section 1689 of the Civil Code, which is our statutory authority for actions for rescission of contracts, provides in part as follows: "A party to a contract may rescind the same in the following cases only: * * * 4. If such consideration, before it is rendered to him, fails in a material respect, from any cause." This section makes no distinction between contracts dealing in real property and those concerned with personal property. It is broad and its language includes those instruments having personal property as their subject-matter just as surely as it does those which concern real estate. It has been so construed and applied in California without exception. (See cases already cited.) We would consider it an unwarranted act of judicial legislation should we attempt to hold this section should be applied in one manner to contracts having to do with real estate, and in another with those treating with personal property, in any case where the cause of action was complete prior to the effective date of section 1742 of the Civil Code. The causes of actions in the Kelly and the Cocores Cases and in the instant case accrued before that time.

[2] It is our conclusion that the fact that in the Kelly Case the contract of sale provided that the buildings on the property sold should be insured by the vendee in a fixed amount while that in the Cocores Case was silent on the question of insurance furnishes us with a rational and logical ground upon which the decisions may be harmonized and brought into complete accord.

A party to a contract may rescind if the "consideration, before it is rendered to him, fails in a material respect, from any cause." This has been held to require a substantial injury as distinguished from an

insignificant or inconsequential one. From this we may inquire, Why may not the parties themselves fix the value of any of the improvements upon the property sold and provide against loss from their destruction? We can conceive of no valid reason why this may not be done. When the parties to a conditional contract of sale agree that a building be insured in a fixed amount, they should be held to have agreed that its value to each of the contracting parties is that amount. By providing for the insurance, they should be held to have agreed that the money received from the insurance company upon the loss or damage to the building shall be in lieu of the building and equal to it in value. Thus they have agreed that when the insurance is received the consideration for the contract of sale has not failed "in a material respect," it having been changed in form but not in value. It follows that no rescission can be had on this ground. If this reasoning is sound, the conclusions reached in the Kelly and the Cocores Cases are in harmony, and neither conflicts with the line of authorities we have cited, for the Kelly Case is the first case we have discovered in which the question of insurance is considered as having a direct bearing on the consideration for the contract failing in a material respect where improvements in possession of a vendee have been destroyed by fire without his fault.

In the instant case the contract provided that the vendees should insure the building in the sum of \$1,200. At that time plaintiffs carried insurance on it in the sum of \$700. Defendants paid plaintiffs the portion of the premium unearned on the date of the contract and the policy was continued in that amount without objection. The parties must be held to have tacitly consented to insurance in such amount. It is true that the contract impliedly fixed the value of the dwelling at \$1,200 while the insurance was only \$700, resulting in a loss of \$500 from the fire. Defendants cannot complain of that loss. In the contract they assumed the obligation of insuring the building for \$1,200. This they did not do. They can neither profit by nor take advantage of their own neglect or wrong.

It is evident that plaintiffs are entitled to judgment for but a small amount of the interest due at the time their suit was filed, if any was so due. It is evident

from what we have said that under the evidence before us defendants are not entitled to a rescission of the contract.

Judgment reversed.

We concur: BARNARD, P. J.; JENNINGS, J.



12 Cal.App.2d 389

JOHNSON v. CITY OF GLENDALE et al.
Civ. 9845.

District Court of Appeal, Second District,
Division 1, California.

March 12, 1936.

1. Statutes $\S$ 141(1)

Act requiring presentation of claims against municipalities for injuries *held* not to revise or amend prior act imposing liability on municipalities for negligence, so as to require amended act to be re-enacted and published in full (St.1931, p. 2475; St.1923, p. 675; Const. art. 4, § 24).

2. Municipal corporations $\S$ 812(2)

Act requiring presentation of claims against city for injuries is mandatory, and noncompliance therewith, unless excused, precludes recovery against city or any officers or employees thereof (St.1931, p. 2475).

3. Municipal corporations $\S$ 812(4)

Limitation on time for giving notice or filing claim against municipality is matter for legislative control, and, where law makes compliance therewith mandatory and provides no exceptions, courts may provide no exceptions under guise of interpretation or construction (St.1931, p. 2475).

4. Pleading $\S$ 63

To enforce purely statutory right, one must allege and prove facts clearly bringing him within conditions of statute.

5. Municipal corporations $\S$ 812(4)

Where right to sue municipality for negligence in maintenance of streets exists only by virtue of statute, Legislature may limit right by any requirement respecting giving of notice or presentation of claims which it sees fit to impose (St.1923, p. 675; St.1931, p. 2475).

6. Municipal corporations $\S$ 812(10)

Compliance with statute requiring presentation of verified claim against municipality for injuries within 90 days after accident

held not excused by claimant's incapacity to file claim, as against contention that to require compliance in such case would require the impossible (St.1931, p. 2475).

7. Municipal corporations $\S$ 812(2)

Failure to present claim against city for injuries sustained from defective sidewalk within 90-day statutory period precluded recovery for such injuries, as against contention that city was estopped to assert, or had waived, rights under statute because of knowledge of city officers of accident and their fraudulent promises to investigate claim, since municipality and its officers cannot waive compliance with statute (St.1931, p. 2475).

8. Action $\S$ 48(2)

Cause of action against city for negligence in maintenance of sidewalk could not properly be joined with cause of action against officers of city for fraud with respect to promises and representations made to plaintiff regarding investigation of her claim (Code Civ.Proc. § 427).

9. Appeal and error $\S$ 782

Attempted appeal from order sustaining demurrer to complaint *held* dismissible.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Della Johnson against the City of Glendale and others. Judgment for defendants, and plaintiff appeals.

Judgment affirmed, and attempted appeal from order sustaining demurrer to the complaint dismissed.

Litta Belle Campbell, of Los Angeles, for appellant.

Bernard Brennan, City Atty., Aubrey N. Irwin, Assistant City Atty., and A. L. Lawson, Deputy City Atty., all of Glendale, for respondents.

SHINN, Justice pro tem.

Plaintiff appeals, from a judgment entered in defendants' favor after an order sustaining a demurrer to plaintiff's complaint.

The action is one for damages for personal injuries sustained by plaintiff by reason of the alleged negligence of defendant city in maintaining a public sidewalk in a dangerous and defective condition. W. J. MacIntyre and F. W. Curl were joined as defendants in their alleged capacity as "officers of said city." Plaintiff did not present her claim for damages to defendant

city within ninety days after the accident, as required by chapter 1167, Statutes 1931, p. 2475, although she did present a claim some five months after the accident. The demurrer of the defendant city was sustained upon the ground that presentation of a claim within the prescribed time was a prerequisite to the maintenance of the action.

[1] The liability of the city is founded upon Statutes 1923, p. 675, Deering's General Laws, Act 5619. That act contained no requirement for the presentation of damage claims to a municipality or other corporate body or any representative thereof. Such presentation was first required by the act of 1931 above referred to. It is the contention of appellant that the latter act is void because when it was adopted it effected an amendment of the act of 1923 and the former act was not re-enacted and published in full in accordance with the provisions of article 4, § 24, of the Constitution, which require that an act revised or section amended must be re-enacted and published in full as amended. This procedure was not followed by the Legislature, nor was it necessary that it should have been followed, in adopting the 1931 act. The latter act did not purport to amend the 1923 act, nor did it, strictly speaking, amend it. The 1923 act created a liability of municipalities and certain other governmental agencies in cases of negligence. That liability was not to any extent changed by the 1931 act. The former act remained in full effect. The latter act covers new matters, such as the presentation of claims for damages, certain duties of attorneys for municipalities, and other agencies in actions for damages against officers, and it makes permissive the insurance of officers against liability arising out of negligence. Thus the law on the subject was made broader by new and independent legislation, but without destroying or impairing any substantive right or liability created by the former act. It has been held frequently that legislation which adds to or supplements or interprets an existing law or makes such law applicable to new situations without otherwise changing its operation is neither a revision nor an amendment of the existing law within the meaning of the constitutional provision. In the early case of *Pennie v. Reis*, 80 Cal. 266, 22 P. 176, it was held that the Constitution "applies clearly to acts which are in terms revisory or amendatory of some former act; it does not ap-

ply to an independent act." Neither does it apply to cases in which the former act remains in full effect. *Hellman v. Shoulters*, 114 Cal. 136, 44 P. 915, 45 P. 1057; *Gadd v. McGuire*, 69 Cal.App. 347, 231 P. 754. It does not apply to the addition of New Code sections, even though the effect thereof be to amend by implication existing code sections. *Deyoe v. Superior Court*, 140 Cal. 476, 74 P. 28, 98 Am.St.Rep. 73; *In re Coburn*, 165 Cal. 202, 131 P. 352; *People v. Peete*, 54 Cal.App. 333, 202 P. 51; *Evans v. Superior Court*, 215 Cal. 58, 8 P. (2d) 467. The act of 1931, in so far as it requires the presentation of claims within ninety days after the happening of an accident, merely prescribes rules of procedure for the enforcement of claims arising under the 1923 act; no such rules having been prescribed by that act. In this respect and as to all other matters to which it relates, the act of 1931 was original legislation; it did not revise or amend the existing law, although it did supplement it. It was therefore legally adopted.

[2] The statute is mandatory, and plaintiff's failure to present her claim within the time provided by law, unless excused by the facts alleged in the complaint, precludes any recovery against the City of Glendale or any officers or employees thereof for negligence. *Spencer v. City of Calipatria* (Cal.App.) 49 P.(2d) 320; *Thompson v. County of Los Angeles*, 140 Cal.App. 73, 35 P.(2d) 185; *Farmers, etc., Bank v. City of Los Angeles*, 151 Cal. 655, 91 P. 795; *Coen v. City of Los Angeles*, 70 Cal. App. 752, 234 P. 426; *Continental Insurance Company v. City of Los Angeles*, 92 Cal.App. 585, 268 P. 920; *Phillips v. County of Los Angeles*, 140 Cal.App. 78, 35 P. (2d) 187.

[3] As an excuse for the failure to present her claim to the city on time, the complaint alleged: "That plaintiff, by reason of her injuries was incapacitated and sick and sore in mind and body for a period of three months and unable to ascertain the true state of the law and the nature of her rights, and unable to file a claim against said city." The allegation of incapacity and inability to file a claim presents a question which has not been directly decided in this state and one as to which the authorities elsewhere are in irreconcilable conflict. In one line of cases it is held that the requirements of statutes, charter provisions, or ordinances for the giving of notice of injuries or for the

presentation of claims for damages need not be strictly met, and that substantial compliance only is demanded. In so holding, the courts have supplied conditions not expressed or attempted to be expressed in the laws. This is held justified by assuming that it could not have been the intention in enacting the legislation to bar the claims of those who might be unable to present them on time by reason of physical or mental incapacity, and this assumption again is held justified under the maxim that the law does not require impossibilities. The contrary, and we think the more satisfactory, rule is that the giving of notice or the filing of claims within the limited period allowed therefor is purely a matter for legislative control, and that where a law makes compliance mandatory and no exceptions are provided in the law itself, the courts may provide none under the guise of interpretation or construction. *Haynes v. City of Seattle*, 83 Wash. 51, 145 P. 73; *Peoples v. City of Valparaiso*, 178 Ind. 673, 100 N.E. 70; *Schmidt v. City of Fremont*, 70 Neb. 577, 97 N.W. 830; *Ellis v. City of Kearney*, 80 Neb. 51, 113 N.W. 803; *McCullum v. City of South Omaha*, 84 Neb. 413, 121 N.W. 438; *Touhey v. City of Decatur*, 175 Ind. 98, 93 N.E. 540, 32 L.R.A.(N.S.) 350; *Huntington v. City of Calais*, 105 Me. 144, 73 A. 829; *Daniels v. City of Racine*, 98 Wis. 649, 74 N.W. 553; *Hay v. City of Baraboo*, 127 Wis. 1, 105 N.W. 654, 3 L.R.A.(N.S.) 84, 115 Am. St.Rep. 977; *Crocker v. City of Hartford*, 66 Conn. 387, 34 A. 98; *City of Ft. Worth v. Shero*, 16 Tex.Civ.App. 487, 41 S.W. 704; *Trost v. City of Casselton*, 8 N.D. 534, 79 N.W. 1071; *Gribben v. City of Franklin*, 175 Ind. 500, 94 N.E. 757; *Collins v. City of Spokane*, 64 Wash. 153, 116 P. 663, 35 L.R.A.(N.S.) 840; *Benson v. City of Hoquiam*, 67 Wash. 90, 121 P. 58.

[4] In following the views expressed in the foregoing cases, we accept, as controlling, the familiar rule that where a right is purely statutory and is granted upon conditions, one who seeks to enforce the right must by allegation and proof clearly bring himself within the conditions.

[5] In this state the right to sue a municipality for negligence in the maintenance of its streets exists only by virtue of statute. *Doeg v. Cook*, 126 Cal. 213, 58 P. 707, 77 Am.St.Rep. 171; 19 Cal.Jur. 126. This is contrary to the general rule that even in the absence of statute expressly creating liability, a municipality having full

control of its streets is liable in damages for injuries resulting from the failure to use ordinary care to keep them in a reasonably safe condition for public travel. 13 R.C.L. 309. Accordingly, in the states where the latter rule obtains, a statute requiring notice to the city within a given time after an accident on a city street, as a condition precedent to suit, operates as a limitation upon an existing right to compensation. It has been held that this right cannot be limited by unreasonable requirements respecting the giving of notice or the presentation of a claim. *Durham v. City of Spokane*, 27 Wash. 615, 68 P. 383; *Born v. City of Spokane*, 27 Wash. 719, 68 P. 386. This rule is not applicable to claims of purely statutory origin, where the right is granted conditionally. The statute of 1923 placed counties, municipalities, and school districts under a liability for damage to property or to persons caused by the dangerous or defective condition of public streets where the governing board or officer had knowledge or notice of such condition and failed and neglected for a reasonable time to remedy the same. The right thus granted to citizens is one that might have been withheld altogether by the legislative authority, and consequently it could be granted upon such conditions as the Legislature might see fit to impose. Therefore, the reasonableness of the conditions may not be brought into question. However strict and onerous they may be, they withhold or limit no right which had existence independent of the statute.

[6] The 1931 act requires presentation of a verified claim to the clerk or secretary of the legislative body of the municipality or other governing board within ninety days after the accident has occurred. It states no exceptions, and we are unable to believe that any were intended. If there were to be exceptions, they should have been stated in the act itself. It is not for the courts to create them. It must be presumed that the Legislature would have made disability an excuse for failure to present a claim had it been intended to grant that privilege. There is nothing novel in this class of legislation. Wherever liability of municipalities for negligence is recognized, general laws, charter provisions, or ordinances will be found imposing conditions upon the assertion of claims for damages, and many such are discussed in the books which are far more rigorous than our own statute. Without excusing the presentation of claims during

possible periods of disability, the 1931 statute allows ninety days in which to make claim, and this must be conceded to be a liberal period when the purposes of the law are considered, one of such purposes, and a very important one, being to afford the municipality an opportunity to investigate the cause of the accident and the extent of the injury or damage. If instead of the period of ninety days an exceedingly short time had been allowed, there would be much more reason for the argument in favor of adopting physical or mental incapacity as an excuse for failure to act in time. In New York, where it is said, in *Walden v. City of Jamestown*, 178 N.Y. 213, 70 N.E. 466, that a common charter provision in that state is one requiring notice to be given within 48 hours, substantial compliance only is exacted. It is readily apparent that a strict enforcement of such an exacting regulation would in many instances require the giving of notice under conditions of extreme difficulty and would in some cases require the impossible. But where a period of ninety days is allowed, the maxim that the law does not require impossibilities cannot control to the extent of justifying what clearly would be judicial legislation, in the form of interpretation. The statute does not require that the injured person shall himself sign or verify the claim and therefore does not preclude others from acting in his behalf. It would be an extreme, and we think unsupportable, view that the statute in question cannot be applied as it is clearly written because to do so would require that which is impossible. *Hurley v. Town of Bingham*, 63 Utah, 589, 228 P. 213. This court has held, in *Phillips v. County of Los Angeles*, 140 Cal.App. 78, 35 P.(2d) 187, 188, that infancy does not excuse the failure to present a claim for damages to a board of supervisors in order to charge the county with liability for negligence. The court said in that case: "The statute having not made infancy an exception in this case, the general provisions of the act must be held to apply, and the minor plaintiff therefore was required to file a claim within the time and in the same manner as an adult, as a condition precedent to bringing suit." And so in the present case the right has been granted and certain conditions have been prescribed for its enforcement and no exception has been made in a case of total inability of the injured person to make written demand for compensation. It is not within

the power of the court to nullify a clear provision of the law by writing into it an exception which might have a material effect upon its operation.

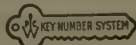
[7] Certain other facts were alleged which appellant contends estopped the city from taking advantage of her failure to file a claim in time. It was alleged that the defendant city of Glendale, its officers, agents, employees, and representatives, and defendants F. W. Curl and W. J. MacIntyre, fraudulently conspired and connived to defraud plaintiff of her rights and to defeat her claim for her injuries. "That immediately after the 8th day of March, 1933, the defendants F. W. Curl and W. J. MacIntyre, as agents and representatives of the said city of Glendale, and in the course of their employment, called upon plaintiff in reference to plaintiff's injuries and made personal and official investigations of the circumstances of said injuries and the condition of the said public street, all in pursuance of their fraudulent conspiracy and plot to defraud and defeat the plaintiff in her rights. That in pursuance of said fraud, conspiracy and plot F. W. Curl and W. J. MacIntyre informed plaintiff that they would investigate her claim and that they would determine the question of settlement and liability and that they would advise her in regard to said liability and settlement." These promises were alleged to have been made without intention to fulfill them. It was alleged that plaintiff believed said promises and representations and because of her reliance thereon she did not employ counsel to file a claim within the time prescribed by law. It is contended that the said acts of the defendants Curl and MacIntyre amounted to a waiver by the city of Glendale of compliance with the law in the matter of filing the claim. This contention cannot be upheld. It is the generally accepted rule that a municipality and its officers are without power to waive compliance with the law in such matters. *Chapman v. City of Fullerton*, 90 Cal.App. 463, 265 P. 1035; *Spencer v. City of Calipatria*, supra; *Touhey v. City of Decatur*, supra; *Dechant v. City of Hays*, 112 Kan. 729, 212 P. 682; *Berry v. City of Helena*, 56 Mont. 122, 182 P. 117. The statute does not authorize a waiver nor does it provide any substitute for a written verified claim. The authorities we have cited quite generally hold that actual knowledge on the part of officers of a municipality of the facts required to be stated in the claim does not dispense with

the claim itself. In view of our holding that the city could not be bound by any alleged waiver, consisting as it would of an extension of time for filing the claim, it is unnecessary to point out the particulars in which the complaint failed to show any authority on the part of defendants Curl and MacIntyre to represent or act for the city except in the mere matter of the investigation of plaintiff's injuries and the cause thereof.

[8] The complaint sought recovery of damages from defendants Curl and MacIntyre, based upon their alleged fraud and deception of plaintiff. No argument is presented by appellant in support of the appeal from the judgment in favor of the individual defendants. It is therefore unnecessary to discuss the sufficiency of the complaint to charge actionable fraud. It is quite apparent, however, that a cause of action against the city for negligence and a cause of action against the individual defendants for fraud could not properly be joined. Section 427, Code Civ.Proc. The demurrer to the complaint was correctly sustained.

[9] The judgment is affirmed; the attempted appeal from the order sustaining the demurrer is dismissed.

We concur: HOUSER, P. J.; DORAN, J.



12 Cal.App.2d 320

Ex parte MOFFETT.*

Cr. 190.

District Court of Appeal, Fourth District,
California.

March 9, 1936.

1. Constitutional law ☞89(4)

Right of employer to hire labor and right of employee to sell his labor may not be abridged except under police powers of state for purpose of promoting health, safety, morals, and general welfare of people.

2. Master and servant ☞74

Statute requiring employers to maintain bimonthly paydays and to post notices for such paydays held not to prohibit employment contract under which employees of lumber

factory were to be paid only as money was collected from sales of lumber, where there was no concealment or fraud by employer in execution of such contract, since it was not injurious to general welfare (St.1919, p. 295, § 2, and § 4 as amended by St.1927, p. 391).

Proceeding in the matter of the application of Ed Moffett for a writ of habeas corpus.

Petitioner discharged.

George A. Work, of San Francisco, for petitioner.

MARKS, Justice.

Petitioner filed his petition for a writ of habeas corpus to secure his release from the jail of Tulare county, where he was confined by the sheriff under a judgment of a justice of the peace sitting in Orosi township in Tulare county. The only return made by the sheriff to the writ is the order under which petitioner was held. Its sufficiency is not attacked, and for the purposes of this opinion we will assume its sufficiency and proper form. No brief has been filed on behalf of the sheriff or in support of the legality of the detention of petitioner.

The facts shown by the record before us may be briefly summarized as follows: The Southern Sierra Pine Company is a partnership, of which petitioner was the managing member, organized for the manufacture of lumber near the town of Cutler in Orosi township, Tulare county. The partnership had insufficient capital with which to pay its operating expenses, and therefore entered into a contract with each of its employees whereby they were to work at a fixed compensation in cash, not to be paid on any fixed or regularly recurring dates, but when the lumber could be sold and out of the proceeds of such sales as the money was collected. Ralph Goodwin was employed under such an express contract on May 12, 1935, at a compensation of 50 cents an hour, which was increased on July 1, 1935, to 55 cents an hour. Goodwin was not discharged, but voluntarily left the employ of the partnership on August 31, 1935. He had earned \$431.31, and had been paid \$308.50 during his employment and \$7 after he had quit, leaving a balance of \$115.81 unpaid on October 22, 1935, at the time the complaint was filed in the justice's court. At

that time there were several thousand dollars' worth of manufactured lumber unsold in the yards of the partnership.

The complaint in this action contained three counts. The first alleged that on July 25, 1935, petitioner continued to employ one or more in and about the sawmill without maintaining semimonthly or two monthly pay days, and particularly without paying such employees in full for their services for the previous semimonthly period on or before the last-mentioned date as required by sections 2 and 4 of the Semimonthly Pay Day Law." Stats. 1919, c. 202, pp. 294, 295, § 2, and § 4 as amended by St.1927, p. 391. Count 2 alleged that petitioner failed to post, and keep posted, in a conspicuous place at the place of employment, or elsewhere, where the employees could see it, or at the office or nearest agency for payment kept by the employer, any notice specifying any regular payday or paydays as required by the same sections of the same law. The third count deserves no notice here. It does not charge a public offense, or at best any other offense than that charged in the first count.

The two sections of the act in question provide that an employer must pay his employees the money earned by them semimonthly, or twice each month, on regular paydays to be designated in advance, and post, and keep posted, conspicuously at a designated place, a notice specifying the regular paydays and the time and place of payment of wages.

It is admitted that petitioner did not have two, or any, regular paydays each month for his employees, and did not post, and keep posted, the notice we have mentioned. It is obvious that he could not conform to the requirements of the statute under the terms of his contracts with his employees as wages became due and payable when and as soon as money was received for the lumber sold and in such amounts as could be paid from the returns from the sales. The question squarely presented here is: Does the Semimonthly Pay Day Law prohibit a special contract of employment between the employer and his employee such as was made between the partnership represented by petitioner and Ralph Goodwin?

We have not been cited to, nor have we found, any California case in which this precise question has been decided. However, the following cases decided under the

Wage Law of 1911 (Stats. 1911, p. 1268, as amended), and under the present law, may be cited: *In re Crane*, 26 Cal.App. 22, 145 P. 733; *Moore v. Indian Spring, etc., Co.*, 37 Cal.App. 370, 174 P. 378; *Manford v. Menil Singh*, 40 Cal.App. 700, 181 P. 844; *Klaaffki v. Kaufman*, 52 Cal.App. 48, 198 P. 36; *Martin v. Going*, 57 Cal.App. 631, 207 P. 935; *In re Oswald*, 76 Cal.App. 347, 244 P. 940; *In re Samaha*, 130 Cal. App. 116, 19 P.(2d) 839; *Sears v. Superior Court*, 133 Cal.App. 704, 24 P.(2d) 842; *In re Sears*, 137 Cal.App. 308, 30 P.(2d) 571; *Fueller v. Justice's Court*, 134 Cal. App. 305, 25 P.(2d) 248; *In re Ballestra's Petition*, 173 Cal. 657, 161 P. 120. In these cases certain phases of the wage act of 1911 were held unconstitutional, and certain phases of the Wage Act of 1919 were held constitutional under the police powers of the state which permits the enactment of laws to promote the general welfare of the citizens of the state. See, also, *In re Miller*, 162 Cal. 687, 124 P. 427, and *In re Farb*, 178 Cal. 592, 174 P. 320, 3 A.L.R. 301.

The limitations placed upon the exercise of the police power in cases similar to the one we are considering are thus defined in *Ex parte Hayden*, 147 Cal. 649, 82 P. 315, 316, 109 Am.St.Rep. 183:

"It has come to be well recognized that the liberty and the pursuit of happiness, in which the individual is protected by the Constitution of the United States and of the state, apply as fully to his right of contract, his right to follow a legitimate vocation untrammelled by unnecessary regulations, as it does to the freedom of arrest or restraint of his person. This subject has received recent consideration by this court, and it is unnecessary to do more than refer to *Ex parte Dickey*, 144 Cal. 234, 77 P. 924, 66 L.R.A. 928, 103 Am.St. Rep. 82 [1 Ann.Cas. 428].

"Putting out of contemplation, therefore, the fundamental right of the government to subject private property to taxation and to take such property in time of public calamity and peril, the right of the state to impose burdens upon such property where the business is legitimate and innocuous, in other words, to regulate harmless vocations, is found in the police power alone. *Young v. Commonwealth* [101 Va. 853] 45 S.E. 327; *Holden v. Hardy*, 169 U.S. 366, 18 S.Ct. 383, 42 L.Ed. 780. The police power, deriving its existence from the rule that the safety of the people is

the supreme law, justifies legislation upon matters pertaining to the public welfare, the public health, or the public morals. Cooley on Constitutional Limitations (7th Ed.) p. 837; *Ruhrstrat v. People*, 185 Ill. 133, 57 N.E. 41, 49 L.R.A. 181, 76 Am.St. Rep. 30. But the Legislature, under the guise of police regulations, cannot enact laws which do not pertain to one or the other of these objects, and which impose onerous and unnecessary burdens upon business and property. By this court it has been said (*Ex parte Whitwell*, 98 Cal. 73, 32 P. 870, 19 L.R.A. 727, 35 Am.St. Rep. 152): 'But it is not true that, when this power is exerted for the purpose of regulating a business or occupation which in itself is recognized as innocent and useful to the community, the Legislature is the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizen to pursue such business or profession. As the right of a citizen to engage in such a business or follow such a profession is protected by the Constitution, it is always a judicial question whether any particular regulation of such right is a valid exercise of legislative power. * * * This principle is stated very forcibly in the case of *Mugler v. Kansas*, 123 U.S. 623, 661, 8 S.Ct. 273, 31 L.Ed. 205, in the following language: "The courts are not bound by mere forms, nor are they to be misled by mere pretense. They are at liberty—indeed, are under a solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."'

In the case of *Adair v. United States*, 208 U.S. 161, 28 S.Ct. 277, 279, 52 L.Ed. 436, 13 Ann.Cas. 764, the Supreme Court of the United States had before it the question of the validity of an act of Congress which prohibited certain employers from discharging employees for specified causes. That court said: "The first inquiry is whether the part of the 10th section of the act of 1898 upon which the first count of the indictment was based is repugnant to the 5th Amendment of the

Constitution, declaring that no person shall be deprived of liberty or property without due process of law. In our opinion that section, in the particular mentioned, is an invasion of the personal liberty, as well as of the right of property, guaranteed by that Amendment. Such liberty and right embrace the right to make contracts for the purchase of the labor of others, and equally the right to make contracts for the sale of one's own labor; each right, however, being subject to the fundamental condition that no contract, whatever its subject-matter, can be sustained which the law, upon reasonable grounds, forbids as inconsistent with the public interests, or as hurtful to the public order, or as detrimental to the common good. This court has said that 'in every well-ordered society, charged with the duty of conserving the safety of its members, the rights of the individual in respect of his liberty may, at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.' *Jacobson v. Massachusetts*, 197 U.S. 11, 29, 25 S.Ct. 358, 362, 49 L.Ed. 643, 651 [3 Ann.Cas. 765], and authorities there cited. Without stopping to consider what would have been the rights of the railroad company under the 5th Amendment, had it been indicted under the act of Congress, it is sufficient in this case to say that, as agent of the railroad company, and, as such, responsible for the conduct of the business of one of its departments, it was the defendant Adair's right—and that right inhered in his personal liberty, and was also a right of property—to serve his employer as best he could, so long as he did nothing that was reasonably forbidden by law as injurious to the public interests. It was the right of the defendant to prescribe the terms upon which the services of Coppage would be accepted, and it was the right of Coppage to become or not, as he chose, an employee of the railroad company upon the terms offered to him. Mr. Cooley, in his treatise on Torts, p. 278, well says: 'It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice. With his reasons neither the public nor third persons have any legal concern. It is also his right to have business relations with anyone with whom he can make contracts, and, if he is

wrongfully deprived of this right by others, he is entitled to redress.”

In the case of *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 541, 49 L.Ed. 937, 3 Ann.Cas. 1133, in which a law involving hours of labor was involved, the Supreme Court of the United States said: “The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution. *Allgeyer v. Louisiana*, 165 U.S. 578, 17 S.Ct. 427, 41 L.Ed. 832. Under that provision no state can deprive any person of life, liberty, or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each state in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated, and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals, and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the state in the exercise of those powers, and with such conditions the 14th Amendment was not designed to interfere. *Mugler v. Kansas*, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205; *In re Kemmler*, 136 U.S. 436, 10 S.Ct. 930, 34 L.Ed. 519; *Crowley v. Christensen*, 137 U.S. 86, 11 S.Ct. 13, 34 L.Ed. 620; *In re Converse*, 137 U.S. 624, 11 S.Ct. 191, 34 L.Ed. 796.”

[1] It thus appears that it is thoroughly established that the right to contract, the right of the employer to hire labor, and the right of the employee to sell his labor, is thoroughly protected by the Federal and State Constitutions and may not be abridged except under the police powers of the state. These powers are restricted to those acts which promote the public health, safety, morals, and general welfare of the people. *Miller v. Board of Public Works*, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479. It remains for us to decide whether the prohibition of contracts such as we have here involved promote any such purposes. It would seem too obvious for argument that such contracts cannot affect either the public health, safety, or

morals. The matter of the general welfare may be a closer question.

The right to contract is a right included in the right to acquire and possess property and enjoy the freedom of action which is guaranteed by the fundamental law of our land. The right to labor and enjoy the fruits of toil is a right which is part of liberty itself guaranteeing to each man that he may sell his labor in an open market and upon the best terms he can obtain, subject only to the restriction that this right must not be exercised in such a manner that it conflicts with the public welfare or is injurious to the public health, safety, or morals. Speaking on this subject, Mr. Cooley in his *Constitutional Limitations*, said (393): “The man or the class forbidden the acquisition or enjoyment of the property in the manner permitted the community at large would be deprived of liberty in particulars of primary importance to his or their pursuit of happiness.”

[2] Under the contract here in question, the wages became due when the money from the sales of lumber was received and in such amounts as could be paid from such receipts. We can see no way in which the general welfare of the people of the state or of any community of the state could be injured by permitting the partnership and its employees to enter into a contract of employment whereby the employees would be paid a fixed compensation for each hour of labor, to be paid out of proceeds derived from the sale of the product of that labor when and as fast as such proceeds were received by the employer.

It is stated that the partnership did not have sufficient funds with which to operate if regular bimonthly pay rolls had been maintained. This was disclosed to the employees, so there was no concealment or fraud on the part of the employer, and the contract was freely and voluntarily entered into and honestly carried out. Thus employment was furnished to several men who otherwise might have remained idle. This was a result greatly to be desired under the conditions prevailing during the early part of that year. Increasing employment was then a major objective of government as well as of industry. Anything that could honestly assist in accomplishing this purpose was strictly in accord with the public policy prevailing at that time. We cannot conceive how the con-

tract in question could be regarded as being injurious to the general welfare. That being true, the statute could not take away from the employer and employee the right to specially contract for labor and fix the time and manner of payment of wages.

The Supreme Court of Illinois had occasion to pass on a contract between an employer and employee which ran contrary to a statute which required certain corporations to pay their employees weekly. That case arose during the depression of the 1890's, and, owing to similar conditions prevailing then and in 1935, the reasoning is particularly applicable here. In the case of *Braceville Coal Co. v. People*, 147 Ill. 66, 35 N.E. 62, 64, 22 L.R.A. 340, 37 Am.St.Rep. 206, the court said: "It is a matter of common knowledge that a large number of manufactories were shut down because of the stringency in the money market. Employers of labor were unable to continue production for the reason that no sale could be found for the product. It was suggested in the interest of employers, as well as in the public interest, that employees consent to accept only so much of their wages as was actually necessary to their sustenance, reserving payment of the balance until business should revive, and thus enable the factories or workshops to be open and operated with less present expenditures of money. Public economists and leaders in the interest of labor suggested and advised this course. In this state, and under this law, no such contract could be made. The employee who sought to work for one of the corporations enumerated in the act would find himself incapable of contracting as all other laborers in the state might do. The corporations would be prohibited entering into such a contract, and, if they did so, the contract would be voidable at the will of the employee, and the employer subject to a penalty for making it. The employee would, therefore, be restricted from making such a contract as would insure to him support during the unsettled condition of affairs, and the residue of his wages when the product of his labor could be sold. They would, by the act, be practically under guardianship; their contracts voidable, as if they were minors; their right to freely contract for and to receive the benefit of their labor, as others might do, denied them."

We are of the opinion that under the facts of this case and the contract between the employer and employee, and in the absence of fraud, deceit, or oppression, the employer was not required to maintain regular bimonthly paydays nor to post a notice for such paydays, and that the provisions of the Semimonthly Pay Day Law are not applicable here. Counsel for petitioner earnestly argues that some of the provisions of that law are unconstitutional. Under the view we take of the case, we are not required to decide those questions nor to proceed any further than we have gone in the decision of this case.

It is ordered that petitioner be discharged and his bail exonerated.

We concur: BARNARD, P. J.; JENNINGS, J.



12 Cal.App.2d 360

POLK v. WEINSTEIN et al.

Civ. 9958.

District Court of Appeal, First District, Division 2, California.

March 11, 1936.

Rehearing Denied April 10, 1936.

Hearing Denied by Supreme Court
May 7, 1936.

1. Automobiles Ⓒ245(79)

Automobile driver, injured in collision with approaching truck, *held* not contributorily negligent, as matter of law, in driving 25 feet from right edge of highway in violation of statute; such act being enacted for benefit of motorists traveling in same direction (St. 1931, p. 2124, § 122 (b)).

2. Automobiles Ⓒ245(79)

Whether driver of automobile, colliding with approaching truck, failed to use degree of ordinary care commensurate with danger to be avoided, *held* for jury, in view of conflicting testimony as to fog and distance from which she saw truck.

3. Automobiles Ⓒ246(24)

Instruction in action for injuries to automobile driver in collision with truck that motorist may assume that others will use ordinary care, but cannot omit any care demanded of him, *held* not erroneous as warranting inference that plaintiff had unqualified right to assume that truck driver would exercise ordinary care and positive right to act on such assumption in absence of contrary knowledge.

4. Trial ☞252(2)

Evidence in action for injuries to automobile driver in collision with approaching truck *held* not insufficient, as matter of law, to support instructions, given by court of its own motion, on subject of imminent peril.

5. Trial ☞255(11)

Instructions, given by court of its own motion, on subject of imminent peril in action for injuries to driver of automobile colliding with truck, *held* proper and necessary, in view of defendants' instructions as to plaintiff's duty to use reasonable care to avoid impending accident.

6. Negligence ☞140

Instruction that defendant's negligence must have been proximate cause of plaintiff's injury to impose liability on defendant *held* not erroneous in omitting word "sole" before "proximate cause."

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Rofena B. Polk against H. L. Weinstein and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Weinmann, Quayle & Berry, of Oakland, for appellants.

Elliott Johnson and Jesse E. Nichols, both of Oakland, for respondent.

STURTEVANT, Justice.

The defendants have appealed from a judgment awarding the plaintiff damages for injuries suffered in an automobile collision. The collision occurred between Livermore and Tracy on the highway at a point east of Altamont and almost in front of the Mountain House. The main highway in that neighborhood is an upgrade from west to east and is a gradual curve from left to right as one drives toward the east. To the right of the point of collision a hill rises toward the south. Scaling the map contained in the record, directly to the south the hill rises approximately 16 feet. Opposite the hill and extending to the north is a branch road which leads to Byron. Both east and west of the point of collision the highway consists of a strip of concrete pavement 15 feet wide. A white line divides the concrete pavement into two equal lanes. Immediately to the south of the concrete pavement at the point where the collision occurred is a strip of oiled macadam 12 feet wide. Immediately to the south of the strip last mentioned is a graveled shoulder 12

feet wide. The distance from the white line to the southerly edge of the graveled shoulder is a trifle over 31 feet.

At about 8 a. m. on December 20, 1934, the plaintiff was driving a Chevrolet car easterly. Her mother was seated on the front seat on the right-hand side. Her father was seated on the rear seat on the left-hand side. They were traveling at a speed estimated at between 20 and 25 miles an hour and were conceded to be in the right-hand lane. The plaintiff testified that she was two feet on the right-hand side of the white line. The testimony shows that the morning had been foggy. As to the exact condition at the time and place of the accident the testimony was conflicting. One witness testified that visibility was so cut down that moving cars could not be seen more than 50 or 60 feet away. The plaintiff testified that visibility ahead was not less than 200 feet. Others testified that the weather was clear. The defendant Jacob Weinstein was driving a truck loaded with 288 boxes of oranges which were stacked eight or nine boxes high, loose oranges scattered over the top rows of boxes, and the load covered with a canvas. He had left Los Angeles the night before and was going to Oakland. He had crossed the top of the mountain and was running down hill at a speed estimated at between 30 and 35 miles per hour. A negro laborer was riding with him. Shortly after the truck passed over the summit, Mr. Crump approached from the east driving his automobile from Modesto to Oakland. He followed the truck, a short distance to the rear, until the accident happened. The plaintiff testified that when she first saw the defendants' truck it was about 200 feet away, coming fast down the hill. As it approached her it seemed to her that defendants' right wheels were on the white line. She turned toward the right, but in her opinion she did not get more than one foot further to the right. As the truck continued to approach, it swerved slightly to its left, then to its right, but as the latter movement was executed the collision occurred.

On the diagram used at the trial, and a copy of which is contained in the transcript, the plaintiff indicated the position of her car when she first saw the truck. The distance between that point and the point of the collision appears to be about 90 feet. Mr. Crump testified that the hill so obscured his view that he did not see the Chevrolet until the moment of the impact. He marked on

the map where his car was at that time. The diagram shows that it was about 90 feet east of the point of the collision. In passing, it should be noted that the impact occurred at the very apex of the curve above mentioned. If the plaintiff saw the defendants' truck when it was 200 feet away, calculating the speeds above mentioned, the cars would meet in about two seconds. If she saw it when it was about 90 feet away the cars would meet in about one second. And if by reason of the fog or the obstruction of the hill, or both, she did not see it until it was 60 feet away, the cars would meet in less than one second.

[1] The defendants' first point is that the plaintiff was guilty of contributory negligence as a matter of law because she was driving her car at least 25 feet from the right-hand edge of the highway in violation of the provisions of section 122 (b) of the California Vehicle Act (St.1923, p. 557, as amended by St.1931, p. 2124). The same contention that these defendants make was made in the case entitled *Arundel v. Turk* (Cal.App.) 44 P.(2d) 383. On page 384 of 44 P.(2d) speaking of the provisions of the section now under consideration, the court said: "We believe, and we have been cited no authority to the contrary, that the section in question was enacted for the benefit of motorists traveling in the same direction." To the same effect see *Mauchle v. P.-P. Int. Exp. Co.*, 37 Cal.App. 715, 174 P. 400.

[2] The defendants then quote the plaintiff's testimony in which she estimated that the truck was 200 feet away when she first saw it, and continuing they point to the fact that she did not get her car more than three feet from the white line before the impact occurred, and they argue that she did not use that degree of ordinary care commensurate with the danger to be avoided and to protect herself from danger. That argument must be determined by a consideration of the presence of fog, its density, and of the distances described—all rested on conflicting testimony. If Mr. Crump did not see the Chevrolet until he was only 90 feet away from it because the hill obstructed his view, it is quite plain that the plaintiff could not see through the hill and see the truck when it was 200 feet away. In short, the whole subject-matter presented solely a question for argument before, and a question of fact for determination by, the jury rather than a question of law for the court.

[3] Among others the trial court gave an instruction as follows: "A motorist must at

all times use ordinary care to avoid colliding with another, and he must be alert and watchful so as not to place himself in danger, and while he may assume that others will use ordinary care, he cannot for that reason omit any of the care which the law demands of him." The defendants assert that the jury might fairly infer that Mrs. Polk had an unqualified right to assume that the driver of the truck would exercise ordinary care, and a positive right, qualified only to the extent that knowledge imparted to the contrary, to act upon the assumption that the driver of the truck would exercise ordinary care and obey the law. In reply to that argument, we think it is sufficient to state that the instruction did not contain any words having the meaning for which the defendants contend. The plaintiff's duty in the premises was fully and correctly stated in said instruction under attack and kindred instructions which were given.

[4, 5] Of its own motion the trial court gave two instructions on the subject of imminent peril. The defendants contend that there was no evidence in the record to support those instructions. From what we have quoted above, we think it is very clear it may not be said as a matter of law that there was not. Furthermore, defendants' instructions Nos. 1 and 2, which were given by the court, admonished the jury regarding the duty of the plaintiff to use reasonable care to avoid an impending accident. To those instructions no objection could be made. However, in connection with those instructions, those given by the court of its own motion were not only correct statements of the law, but rules very necessary in properly disposing of the issues before the jury.

[6] Of its own motion the trial court gave an instruction to the jury which was as follows: "In order to impose liability upon a defendant, his negligence must have been a proximate cause of the injury, and in order that a plaintiff's contributory negligence defeat plaintiff's recovery, such negligence must have contributed proximately to her injury." The defendants contend that the instruction should have read, "In order to impose liability upon a defendant, his negligence must have been the sole proximate cause, etc. * * *". The point has been decided against these defendants. *Griffith v. Oak Ridge Oil Co.*, 190 Cal. 389, 212 P. 913.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

12 Cal.App.2d 380

BLISS v. RICHARDSON, Superintendent of
Banks.
Civ. 5369.

District Court of Appeal, Third District,
California.

March 11, 1936.

1. Notaries ☞3

Evidence held to sustain judgment for notary who was also bank employee for fees for notary work performed which were impounded in special trust fund in bank.

2. Notaries ☞3

In action for fees of notary, who was also a bank employee, allegedly retained by failed bank in trust for notary, finding that agreement by implication existed whereby bank retained as its own property fees of notary held not in conflict with judgment for notary, in view of further finding that such agreement was void for want of consideration.

3. Notaries ☞3

Agreement whereby notary allowed failed bank to retain as its own property fees of notary held void for want of consideration, where notary whose salary was not increased performed notarial work in addition to services as bank employee, bank's customers and not bank paid the fees, and notary was informed that, when doing notarial work, he was not working for bank.

4. Notaries ☞3

Notary who was bank employee and held claim against failed bank upon special trust fund consisting of notary's fees did not waive claim by delivering to bank fees personally collected in conformance with bank rule.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Charles A. Bliss, Jr., against Friend W. Richardson, State Superintendent of Banks, substituted for Edward Rainey, as State Superintendent of Banks, and trustee in charge of the California Trust & Savings Bank in liquidation. From an adverse judgment, the defendant appeals.

Affirmed.

Sullivan, Roche, Johnson & Barry, of San Francisco, for appellant.

Charles A. Bliss, Sr., of Sacramento, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant, as state superintendent of banks, has appealed from a judgment which was rendered against him in a suit for notary's fees for services performed by the plaintiff at the request of California Trust & Savings Bank, which fees were paid to and retained by said bank in a trust fund, and determined to be the property of the plaintiff. The action is in the nature of assumpsit, for money belonging to the plaintiff had and received and retained in a trust fund of the bank, the assets of which bank are held in the control and possession of the state superintendent of banks by virtue of proceedings which are pending for the liquidation of the bank pursuant to law.

The cause was tried by the court sitting without a jury. Upon some conflict of evidence the court found all the material issues in favor of the plaintiff, and rendered judgment against the defendant for the sum of \$1,119.25. The court specifically found that for a long time prior to the appointment of the plaintiff as a notary public he was employed by California Trust & Savings Bank as a clerk in its trust department on an agreed salary of \$90 per month, and that said employment continued through the entire period which is involved in this action, all of which salary was fully paid; that prior to February 23, 1931, at the request and for the accommodation of the bank, it procured plaintiff's appointment as a notary public, without any valid agreement as to whom the legal fees which were paid on account of such notary services were to belong; that the plaintiff thereafter, from the date of his appointment as a notary to January 21, 1933, at the request of the bank, duly protested notes, checks, drafts, and trade acceptances, administered oaths and acknowledged written instruments as required by law, for which services the legal fees were paid by customers of the bank to the bank and deposited in a special separate trust fund therein, and retained by the bank in the aggregate sum of \$1,119.25, which belongs to the plaintiff, no part of which has been paid to him; that no demand was made upon the bank for this money until after the assets of the bank were taken possession of by the defendant in the proceeding now pending for the liquidation thereof, after which a duly itemized and verified claim therefor was presented for payment and rejected; and that the defendant now holds

in his possession said sum of money in trust for and belonging to the plaintiff. The court did further find that by his failure to demand payment of said fees for a period of nearly two years, and by personally collecting and turning over to the bank some of said fees, the plaintiff acquiesced in the bank retaining said money as its own property, but that the last-mentioned implied agreement was without consideration and void. Thereupon judgment was rendered in favor of the plaintiff for the sum of \$1,119.25, from which judgment the defendant has appealed.

It is contended the findings and judgment are not supported by the evidence, that the findings are in irreconcilable conflict, and that the plaintiff is estopped from claiming any portion of the notary fees by his conduct in personally collecting and paying to the bank a portion thereof and by failing for a period of nearly two years to demand payment thereof.

[1] We are of the opinion the findings and judgment are adequately supported by the evidence. During all of the time involved in this litigation, and for more than two years prior thereto, the plaintiff was employed by the California Trust & Savings Bank as a clerk in the savings department thereof, during all of which time he was engaged in the performance of clerical duties separate and distinct from his services as a notary public, on a stipulated salary of \$90 per month, which amount was never increased or changed, and which was paid monthly by checks inclosed in an envelope and left on his desk. In February, 1931, he was appointed as a notary at the request of the bank for its accommodation in aiding and expediting its notarial work for the benefit of customers separate and distinct from his duties as a clerk of the bank, the compensation for which was invariably paid by the customers and not by the bank; he was personally responsible for all damages for errors committed by him in his notarial services; his services as a notary did not interfere with the performance of his duties as a clerk; much of such services were performed by him outside of the bank after banking hours, and, when they were performed during banking hours, it was always with the consent and approval of his superior officer in the bank; it was a rule of the bank that moneys paid incident to all banking transactions should be deposited in the bank, and that notary fees thus paid should be and were impounded in a special trust fund maintained for

that purpose; several of the clerks of the bank were permitted to and did perform services outside of the bank in keeping books for other individuals and enterprises for which they charged, collected, and retained their fees. Mr. Wilbur D. Polk had charge and supervision of the clerks and the bookkeeping of the trust department of the bank. He testified that the plaintiff "took over the duties, the notarial work, to assist myself and Mr. Blair in handling some of that work." In response to a question: "Did you ever have any understanding with him when he was appointed a notary public? * * *" he replied: "A. No, just a general understanding. * * * The Court: Q. When he was appointed there was no agreement made? A. No. * * * I presumed it was understood." The plaintiff testified that no agreement was ever made with the bank that the notary fees were to belong to it, and that no statement to that effect was ever made to him by any officer of the bank. In response to the question propounded by the court, "When he was appointed [as notary] there was no agreement made?" Mr. Polk replied, "No." Furthermore, Mr. Polk testified that "I recollect a conversation had with him [the plaintiff] to the effect that when he was acting in the capacity of a notary public that he was not working for the bank. * * * [That] he was working as a notary public and in that capacity entirely and not as an employee of the bank when doing that work." The last statement infers that the plaintiff was deemed to be working for himself in the performance of his duties as a notary public, and that he would be entitled to the fees allowed by law therefor. Upon the preceding testimony, the court would have been justified in finding that there was no agreement that the bank was to own the fees collected by the plaintiff for his notary services. In effect that is what the court found. Those fees were in fact impounded in a special trust fund, and the court properly determined that they belong to the plaintiff. The findings and judgment to that effect are adequately supported by the evidence.

There is nothing in the case of *Second National Bank of Ashland v. Ferguson*, 114 Ky. 516, 71 S.W. 429, 430, upon which the appellant relies, in conflict with what we have heretofore said. In that case Ferguson was acting as bookkeeper for the bank. He was also a notary public, and by consent of the bank he had been retaining his notary fees for protesting instruments for

the bank. His salary was reduced. A resolution of the board of directors of the bank was regularly adopted, which provided that "the salary of the individual bookkeeper be fixed at the rate of \$600 per annum, and he shall make all protests free of charge." This resolution and the specified terms of his future employment were known to the clerk. He made a counter proposition to continue working for \$50 per month and \$10 in addition thereto in lieu of notary fees. This was rejected. He continued to work for the bank for some time. When he resigned from his clerkship, he brought suit for the aggregate amount of notary fees which accrued since the change in his salary occurred. Judgment was rendered in favor of Ferguson. On appeal, the judgment was properly reversed, for the reason that the evidence refutes the possibility that the clerk and the bank had an agreement that he should retain any part of his notary fees. The undisputed evidence showed that no such agreement existed.

For similar reasons the case of McNulty v. Kansas City, 201 Mo.App. 562, 198 S.W. 185, 186, upon which the appellant in this case also relies, is not authority in his favor. The judgment which was awarded McNulty for notary fees earned while he was also acting as a clerk for the treasurer of Kansas City was reversed, for the reason that the clerk had specifically agreed to serve as such for a specified salary and waive all notary fees. The court said in that regard: "Not only did plaintiff make an express agreement to waive his notary fees, and accept a stipulated salary in full for all his services including those of a notarial character," but his conduct also implied that he waived the fees. In the present case there was no express agreement to waive the fees. Moreover, the court found that the implied agreement to that effect was void for lack of consideration. These cases are therefore not authority in support of the appellant's contention that the law implies a waiver of the fees, for the reason that they were not demanded for a period of some two years.

[2,3] Nor are the findings in irreconcilable conflict with the reason that the court determined that the plaintiff's failure to demand of the bank the impounded fees for

a period of nearly two years constitutes an agreement "by implication" that the fees belong to the bank. The court in fact specifically found that this agreement which was assumed to have arisen by implication was void for lack of consideration. It follows that, since a void agreement, in effect, is no agreement, the court virtually found that no such valid agreement exists. The judgment in favor of the plaintiff was rendered on the findings and theory that there was no valid agreement for the bank to retain the notary fees. These findings are supported by the evidence. There is no evidence that there was any consideration for an implied agreement on the part of the plaintiff that the bank should retain his notary fees. He performed the notarial work in addition to his services as a clerk in the trust department. He was responsible on his bond for any dereliction of his duties as a notary public. The fees were not paid by the bank, but by customers of the bank. He continued to perform his duties as a clerk of the trust department exactly as he had done prior to his appointment as a notary public. These duties were added to his services as a clerk, without increasing his salary. He was not told that the fees would belong to the bank. On the contrary, he was specifically informed that, when he was performing duties as a notary public, he was not deemed to be working for the bank. There was no consideration for an agreement for the bank to retain the notary fees allowed by law for the performance of such services by the plaintiff.

[4] The plaintiff did not waive his claim upon the special trust fund for the return of his notary fees by voluntarily delivering to the bank a portion of his notary fees which he personally collected. This may be deemed to have been done to conform to the rule of the bank that all money paid to any officer of the bank incident to bank transactions should be paid to it and deposited in the special fund so that the bank might retain a complete history of all such transactions.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

**FIRST NAT. BANK OF SANTA ANA v.
KINSLOW et al. ***
Civ. 1537.

District Court of Appeal, Fourth District,
California.

March 9, 1936.

Hearing Granted by Supreme Court
May 7, 1936.

**1. Constitutional law ☞309(1)
Execution ☞184**

Statutory proceeding to determine title to property levied upon which was claimed by third parties *held* not to deprive claimants of their property without due process of law on ground that requirements for notice were insufficient, where statute provided that ten days' notice of hearing must be given to all interested parties (Code Civ.Proc. § 689, as amended by St.1933, p. 1887, § 135; Const.U.S. Amend. 14; Const.Cal. art. 1, § 13).

2. Constitutional law ☞310

Statute providing for determination of title to property levied upon which was claimed by third parties *held* not violative of due process clause in failing to provide same forms of pleading as in other actions, where adequate notice to claimants was provided for, since application for such hearing was sufficient pleading to bring matter before court (Code Civ.Proc. § 689, as amended by St.1933, p. 1887, § 135; Const.U.S. Amend. 14; Const.Cal. art. 1, § 13).

3. Constitutional law ☞305

Parties to action have no vested right in certain form of procedure except as given by statute, and Legislature may change procedure so long as minimum requirements of due process clauses are complied with (Const. U.S. Amend. 14; Const.Cal. art. 1, § 13).

4. Jury ☞13(1)

Constitutional guaranty of right to jury trial has no application to equity cases (Const. art. 1, § 7).

5. Jury ☞13(5)

Where legal issues are merely incidental to equitable relief sought, parties are not entitled to jury (Const. art. 1, § 7).

6. Jury ☞13(7)

Parties to fraud case involving application of equitable doctrines and granting of equitable relief are not entitled to jury (Const. art. 1, § 7).

7. Jury ☞13(7)

Statute providing for determination of title to property levied upon which was claimed by third parties *held* not unconstitutional as depriving claimants of right to jury trial, since proceeding involved application of eq-

uitable doctrines to fraud case (Code Civ. Proc. § 689, as amended by St.1933, p. 1887, § 135; Const. art. 1, § 7).

8. Jury ☞19(1)

Right to jury trial does not exist in cases where right did not exist at common law, and jury may not be demanded in special proceedings unless right thereto is given by statute (Const. art. 1, § 7).

9. Execution ☞192

In proceeding to determine title to property levied upon which was claimed by third parties, petition alleging entry of judgment, issuance and levy of execution, filing of third party claim, and that judgment-debtor purported to convey property involved to third party claimants without valuable consideration in contemplation of insolvency while owing judgment creditor, *held* not demurrable (Code Civ.Proc. § 689, as amended by St.1933, p. 1887, § 135).

10. Fraudulent conveyances ☞61

Where one who is insolvent or who acts in contemplation of insolvency voluntarily transfers property without valuable consideration, no other intent to defraud creditors need be shown, since such transfer is void as to existing creditors (Civ.Code, § 3442).

11. Fraudulent conveyances ☞61

Insolvency of transferor is in itself conclusive of fraudulent intent, and inference of fraud arises where one transfers property knowing that he has no other property with which to satisfy creditors (Civ.Code, § 3442).

12. Execution ☞194(2)

In proceeding to determine title to property levied upon which was claimed by third parties, judgment roll in original action against judgment debtor which had not yet become final *held* admissible to show right of judgment-creditor to attack transfer of property (Code Civ.Proc. § 689, as amended by St. 1933, p. 1887, § 135).

13. Fraudulent conveyances ☞225

Evidence that judgment-debtor transferred property because of suggestion of judgment-creditor's officers *held* insufficient to estop judgment-creditor from claiming that such transfer was fraudulent (Code Civ.Proc. § 689, as amended by St.1933, p. 1887, § 135).

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Suit by the First National Bank of Santa Ana against Lenora E. Kinslow, defendant, and Walter T. Kinslow and another, third party claimants. Judgment for plain-

tiff, and defendant and third party claimants appeal.

Affirmed.

Arthur Koepsel, of Santa Ana, for appellants.

Forgy, Reinhaus & Forgy, of Santa Ana (A. M. Bradley, of Santa Ana, of counsel), for respondent.

BARNARD, Presiding Justice.

In an action based upon certain promissory notes the plaintiff, on February 17, 1934, secured a judgment against the defendant, which was later affirmed on appeal. 2 Cal.App.(2d) 456, 38 P.(2d) 163. On August 21, 1933, the defendant had conveyed certain real property to her two sons; the consideration named in the deed being love and affection. On March 27, 1934, an execution was issued upon said judgment and levied upon the property so conveyed. The grantees in the deed referred to filed a third party claim describing the property and demanding that it be released from the execution. Plaintiff filed a petition under section 689 of the Code of Civil Procedure, as amended by St.1933, p. 1887, § 135, praying that the court set a time for hearing and proceed to determine the question of title thus raised by the third parties. The court made an order setting the same for hearing on May 3, 1934, at 9:30 a. m. in department 1 of the superior court of Orange county. Notice of this hearing and copies of the petition and order were served upon the defendant and the third party claimants. These parties filed a demurrer to the petition, and, after the court had sustained an objection to the hearing of said demurrer, filed answers to the petition. The matter came on for hearing, and, in addition to other evidence introduced by the plaintiff, the defendant testified that she had no property; that at the time she deeded this property to her sons it was the only property she owned; that when she deeded it to them she had nothing left; and that she received nothing for the deed.

The court made its findings and conclusions of law in all respects in favor of the plaintiff and entered a judgment decreeing that the transfer of the property from the defendant to the third party claimants was made by the defendant voluntarily, without a valuable consideration and in contemplation of insolvency, and that the same was and is fraudulent and void as to the plain-

tiff, who was an existing creditor of the defendant at the time the transfer was made. It was then decreed that title to the property is in the defendant and that neither of the third party claimants has any right, title, or interest therein. From this judgment, the defendant and third party claimants have taken this appeal.

[1] Appellants' main contention is that the proceeding to determine title provided by section 689 of the Code of Civil Procedure, as amended in 1933 (St.1933, p. 1887, § 135), is unconstitutional and void as depriving them of their property without due process of law, in violation of the Fourteenth Amendment to the Federal Constitution and section 13 of article 1 of the State Constitution. In this behalf it is urged that the proceeding is of a summary nature; that no pleadings are provided for; that the right of trial by jury is denied; and that the section does not provide or require that the third party claimant be given notice of the time, place, and court where the hearing will be had.

Appellants' claim that section 689 deprives them of due process of law seems to be mainly based upon the contention that the requirement for notice contained in the section is fatally defective. It is argued that the notice required need not specify the time, place, or court in which the hearing will be had, that nothing is required except a statement that the purpose of the hearing is to determine title to the property in question, and that a notice which failed to state the time or place of the hearing and in what court it was to be held would comply with the section. We are unable to accept this narrow interpretation of the statute. The section plainly provides that ten days' notice of such hearing must be given to all parties claiming an interest in the property or to their attorneys. Ten days' notice of such a hearing cannot be given without giving notice of the time and place where the hearing will be held. We think a requirement that notice of the time and place of hearing be given not only follows by necessary implication from the language of the section (Paulsen v. City of Portland, 149 U.S. 30, 13 S.Ct. 750, 37 L.Ed. 637), but that, under the only reasonable interpretation of the language used, the statute directly provides for such a notice.

[2, 3] We are unable to see how this statute violates the due process clause of

the Constitution by failing to provide for the same forms of pleading and the same rules of pleading which are provided in certain other forms of action. So far as material here, the only essential requirements of due process of law would be notice of the time and place of hearing and of the matter to be determined. There is no vested right in any certain form of procedure except as this is given by statute, and the Legislature has the power to change the procedure in a particular instance so long as the minimum requirements of the due process clauses of the Constitution are complied with. Under this statute here in question the parties claiming an interest in the property are accorded their day in court upon adequate notice both as to the time and place of the hearing and the matter to be determined. The application or petition for such a hearing, while it may not technically be denominated a pleading, is sufficient to bring the matter before the court and may be considered a pleading for this purpose. Whether or not the third party claimants file an answer, they must be heard in opposition to the claims of the other party with respect to the title of the property. In the instant case the appellants filed an answer and appeared at the hearing, and the issue between the parties was clearly presented.

[4-8] It is further urged that the section under consideration deprives the appellants of the right to a trial by jury (Const. art. 1, § 7). It is well settled that the constitutional guaranty of the right to trial by jury has no application in cases coming within the equity jurisdiction of the court. *Ballou v. Avery*, 175 Cal. 641, 166 P. 1003. There is no right to a jury where the gist of the action is the enforcement of some right which is cognizable only in equity. *Moore v. Copp*, 119 Cal. 429, 51 P. 630. A similar situation prevails where the legal issues are merely incidental to the relief sought which, in the main, is equitable in nature. *Schaefer v. United Bank & Trust Co.*, 104 Cal.App. 635, 286 P. 723. Where a fraud case involves the application of doctrines of equity and the granting of relief which can be granted only in a court of equity, the parties are not entitled to a jury. *Fish v. Benson*, 71 Cal. 428, 12 P. 454. This is the situation here, where the third party claimants held the legal title to the land in question and where the respondent was attempting to subject their

title to the equitable lien of its judgment. It is also well settled that no right to trial by jury exists in cases where the right did not exist at common law, and that a jury may not be demanded in special proceedings unless the right thereto is given by statute. *Gregory v. Hecke*, 73 Cal.App. 268, 238 P. 787; *Hutchison v. Reclamation District No. 1619*, 81 Cal.App. 427, 254 P. 606.

We conclude that section 689 is not unconstitutional for any of the reasons here urged.

[9-11] The appellants next argue that the court erred in sustaining an objection to a hearing on a demurrer filed by them and in overruling an objection to the introduction of any evidence. These points are based on the contention that a number of allegations in the petition are merely conclusions of law and that an intent to convey the property to defraud creditors is not sufficiently alleged. Without deciding whether all of the rules of pleading are applicable in a case of this character, we think the petition was sufficient to raise the desired issue in this proceeding. The appellants did not stand upon their demurrer, and filed an answer which squarely met the issue presented by the respondent. Among other things, the petition or application alleged the entering of the judgment; that execution was issued and levied on this real property; that a third party claim was filed by these claimants, said claim being attached and made a part thereof; that the judgment-debtor is the owner of the property; that the judgment-debtor purported to convey the property to the third party claimants; that this transfer was made and given voluntarily and without a valuable consideration; that the same was made by the judgment-debtor in contemplation of insolvency; that the same was fraudulent and void as against the judgment-debtor; and that the respondent was an existing creditor of the judgment-debtor at the time the conveyance was made. It is urged that an attempt to defraud was not sufficiently alleged in the petition. It was alleged that the transfer was made without a voluntary consideration and in contemplation of insolvency, at a time when the respondent was an existing creditor of the judgment-debtor. Similar allegations were held to be a sufficient allegation of intent in *Sewell v. Price*, 164 Cal. 265, 128 P. 407. Under section 3442

In re SOMERVILLE'S ESTATE.

L'HOMMEDIEU v. JOHNSON, Public Adm'r.
Civ. 10084.

District Court of Appeal, First District, Division 1, California.

March 13, 1936.

Hearing Denied by Supreme Court
May 4, 1936.

of the Civil Code, a voluntary transfer of property without a valuable consideration by one who is insolvent or who acts in contemplation of insolvency is void as to existing creditors and no other intent to defraud creditors need be shown. *Gray v. Brunold*, 140 Cal. 615, 74 P. 303; *Lefrooth v. Prentice*, 202 Cal. 215, 259 P. 947. Insolvency is in itself conclusive of fraudulent intent (*Allee v. Shay*, 92 Cal.App. 749, 268 P. 962), and an inference of fraud arises where one transfers property at a time when he knows he has no other property with which to satisfy creditors (*Schwartz v. Brandon*, 97 Cal.App. 30, 275 P. 448). Under the circumstances here appearing, we see no error in the rulings complained of, and the court found that the conveyance was made in contemplation of insolvency, that the defendant, after making said conveyance, became insolvent by reason of said conveyance, and that the conveyance was therefore fraudulent and void as against the plaintiff.

[12] It is next urged that the court erred in permitting the respondent to introduce in evidence the judgment roll in the original action, since the judgment against *Lenora E. Kinslow* was not at that time final. This proceeding is similar in nature to a creditor's bill. *Gilbank v. Benton* (Cal.App.) 50 P.(2d) 815. We think it is sufficiently settled that in such a proceeding as this a judgment may be introduced in evidence for the purpose of showing the right of the judgment-creditor to attack a transfer of property which prevents his enjoyment of the judgment although the same has not yet become final. *Sewell v. Price*, supra; *Rossen v. Villanueva*, 175 Cal. 632, 166 P. 1004; *Thomas v. Lavery*, 125 Cal.App. 666, 14 P.(2d) 158.

[13] Some contention is made that the respondent is estopped from attacking the validity of the transfer here in question. This is based upon certain testimony given by *Lenora E. Kinslow* to the effect that one of the officers of the respondent advised her to make this deed to her sons and that she made the deed as a result of his suggestion. This testimony was contradicted by the officer in question, and the court has found against the appellants on conflicting evidence.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

1. Executors and administrators ⇨17(7)

Nominee of person entitled to priority in appointment to administer an estate has no greater right than person entitled (Probate Code, §§ 422, 423).

2. Descent and distribution ⇨45

Testator must make valid disposition of his property in order to destroy right to succeed.

3. Charities ⇨20(3)

Associations formed for charitable objects, whether incorporated or not, are capable of taking bequests.

4. Wills ⇨466

Words "a dog" used in holographic will directing purchase of a dog for home for blind could be applied to mean the purchase of several dogs where intent to leave entire estate to home for the blind was clear.

5. Charities ⇨31

Where general intention of testator to create charity appears from will, courts, in dealing with ambiguous residuary clause, will lean in favor of broad rather than restricted construction.

6. Charities ⇨31

Where the intention appears, the general charitable purpose of the testator will be carried out.

7. Charities ⇨35

Where holographic will expressly stated that none of testator's relatives except his wife should partake in his estate, and contained provision that if wife should predecease testator he wished to buy "a dog" for the home for the blind, and testator's wife predeceased him, home for blind held entitled to testator's entire estate as against contention that testator's sister was entitled to residuary estate for failure of testator to name residuary legatee.

Appeal from Superior Court, Contra Costa County; *Thomas D. Johnston*, Judge.

Proceeding in the matter of the estate of *David R. Somerville*, deceased, wherein *William P. L'Hommedieu* applied for letters of administration. From an order

granting Raymond P. Johnston, Public Administrator of Contra Costa County, letters of administration with will annexed, and denying petitioner's application, the petitioner appeals.

Order affirmed.

Clarence De Lancey, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and J. E. Rodgers and W. L. Wollitz, both of Martinez (Elvera E. Wollitz, of Reno, Nev., of counsel), for respondent.

PER CURIAM.

Appeal from an order granting the public administrator of Contra Costa county letters of administration with the will annexed of the above estate, and denying the petition of the nominee of the surviving sister of decedent for letters.

The material part of the will is as follows: "This is a Will the first & Let us hope the last one. In writing this the object is to stop any of my relatives from getting a cent of my small estate. I want it to go to my wife Frieda. I quote here especially I do not want my sister to have one dime of my money in the past twenty years she has had enough, without repaying if my wife does not get it my wish is to buy a dog for the Blind Home on Telegraph Ave. Oakland."

Decedent's wife predeceased him, and there was left surviving a sister, Anne C. L'Hommedieu, who is heir at law. The latter nominated her husband as administrator of the estate, and he has appealed from the order mentioned.

Appellant claims that the will names no residuary legatee and that consequently the sister is entitled to succeed to the residuary estate notwithstanding the attempt of the deceased to disinherit her, for which reason it was error on the part of the court to refuse to appoint her nominee as administrator.

A brother or sister entitled to succeed is entitled to administer (Probate Code, § 422, subd. 5), and administration may be granted to one or more competent persons, although not otherwise entitled, at the written request of one who is entitled (Probate Code, § 423). This section also provides that "If the person making the request is a child, parent, brother or sister of the decedent, the nominee shall have priority next after those in the class of the person making the request; otherwise the

court, in its discretion, may appoint either such nominee or a person of a class subsequent in rank to that of the person making the request."

The section plainly gives priority to a competent nominee of a child, parent, brother, or sister of a decedent over persons in subsequent classes; and it is only as to the latter classes that the court may in its discretion appoint either a nominee or a person of a class subsequent in rank to that of the person making the request. It is not contended that the appellant is not otherwise competent to act; and if decedent's sister is entitled to succeed to the residue of the estate, the court erroneously granted letters to the public administrator.

[1-5] A relative is entitled to priority in appointment only when entitled to succeed to the estate or some portion thereof (Probate Code, § 422); and a nominee as such can have no greater right than the person entitled (In re Estate of Myers, 9 Cal. App. 694, 100 P. 712; In re Estate of Connick, 189 Cal. 498, 209 P. 356). However, to destroy the right to succeed a testator must do more than evince an intention to disinherit; he must make a valid disposition of his property. In re Estate of Walkerly, 108 Cal. 627, 41 P. 772, 49 Am.St. Rep. 97; In re Estate of Fritze, 85 Cal.App. 500, 259 P. 992. There appears to be no question as to the identity of the body designated by the testator as trustee, namely, the Blind Industrial Home for Adults in Oakland, Cal. Associations formed for a charitable object, whether incorporated or not, are capable of taking bequests of this character (In re Estate of Winchester, 133 Cal. 271, 65 P. 475, 54 L.R.A. 281; In re Estate of Irwin, 196 Cal. 366, 237 P. 1074; In re Estate of McDole, 215 Cal. 328, 10 P.(2d) 75); nor does it admit of question that specially trained dogs are now furnished to and used by the blind. While the testator directs the purchase of "a dog," a word importing the singular number only may in cases of this character be applied to several persons or things as well as to one person or thing. *Dunn v. Cory*, 56 N.J.Eq. 507, 39 A. 368; *Thrasher v. Ballard*, 35 W.Va. 524, 527, 14 S.E. 232. The question is one of intention, to be collected from the language of the whole will; and where the general intention of the testator to create a charity appears therefrom, the courts, in dealing with an ambiguous residuary clause, will lean in

favor of a broad rather than a restricted construction. *Lamb v. Lamb*, 131 N.Y. 227, 30 N.E. 133.

[6,7] The will was holographic and drawn by a person unskilled in the use of legal terms; but notwithstanding the uncertainty created by the use of a word importing the singular number, when it is considered that the testator wished to exclude all his relatives except his wife from participation in his estate, enough was said to show beyond reasonable question the general intention that the residue should be applied to the charity mentioned. Where the intention appears, the general charitable purpose of the testator will be carried out (In re Estate of Peabody, 154 Cal. 173, 174, 97 P. 184); and the rule applies to a surplus as well as where there is a deficiency in the fund (*American Academy of Arts & Sciences v. President, etc., of Harvard College*, 12 Gray [Mass.] 582; *Attorney General v. Rector, etc., of Trinity Church*, 9 Allen (91 Mass.) 422; *Society, etc., v. Attorney General*, 135 Mass. 285; *Camp v. Presbyterian Society*, 105 Misc. 139, 173 N.Y.S. 581). The record is silent as to what evidence, if any, respecting the circumstances under which the will was drawn, the value or condition of the estate, or other facts adduced at the hearing; but we are satisfied the construction given to the will by the probate court was correct that the testator made a valid disposition of his whole estate.

The order is affirmed.



12 Cal.App.2d 386

PARRA v. CLEAVER et al.
Civ. 1582.

District Court of Appeal, Fourth District,
California.
March 11, 1936.

1. Infants ⇐105

Under statute requiring minor's judgments exceeding \$500 to be paid to general guardian, neither minor nor guardian ad litem may receive payment and give valid satisfaction (Code Civ.Proc. § 1810b, as amended by St.1927, p. 530).

2. Infants ⇐114

Under statute requiring minor's judgments exceeding \$500 to be paid to general guardian, payment to attorney appointed by guardian ad litem held unauthorized, and hence, after general guardian's appointment, satisfaction of judgment could be set aside and execution issued (Code Civ.Proc. § 283; § 1810b, as amended by St.1927, p. 530).

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action by Jose Parra, an infant, by Manuel Parra, his guardian ad litem, against A. W. Cleaver and others. From an order setting aside a satisfaction of a judgment for plaintiff and permitting execution thereon, defendants appeal.

Affirmed.

Guss Hagenstein, of Fullerton, for appellants.

Frank J. Barry, of Los Angeles, and Carl M. Heim, of Santa Ana, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order setting aside a satisfaction of judgment and permitting the plaintiff to take out an execution.

The action was begun in 1927 through a guardian ad litem, the infant being then about two years of age. A judgment was entered against the defendant, from which he appealed. The guardian ad litem died in 1929, while the appeal was pending, and no other guardian of any kind was appointed. After the judgment had become final, and without knowledge of the death of the guardian ad litem, the defendant paid the full amount of the judgment to the attorneys who had acted for the plaintiff. These attorneys executed and acknowledged a satisfaction of judgment, which was filed on February 10, 1931. The amount so paid was embezzled by one of the attorneys for the plaintiff and never reached the estate of the minor. Subsequently, a general guardian of the person and estate of the minor was appointed and a motion was made which resulted in the order here appealed from.

The appellant, while conceding that the authority of an attorney is terminated by the death of his client, argues that in a case of this kind the attorney, although appointed by the guardian ad litem, acts

for the infant and not for the guardian who appoints him. It is then argued that, under such circumstances, the death of the guardian ad litem does not affect the authority of the attorney which, under section 283 of the Code of Civil Procedure, includes the authority to receive money and to satisfy a judgment.

Cases from other states may be found on both sides of the question whether such an attorney is to be considered as acting for the infant or for the guardian. In one case in this state it is stated that one so appointed "is the attorney of the guardian and not of the infant." *Emeric v. Alvarado*, 64 Cal. 529, 2 P. 418. Whether that is to be taken as the established rule in this state need not be here decided, as the matter here in controversy seems to be settled by statute. Section 1810b of the Code of Civil Procedure (as amended by St.1927, p. 530), as existing in February, 1931, and now included in the Probate Code, in addition to providing that all contracts for attorneys' fees for the benefit of minors are void and that all such fees must be fixed by the courts in which judgments are rendered, provides: "And if said judgment is for money and there is no general guardian for said minor, one shall be appointed by the court, and the entire amount of the judgment shall be paid to and cared for by such general guardian, under the control of the court; provided, where a minor has brought an action by a guardian ad litem and has recovered a money judgment not in excess of five hundred dollars, exclusive of costs, and the guardian ad litem is a blood relative of said minor, then by the approval of the court which rendered such judgment the whole of said judgment may be paid directly to such guardian ad litem without any bond being required therefor."

[1,2] The minor himself may not receive the money and give a valid satisfaction of judgment, and under this statute, this cannot be done by the guardian ad litem. The statute provides, except where the judgment is not in excess of \$500 and where the court has approved a different course, that the entire amount of the judgment must be paid to and cared for by a general guardian. Such a guardian may be appointed only under safeguards for the protection of a minor which are lacking in the case of a guardian ad litem. The very fact that this provision was originally placed in a section covering con-

tracts for attorneys' fees in actions in which minors were parties, indicates an intention on the part of the Legislature to avoid any possibility of attorneys attempting to deduct their fees from monies which had come into their hands by specifically providing that the entire amount of the judgment must be paid to a general guardian. The plain inference is that the money must not be paid to one who has been acting as attorney for a guardian ad litem. Under this statute the money may not be paid to the guardian ad litem, and we think it is equally true that it may not be paid to the attorney appointed by him, whether or not this attorney may be said to be specifically representing the infant. This attorney cannot be representing the general guardian, the only person authorized to receive the money, when such a guardian has neither been appointed nor qualified. This statute has the effect of limiting and superseding the general authority to receive money and satisfy judgments given to an attorney by section 283 of the Code of Civil Procedure. Had this guardian ad litem not died, the situation would have been the same.

The rule indicated by this Code section is in accord with the rule generally prevailing in other jurisdictions, although exceptions may be found. In 31 *Corpus Juris*, 1174, it is said: "It is generally held that a guardian ad litem or next friend of an infant in whose favor a judgment has been rendered is not authorized to receive the amount, or receipt for, discharge, or enter satisfaction of the judgment, nor can this be done by attorney of record, but that only a regularly qualified guardian of the infant can do so. And where there is a general guardian, no one but him or some person deriving authority from him can legally receive a (or) receipt for money due to the ward. The payment of the judgment to any person not authorized to receive it will not operate as a satisfaction thereof, and it will not be binding on the infant, who will continue to be entitled to execution on the judgment."

While this is one of those cases where a loss must fall upon one of two more or less innocent parties, in the last analysis this loss was caused by the failure of the appellant to comply with the statute governing the manner in which he might pay the money. This act was passed for the very purpose of protecting such an infant

from a number of situations, one of which is well illustrated by the facts in the present case.

The order appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.



12 Cal.App.2d 420

BANTA v. ROSASCO et al.
Civ. 5407.

District Court of Appeal, Third District,
California.

March 12, 1936.

1. Mortgages ¶282(1)

Grantee assuming mortgage is liable to mortgagee for payment thereof.

2. Principal and surety ¶147(1)

Creditor is entitled to benefit of all obligations or securities given by debtor to surety.

3. Mortgages ¶280(3)

Grantee's promise to assume mortgage may be oral and may be implied.

4. Mortgages ¶280(3)

Generally, grantee's promise to assume mortgage is implied where mortgage obligation is included in purchase price and retained by grantee.

5. Frauds, statute of ¶49

Where mortgage note was due on or before expiration of five years after its execution, promise by grantee about three years before such expiration to assume mortgage held not within statute, since debt could have been paid within year (Civ.Code, § 1624, subd. 1).

6. Frauds, statute of ¶49

Statute held to invalidate only oral promises which cannot be validly executed within year; possibility of performance within year being sufficient to satisfy statute (Civ.Code, § 1624, subd. 1).

7. Mortgages ¶559(2)

Statute requiring appraisal and governing deficiency judgments held inapplicable to antecedent mortgage (Code Civ.Proc. § 726).

8. Mortgages ¶559(2)

Statute forbidding deficiency judgment after sale under purchase-money mortgage held inapplicable to mortgage securing loan

and subsequently assumed by purchaser of mortgaged land (Code Civ.Proc. § 580b, as added by St.1933, p. 1673, § 5).

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Action by Edythe Banta, executrix of the will of Joseph Rosasco, deceased, against Charles Rosasco, A. T. Taecker, and others. Judgment for plaintiff, and the last-named defendant appeals.

Affirmed.

George F. Rankin, of Los Angeles, for appellant.

Rowan Hardin, of Sonora, for respondent.

LEMMON, Justice pro tem., delivered the opinion of the court.

Plaintiff, as executrix of the will of Joseph Rosasco, deceased, brought this action to foreclose a mortgage executed to Joseph Rosasco, to secure the payment of a promissory note in the sum of \$10,000. The note and mortgage were executed by the defendants Charles and Mary Rosasco, on August 20, 1927. Subsequently, and on August 10, 1929, A. T. Taecker purchased the property, the subject of the mortgage. From the decree of foreclosure which provides for the docketing of a judgment against Charles and Mary Rosasco and A. T. Taecker for any deficiency remaining after the sale of the mortgaged premises, Taecker alone prosecutes an appeal.

In the negotiations leading up to the purchase of the property by Taecker, he was represented by two real estate agents. These agents agreed orally that Taecker would assume and discharge the mortgage. Appellant contends, however, that there is no evidence that the agents were authorized to bind him in this regard.

[1-3] It is well settled that a grantee who assumes and agrees to pay the mortgage debt is liable to the mortgagee for the payment thereof, upon the rule in equity that a creditor is entitled to the benefit of all obligations or securities given by his debtor to one who has become a surety of the debt or for the discharge of the debt. The promise of the grantee may be made orally, or it may be implied. The rule, well established in this regard, is expressed in *Hopkins v. Warner*, 109 Cal. 133, 41 P. 868, 869, as follows: "It is not necessary that there should

be a formal promise on the part of the grantee to pay the mortgage debt, in order to render him liable therefor, if his intention to assume the debt appears from a consideration of the entire instrument. The obligation may be made orally or in a separate instrument. It may be implied from the transaction of the parties, or it may be shown by the circumstances under which the purchase was made, as well as by the language used in the agreement."

Appellant admitted under examination that he knew during the negotiations that the purchase price of the property was \$20,000. He was also aware that the mortgage was in the principal sum of \$10,000. The amount which he paid at the closing of the transaction was the difference between the purchase price of \$20,000 and the amount then due on the mortgage.

[4] The prevailing rule is that a promise to assume is implied when the mortgage obligation is included in the purchase price and is retained by the purchaser. "The rule generally adhered to now is that the purchaser becomes personally liable for the mortgage debt when the amount thereof is deducted from the purchase price, it being a part of the consideration for the conveyance, which the purchaser is legally bound to pay." 2 Jones on Mortgages, 305. Substantially the same statement appears in 41 Corpus Juris, at page 724. That the majority rule prevails in this state is indicated by the following quotation from *White v. Schader*, 185 Cal. 606-611, 198 P. 19, 21, 21 A.L.R. 499: "And the rule is the same, although there be no assumption of payment of the indebtedness, if the purchase be made expressly subject to the incumbrance, and the amount of the indebtedness * * * is included in and forms a part of the consideration of the conveyance." Having retained from the purchase price the amount of the mortgage debt under the circumstances disclosed, in equity and good conscience appellant should be required to pay that part of the purchase price so retained by discharging the obligation secured by the mortgage.

[5, 6] By the terms of the mortgage note, it was due on or before five years after its execution. At the time appellant purchased the property, approximately two of the five years had transpired. The assertion is therefore made that the promise to assume is

unenforceable under the provisions of subdivision 1 of section 1624 of the Civil Code. The answer to this is that the debt could have been paid within the year. The statute does not declare void a promise not in writing which may not be performed within a year, or which is not likely to be performed within that period. It embraces only such promises which do not admit of a valid execution within the year. The possibility of performance within that period is sufficient to take the promise outside the statute. 12 Cal.Jur. 875. If performance had been tendered within the year, the payee of the note would have been obliged to accept payment. The case of *McKeaney v. Black*, 117 Cal. 587, 49 P. 710, is consistent with these views. In that case the promise was expressed, and obligated the promisor to pay the mortgage debt at maturity, which time was without the one year period, while in the instant case the implied promise was to assume and pay the debt. This, as stated, could have been accomplished within the statutory period.

[7] It is contended that the court failed to appoint an inheritance tax appraiser to appraise the mortgaged property, and that under the provisions of section 726, Code of Civil Procedure, the court was therefore without authority to enter a deficiency judgment. This section was enacted subsequent to the execution of the mortgage. The section, therefore, can have no application to the situation presented. *Wilson v. Superior Court* (Cal.App.) 47 P.(2d) 331.

[8] Finally, the point is made that section 580b of the Code of Civil Procedure (as added by St.1933, p. 1673, § 5) prohibited the court from entering a deficiency judgment. This section was adopted some time after the date of the execution of the mortgage, and forbids a deficiency after a sale under a deed of trust or mortgage given to secure the balance of the purchase price of real property. The mortgage was not given as a part of the purchase price of the premises, but was given to secure the repayment of money loaned by the mortgagee to the mortgagors.

It follows that the judgment appealed from should be and it is therefore affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

5 Cal.2d 416

O'LEARY v. HERBERT et al.

RODEO VALLEJO FERRY CO. v. SAME.

Sac. 4805.

Supreme Court of California.

Feb. 28, 1936.

1. Mines and minerals Ⓒ71

Lessors of mining property out of possession and control thereof *held* not liable for negligence of lessee in possession of property with reference to water rights of adjoining landowner.

2. Landlord and tenant Ⓒ167(7)

Landlord is not liable for negligence of tenant.

3. Mines and minerals Ⓒ71

Receipt by lessors of mining property of royalties for minerals *held* not to authorize lessors to interfere with or control mining operations carried on by lessee so as to render lessors liable for damage to water rights of adjoining landowner caused by negligence of lessee.

4. Action Ⓒ1

Cause of action does not arise from doing of lawful act or exercise of legal right if done or exercised in lawful and proper man-

ner, the resulting damage, if any, being "damnum absque Injuria."

[Ed. Note.—For other definitions of "Damnum Absque Injuria," see Words & Phrases.]

5. Waters and water courses ⇨101

Rights of all landowners over common basin, saturated strata, or underground reservoir are coequal or correlative so that one landowner cannot extract more than his share of water even for use on his own land where rights of others are injured thereby.

6. Waters and water courses ⇨105

Owner of property upon which was located a spring, fed by underground reservoir, held entitled to damages for deprivation of water and wastage thereof through tunnel constructed by lessee of adjoining property in orderly and necessary course of mining.

7. Appeal and error ⇨1008(1)

Question of damage to health resort caused by deprivation of water by drainage through tunnel by company operating mine on adjoining property and continued wastage thereof held for trial court.

8. Waters and water courses ⇨107(3)

\$21,500 held not excessive for drainage of water underlying property used as health resort causing spring to cease to flow and rendering irrigation of property impossible, so that property would not be useful for purposes for which it had been used, which included bottling and sale of water from spring.

9. Waters and water courses ⇨107(2)

Owner of health resort held entitled to enjoin draining from underground reservoir any waters in excess of amount reasonably necessary for domestic, agricultural, mining, or other beneficial uses on lands riparian to underground reservoir by company operating mine on adjoining property.

In Bank.

Appeal from Superior Court, Solano County; Edward I. Butler, Judge.

Separate actions by M. T. O'Leary against John Henry Herbert and others, and by the Rodeo Vallejo Ferry Company against John Henry Herbert and the Sulphur Spring Valley Water Company and others. Judgment for the plaintiffs, and the defendants appeal.

Judgment in favor of the Rodeo Vallejo Ferry Company against Hannah M. Hastings and others reversed, and judgment against other defendants affirmed.

Grant H. Smith and Clarence A. Linn, both of San Francisco, for appellants Hastings Development Co. and H. L. Slosson, Jr.

L. C. Leet, of Oakland, for appellants Hastings and others.

T. J. O'Leary, of Oakland, and Leo C. Dunnell, of San Francisco, for respondent O'Leary.

Dunn, White & Aiken, of Oakland, and Joseph M. Raines, of Fairfield, for respondent Rodeo Vallejo Ferry Co.

WASTE, Chief Justice.

Plaintiffs each brought an action claiming damages against the defendants and seeking injunctive relief. It is alleged that plaintiffs have been damaged through the cessation of the flow of water from a spring on their lands claimed to have been caused by a tunnel, dug and driven by Hastings Quicksilver Mining Company, piercing an underground reservoir which fed the spring on plaintiffs' property. The water from the underground reservoir, it is further alleged, was being allowed to run to waste through the tunnel, and the underground reservoir supplying it has been drained to a point below the level of the spring, thereby causing the water to cease to flow.

At some stage of the proceedings the action was dismissed as to the defendant Slosson. Judgments were awarded each plaintiff, to wit: (1) In favor of the plaintiff O'Leary (a) against defendant Hastings Development Company, Limited, for \$20,000; (2) in favor of plaintiff Rodeo Vallejo Ferry Company (a) against defendant Hastings Development Company, Limited, for \$1,500, and (b) against defendants Sulphur Spring Valley Water Company, Limited, John Henry Herbert, Hastings Development Company, Limited, Hannah M. Hastings, George W. Hastings, Zita Hastings Courtney, and L. C. Leet, as administrator with the will annexed of the estate of Alice Hastings Hunt, deceased, restraining these defendants from taking water from the underground reservoir other than in a reasonably necessary amount for domestic, agricultural, mining, or other beneficial uses. By both judgments the Hastings group of defendants was relieved from costs.

But two of the several appeals taken are here for consideration. By stipulation, these causes were consolidated on appeal, and are presented here on but one transcript. We will deal with the appeals separately.

[1] We take up first the appeal of Hannah M. Hastings, George W. Hastings, Zita Hastings Courtney, and L. C. Leet, as administrator with the will annexed of the estate of Alice Hastings Hunt, deceased. The evidence and the findings show these appellants to be only lessors or landlords out of possession and control of the mining interests in the property involved in the litigation. They are the owners of reserved mining and mineral rights in the lands, which are in fact owned by defendant John Henry Herbert, who gave notice of appeal, but who does not further appear. Through an established channel of transfers, the interest, possession, and control of these rights are leased to the defendant Hastings Development Company, Limited, which is a reincorporation of the Hastings Quicksilver Mining Company, and which has, at all times here involved, continued in the exclusive possession and control of the mining property as lessee, and has conducted the mining operations without control or interference, or any right of control or interference, by these appellants. There is no evidence or finding showing the exercise or attempted exercise of any control or right of control over the lessee or the property; nor is there any finding that these appellants received any benefit from the mining operations carried on by the lessee. It therefore results that these appealing defendants are not liable for the alleged acts of negligence on the part of the Hastings Development Company, Limited.

[2, 3] It is well established in this state, as in other jurisdictions, that a landlord is not liable for acts of negligence of tenants. Among the leading cases are *Kalis v. Shattuck*, 69 Cal. 593, 11 P. 346, 58 Am.Rep. 568, and *Higgins v. Los Angeles Gas & Elec. Co.*, 159 Cal. 651, 115 P. 313, 34 L.R.A.(N. S.) 717. In the first of these cases it was held (69 Cal. 593, at page 597, 11 P. 346, 58 Am.Rep. 568) that a landlord is not liable for the consequences to others of a nuisance in connection with property in the possession and control of a tenant unless the landlord authorized or permitted the act which caused it to become a nuisance occasioning the injury. As stated by the Supreme Court of Massachusetts: "A landlord is not responsible to other parties for the misconduct or injurious acts of the tenants to whom his estate, when no nuisance or illegal structure existed upon it, has been leased for a lawful and proper purpose." *Saltonstall v. Banker*, 8 Gray, 195; *Peck v. Peterson*, 15 Cal.App. 543, 115 P. 327. The receipt by

these defendants of royalty for the minerals, under the circumstances found, would not authorize or require them to interfere with or control the mining operations carried on by their lessee. *Alabama Clay Products Co. v. Black*, 215 Ala. 170, 110 So. 151. It is not shown or found that the defendants Hastings or Leet, as administrator, have any interest in the relief sought by the respondents. In the lease of the mining interests these appellants retained the right to enter upon and examine the property at any time, and, by its terms, they required the mining company to operate the mine with due regard to the safety, development and preservation of the premises as a working mine. No damages were awarded against the absentee landlords (these appellants), nor were costs assessed against them. We must therefore conclude that the trial court was of the view that they were in no way liable in the premises. No connection has been established between these appellants and the continued flow of water through the tunnel. The restraining order against the maintenance of that condition, so far as these appellants are concerned, seems an idle act. The trial court should have granted their motion to vacate and set it aside. The judgment and order, so far as concerns these appellants, should be reversed and the appellants should have their costs on appeal. It will be so ordered.

Each of the plaintiffs recovered damages against the company operating the mine. There remains to be considered, therefore, the appeal of the Hastings Development Company, Limited, the lessee of the mining interests of the defendants Hastings, and, by itself or its predecessor, in exclusive possession and control of the mining rights as lessee during all of the times here relevant. The mine known as the Hastings Quicksilver Mine had been owned by the Hastings family for more than fifty years, but in 1912 the land was acquired by others, the mining rights being reserved. In 1929, the Hastings Quicksilver Mining Company, which was operating the mine on Sulphur Spring Mountain under a lease, drove a tunnel under certain old workings in order to drain the mine for the purpose of enabling it to extract the ore. A large and totally unexpected flow of water was encountered in the core of the mountain. Plaintiffs' spring, which was located on the opposite side of the range, one and a half miles from the portal of the tunnel and 108 feet above the level of the tunnel, ceased to flow shortly after the body of water was encountered. Consid-

erable testimony was taken as to the cause of this cessation. Eminent geologists and other experts testified on both sides of the case. The court found that the rock forming portions of Sulphur Spring Mountain to a depth of several hundred feet has been rendered open and porous through geologic processes, and now constitutes a vast underground reservoir in which, for hundreds of years last past, there has accumulated water that fell as rain on the surface of the mountain, and which water, from time immemorial to the date it ceased flowing as described, was discharged from the underground reservoir through spring flow on the mountain, one of which springs was that of the plaintiff O'Leary. This water was retained in the core of the mountain by belts of black shale lying along the base of the mountain range on both sides. There was testimony that if the mining company's tunnel were bulkheaded to take the place of the shale at that point, it would require a maximum of ten years for the water table to rise sufficiently to cause the spring to flow again. Another eminent geologist estimated it would require approximately twenty-five years. The cost of such bulkheading would be very great.

The court found that, notwithstanding the injury complained of by the plaintiffs, the tunnel was "excavated in the orderly and necessary course of mining for the purpose of draining and developing the defendant company's quicksilver mine and extracting the ore therefrom; that at the time said tunnel was driven it was not known to the defendants, nor to any of them, that the underground reservoir existed in Sulphur Spring Mountain, nor that the driving of the tunnel, nor the flow of water therefrom, would in any manner affect the flow of water from plaintiff's spring." It appears from the evidence and findings that no person knew or could have assumed that an underground reservoir existed on the interior of the mountain. Geologists from the University of California testified that the rush of water in the tunnel "would be as much a surprise to a geologist as it was to a miner; that rush of water there from that mine is due to an exceptional situation, and not a situation that you can find in the hills generally." There was other evidence to like effect.

The trial court awarded damages in favor of plaintiff O'Leary in the sum of \$20,000 against the appellant Hastings Development Company, Limited; granted the prayer of the plaintiff Rodeo Vallejo Ferry Company

for an injunction restraining the use of water from the tunnel over an amount reasonably necessary for certain designated purposes, and awarded damages in its favor against the development company in the sum of \$1,500.

[4-9] Under the common law, the case on the facts established is wanting in all of the elements upon which a recovery may be predicated. It falls fairly within the doctrine of *damnum absque injuria*. The following quotation from 1 *Corpus Juris*, pp. 965, 966, enunciates the rule: "No cause of action arises from the doing of a lawful act or the exercise of a legal right if done or exercised in a lawful and proper manner, the resulting damage, if any, being *damnum absque injuria*. A liability may, however, arise from the doing of a lawful act or the exercise of a legal right in a negligent or improper manner, but in such cases the liability is based not upon the act done, but upon the manner of doing it." The trial court here found that the work of constructing the tunnel was carried on in "the orderly and necessary course of mining," i. e., in the exercise of a legal right in a lawful and proper manner.

There is no pretense that the work of constructing the tunnel was carelessly or negligently done. It is well settled in California, however, that the doctrine of the common law in relation to the situation here presented has been changed and modified. That subject is well considered and such conclusion announced by this court in *Katz v. Walkinshaw*, 141 Cal. 116, 122 et seq., 70 P. 663, 74 P. 766, 64 L.R.A. 236, 99 Am.St. Rep. 35. See, also, the first opinion in the cause, 141 Cal. 138, 150, 70 P. 664, 668. A more recent case applicable to the facts relating to the appeal of the Hastings Development Company is *Eckel v. Springfield Tunnel & Dev. Co.*, 87 Cal.App. 617, 262 P. 425, 427, opinion by Mr. Presiding Justice Finch of the Third District Court of Appeal (petition for hearing by the Supreme Court denied). There, as here, the waters underlying the appellant's land were percolating waters—a vast mass of water confined in a basin, always moving slowly down to an outlet or outlets. Quoting from *Hudson v. Dailey*, 156 Cal. 617, 628, 105 P. 748, the court used language stating in effect that the owner of land has a natural right to the reasonable use of waters percolating therein, although the water may be moving through his land to the land of his neighbor, and although he may prevent it

from entering his neighbor's land or draw it therefrom. This right, continues the court, "arises from the fact that the water is then in his land so that he may take it without trespassing upon his neighbor. His ownership of the land carries with it all the natural advantages of its situation, and the right to a reasonable use of the land and everything it contains, limited only by the operation of the maxim '*sic utere tuo ut alienum non lædas*.' It is upon this principle that the law of riparian rights is founded, giving to each owner the right to use the waters of the stream upon his riparian land, but limiting him to a reasonable share thereof, as against other riparian owners thereon. We think the same application of the principle should be made to the case of percolating waters feeding the stream and necessary to its continued flow. There is no rational ground for any distinction between such percolating waters and the waters in the gravels immediately beneath and directly supporting the surface flow, and no reason for applying a different rule to the two classes, with respect to such rights, if indeed, the two classes can be distinguished at all. Such waters, together with the surface stream supplied by them, should be considered a common supply, in which all who by their natural situation have access to it have a common right, and of which they may each make a reasonable use upon the land so situated, taking it either from the surface flow, or directly from the percolations beneath their lands. The natural rights of these defendants and the plaintiff in this common supply of water would therefore be coequal, except as to quantity, and correlative." (Citing cases.) The court, quoting further from the case of Verdugo Cañon Water Co. v. Verdugo, 152 Cal. 655, 667, 93 P. 1021, explains the distinction between the English rule, as modified by the modern American rule of reasonable use, and the rule of correlative rights, and holds that the rule of "correlative rights" abrogates the English rule as to percolating waters and that the rights of all landowners over a common basin, saturated strata, or underground reservoir, are coequal or correlative, and that one landowner cannot extract more than his share of the water, even for use on his own lands, where the rights of others are injured thereby. Citing Kinney on Irrigation and Water Rights (2d Ed.) § 1192. In the Eckel Case, the owners of a mine constructed a drain tunnel, thereby intercepting percolating waters which naturally

fed a certain spring, as a result of which the spring ceased to flow. It was held that the plaintiff was entitled to damages.

The trial court in the case now before us has found that both plaintiffs are entitled to damages. The substance of the evidence on the question of damages is that the value of the property as a going concern was much greater before the Blue Rock Spring ceased to flow than it was after there was no water. The trial court found that the property of the plaintiffs had long been maintained as a well-improved health resort; that the waters from the spring had been bottled and sold to the public for beverage and medicinal purposes; that without the water irrigation was impossible, and the laws and greens of the golf course and the trees, plants, and shrubs were damaged and greatly depreciated in size and growth because of the lack of water. Before the spring ceased to flow there was sufficient water for irrigation purposes. The flow of water cannot be restored for a period of at least fifteen years, and without the water the lands and real property of plaintiffs will be no longer useful for the purposes for which they had been used, but will be suitable only for pasturage purposes and at a greatly diminished and depreciated rental value and revenue return therefrom to plaintiffs, by reason of all of which the improvements placed on the property have become a total loss. Consideration of the mass of evidence on the question of the damage caused by the deprivation of water owing to drainage through the tunnel, and the continued wastage thereof was a matter for the trial court. It has met the burden squarely, and we are not inclined to disturb its findings. Counsel for respondents have called our attention to the fact that, pending the determination of this appeal and in compliance with the injunction granted, a bulkhead was placed in the tunnel. Its effect on the restoration of the natural water supply of Sulphur Spring Mountain was recently the subject of comment by this court. *L. Mini Estate Co. v. Walsh* (Cal.Sup.) 48 P.(2d) 666. What effect this condition may have in future on the operation of the injunction granted in this case is not now material.

(1) The judgment in favor of plaintiff O'Leary against Hastings Development Company, Limited, for damages in the amount of \$20,000 is affirmed.

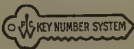
(2) The judgment in favor of plaintiff Rodeo Vallejo Ferry Company against Hastings Development Company, Limited,

for damages in the amount of \$1500 is affirmed.

(3) The judgment in favor of plaintiff Rodeo Vallejo Ferry Company restraining the defendant Hastings Development Company, Limited, after a reasonable time, from draining or taking from the underground reservoir mentioned and referred to in plaintiff's complaint any waters in excess of that amount of water which is or will be reasonably necessary for domestic, agricultural, mining, or other beneficial uses on lands riparian to the underground reservoir, is affirmed.

(4) The judgment in favor of plaintiff Rodeo Vallejo Ferry Company restraining the defendants Hannah M. Hastings, George W. Hastings, Zita Hastings Courtney, and L. C. Leet, as administrator with the will annexed of the estate of Alice Hastings Hunt, deceased, is reversed, these defendants to have their costs on appeal.

We concur: SEAWELL, J.; SHENK, J.; THOMPSON, J.; LANGDON, J.



5 Cal.2d 665

ROARK v. STATE BAR OF CALIFORNIA.
L. A. 15440.

Supreme Court of California.

March 20, 1936.

1. Attorney and client ☞53(2)

Evidence held to establish misconduct of attorney for guardian of incompetent's estate in obtaining loan from estate by misrepresentation as to security therefor and forging guardian's name to three documents in guardianship matter with intent to deceive court and guardian and defraud estate, requiring disbarment of attorney (Code Civ.Proc. § 282, subd. 4).

2. Attorney and client ☞57

Misconduct of one of examiners in disbarment proceeding in intimidating witness and resorting excessively to leading questions and conducting improper and prejudicial cross-examination held not prejudicial where evidence conclusively established attorney's misconduct (Code Civ.Proc. § 282, subd. 4).

3. Attorney and client ☞53(1)

License to practice law is certificate of good moral character, and representation by court as of date of license that licensee is trustworthy person who reasonably may be expected to act fairly and honestly in practice of his profession, and thereafter original representation exists as continuing presumption in absence of proof to contrary.

4. Attorney and client ☞53(1)

When charges of misconduct have been made against attorney and proved in disbarment proceeding, representation of attorney's trustworthiness and continuing presumption thereof arising from original license is overcome (Code Civ.Proc. § 282, subd. 4).

5. Attorney and client ☞58

In disbarment proceeding, where it is established by evidence amounting to proof that attorney has deliberately been dishonest in dealing with affairs of client, and has violated duty not to seek to mislead judge or judicial officer, attorney must be disbarred rather than subjected to some form of discipline (Code Civ.Proc. § 282, subd. 4).

In Bank.

Proceedings on the petition of Alfred T. Roark to review an order of the Board of Governors of the State Bar of California, recommending that petitioner be disbarred from further practice of law.

Petitioner disbarred.

E. L. Johnson, of San Diego, for petitioner.

Philbrick McCoy, of Los Angeles, for respondent.

CONREY, Justice.

This proceeding was instituted to review an order of the board of governors of the State Bar of California, adopting the findings of local administrative committee No. 3 of San Diego county, and recommending to this court that petitioner be disbarred from further practice of the law in this state.

The notice to show cause and amendment thereto contained seven counts charging petitioner with professional misconduct while acting as attorney for the guardian of the estate of Amanda Lindquist, an incompetent person. The committee found that the evidence was insufficient to prove

the charges contained in counts 3, 4, and 6, but found that petitioner was guilty of misconduct in whole or in part as charged in the remaining counts.

Petitioner contends that there was insufficient evidence to support the said findings and recommendation and that he was prejudiced by misconduct of one of the examiners acquiesced in by the committee, as well as by an inadequate consideration of the record on the part of the board of governors. Lastly, he pleads that the discipline recommended is too drastic and is unwarranted by the facts and circumstances.

[1] Let it first be said that there is abundant evidence of petitioner's guilt and there is no doubt as to the commission by him of acts of misconduct of most serious import, even if not to the extent originally charged. The evidence establishes clearly the following facts:

In February, 1919, petitioner was appointed as attorney for the guardian of the estate of Amanda Lindquist, an incompetent person, and he acted in that capacity until death of the incompetent, and thereafter until August, 1933. The estate was a small one and by the year 1928 petitioner had succeeded in converting practically all of the assets thereof into cash, some \$4,000. Petitioner thereupon petitioned the San Diego county superior court in the matter of said estate and secured its approval to a loan of said \$4,000, to be secured by note and mortgage on San Diego real property of a represented value of \$12,000. Petitioner and his wife were the borrowers, but petitioner did not inform either the court or the guardian of that fact. He merely told the guardian that the \$4,000 had been loaned and that the loan was secured by first mortgage on real property of \$12,000 value. Petitioner took the \$4,000 for his own use and he and his wife signed a note and mortgage purporting to be a lien on a lot owned by them, designated as lot 14, Block E, Burlingame, San Diego. But the note and mortgage were never recorded or delivered to the guardian. It was not until 1933, some time after the death of the incompetent, that inquiries by the public administrator brought to light the true status of the affairs of the estate. Shortly after execution of said note and mortgage (which remained unrecorded), and without regard for the purport of said documents, petitioner obtained a \$1,500 bank loan which he secured by a recorded first lien on said

same real property, lot 14. Later this loan was repaid and the recorded lien discharged, but petitioner thereafter borrowed \$5,000 and to secure this loan he and his wife executed a trust deed on said property, which trust deed was recorded and became a first lien of record thereon. It is undoubtedly true that petitioner's failure to record the original note and mortgage executed to the guardian was intentional, enabling him to procure the two later loans on the property, and that these acts were a fraud upon the estate of the incompetent. Subsequent to execution of the \$5,000 trust deed, petitioner and his wife parted with all title to the real property, thereby leaving the \$4,000 loan unsecured.

The result of the above loan transaction was that petitioner converted to his own use about \$3,880 of estate funds. On this amount, over the remaining years of the guardianship, there was credited by way of court allowances for care of the ward, fees, expenses, etc., about \$3,000, but a balance of no less than \$834.36 was never returned to the estate or to the guardian. Furthermore, between August, 1929, and August, 1933, the court awarded to the guardian fees aggregating \$200. These fees were never received by the guardian but, on the contrary, without her knowledge and consent they were converted by petitioner to his own use.

There is evidence tending to prove that petitioner, with intent to deceive the court and the guardian and to defraud the estate, willfully and fraudulently forged the guardian's name to at least three documents, to wit: (1) To a petition for the sale of personal property and verification thereto, dated and filed in the superior court on August 29, 1919; (2) to third account and verification thereto, dated and filed in the superior court August 19, 1929; and (3) to petition seeking approval of third account and allowance for guardian and her attorney for services rendered in connection with the estate, dated and filed in the superior court August 19, 1929. While the testimony of experts as to the handwriting questions at issue presents conflicting opinions, the evidence justifies the findings of the committee that the signatures were not genuine.

[2] We come now to petitioner's contention that one of the examiners was guilty of prejudicial misconduct in that he went to the home of the guardian on the day she was subpoenaed to appear and intimidated

her, and thereafter, when examining her, resorted excessively to leading questions and conducted an improper and prejudicial cross-examination. Assuming, without deciding, that these criticisms are in some degree justified, the evidence of petitioner's misconduct, and his own admissions in relation thereto, leave the proof against him so strong that the findings are completely justified. Even without the forgeries, which are vehemently disputed, petitioner's misapplication of the estate's funds was far too flagrant to be disregarded or excused.

The above discussion leaves but one further question for consideration: Should petitioner be disbarred, or should he be subjected merely to some form of discipline?

[3, 4] The license to practice law as an attorney and counselor is a certificate of good moral character. It is a representation by the court, speaking as of the date of the license, that the licensee is a trustworthy person who reasonably may be expected to act fairly and honestly in the practice of his profession. Thereafter, in the absence of proof to the contrary, the original representation exists as a continuing presumption. The relations between courts and counsel are and must be those of confidence, and not of suspicion. But when charges of misconduct have been made and proved in a disbarment proceeding, the original representation has fallen, and with it the presumption becomes dust and ashes. There are, as every one knows, many lapses from high standards, due to human frailty, which may be overlooked, or visited with mild punishment. The numerous instances of discipline by way of suspension or reprimand have shown the reluctance with which the disbarment penalty is imposed.

[5] But when in a disbarment proceeding it is established by evidence amounting to proof, that an attorney and counselor has deliberately been dishonest in dealing with the affairs of his client, and has violated the duty which he owes to "never seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law" (sec. 282, subd. 4, Code Civ.Proc.), and when judgment of the Supreme Court is invoked upon such facts, then a refusal to order disbarment amounts to a renewal of the original license, and is a declaration that in spite of his own record, the attorney is fit to be offered to the public as one

who safely may be trusted. In this case the court has no reasonable alternative. The petitioner has disbarred himself.

It is therefore ordered that petitioner, Alfred T. Roark, be and he is hereby disbarred from the practice of law in this state, and his name is stricken from the roll of attorneys of the state of California.

We concur: WASTE, C. J.; SHENK, J.; THOMPSON, J.; LANGDON, J.; SEAWELL, J.; CURTIS, J.



5 Cal.2d 631

CONSTANTIAN et al. v. MERCEDES-
BENZ CO.

L. A. 13756.

Supreme Court of California.

March 17, 1936.

1. Appeal and error ⇨1011(1)

Trial court's finding on conflicting evidence will not be disturbed.

2. Bailment ⇨14(1)

Automobile company renting rugs and furniture to be used in company's showroom held liable for destruction of rented property by fire after its removal from company's showroom to automobile show, notwithstanding that destruction of property was without fault of company (Civ.Code, § 1930).

3. Bailment ⇨14(1)

Printed stipulation in contract of bailment that renters were responsible for loss or damage of goods while in their possession held part of contract of bailment, so that renter was liable for destruction of rented goods by fire, notwithstanding that destruction of goods was without fault of renter.

4. Principal and agent ⇨123(3)

Evidence held to support finding that automobile salesman and person who maintained garage in same building with automobile company had authority to contract for automobile company for renting of rugs and furniture to be used in automobile company's showroom and at exhibit at automobile show so as to render company liable for destruction of rented property by fire.

In Bank.

Appeal from Superior Court, Los Angeles County; Thos. P. White, Judge.

Action by M. S. Constantian and another, copartners doing business as Constantian Brothers, against the Mercedes-Benz Company. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Prior opinion (Cal.App.) 39 P.(2d) 496.

Stick & Moerdyke, Stick, Moerdyke & Gibson, and John Stick, all of Los Angeles, for appellant.

C. H. Hartke, John Y. Pashgian, E. A. Sarkisian, and Frank G. Tyrrell, all of Los Angeles, for respondents.

PER CURIAM.

This appeal is taken by the defendant from a judgment for the value of property rented to them by the plaintiffs and destroyed by fire admittedly without fault or negligence upon the part of the defendant.

The trial court found that plaintiffs, doing business under the name of Constantian Bros., rented to the defendant corporation on or about January 10, 1929, for 60 days, one oriental carpet, settee, table, and statue, to be used in its display room only; that defendant assumed the risk and agreed to be responsible for any loss or damage to such personal property or any part thereof while in its possession and to pay a rental of \$150; that without the knowledge or permission of plaintiffs, defendant moved the rented property to its exhibit in the automobile show on March 1, 1929; that, on or about March 2, the defendant rented from the plaintiffs three other oriental rugs for use in its exhibit, agreeing to pay an additional rental of \$37 therefor, and assumed the risk and agreed to become responsible for any loss or damage while in its possession; that, without fault or negligence on the part of the defendant, the property was wholly destroyed by fire; that the value of the property was \$2,675; that there was paid as rental the sum of \$75, leaving a balance due of \$112. Judgment was rendered for \$112, unpaid rental, and \$2,675, value of the property destroyed, with interest on the total (\$2,878) from March 11, 1929, until paid.

No question is raised on this appeal as to the amount of rent found due and unpaid or the value of the lost property as found by the court. Appellant's contention is that

as bailee for hire it is not liable for the value of the goods destroyed during the bailment without its fault or negligence, that it did not by the contract of hiring assume a larger responsibility, and that the finding that it agreed to be responsible for any loss or damage to the goods while in its possession is unsupported by the evidence.

[1, 2] The property was rented on three different occasions, the transactions being represented by three sets of duplicate delivery sheets, Exhibits 1, 3, and 5 being the white originals, and Exhibits 2, 4, and 6 the yellow duplicates. These sheets bore at the top the name and address of Constantian Bros. and a serial number. On each was filled in the name of Mercedes-Benz Company, the date, the term of the hiring, the number, description and value of the articles and the rental. At the bottom of the sheet appeared the printed condition "Renters Responsible for loss or damage of goods while in their possession." Exhibits 1 and 2 bear the signature "Mercedes Benz Co. by Zier," and cover one rug, the settee, table, and statue. Zier was a salesman in the employ of the defendant. The date of this transaction is January 10, 1929, and the term is therein stated to be 60 days. With regard to these articles, the court found, and its finding is supported by the testimony of Arzivian, manager of the plaintiffs' rental department, that they were to be used in plaintiffs' showroom only and were not to be taken to the automobile show. This testimony of Arzivian is flatly contradicted by Smith, defendant's manager, but, the trial court having resolved the conflict in favor of the plaintiffs, the finding cannot be disturbed upon appeal. With respect to these articles, therefore, the defendant improperly removed them from the premises on which they were to be kept under the terms of the contract of hiring and is consequently responsible for their loss. Civ. Code, § 1930.

The other rugs were rented expressly for the purpose of use at the automobile show, Exhibits 3, 4, 5, and 6 bearing the notation "During Auto Show," and the liability of defendant depends upon the effect of the printed condition at the bottom of the delivery sheets. The appellant insists, first, that it is not a part of the contract; and, second, that it is but a restatement of the responsibility imposed by law upon the bailee and does not enlarge its liability.

[3] It is clear that the printed stipulation, "renters responsible for loss or dam-

age of goods while in their possession," if effective at all, operated to enlarge the liability of the bailee. The language is unconditional and makes no attempt to limit the bailee's risk to loss occurring through his own negligence. *Wilmington Transp. Co. v. O'Neil*, 98 Cal. 1, 32 P. 705.

That the printed stipulation upon the bottom of the delivery sheet, placing upon the bailee responsibility for loss or damage, is a part of the contract of bailment is settled by *Taussig v. Bode & Haslett*, 134 Cal. 260, 66 P. 259, 54 L.R.A. 774, 86 Am.St. Rep. 250. Photostatic copies of the delivery sheets are contained in the record and it appears therefrom that the stipulation is as plainly printed upon the face of the document, as was the condition upheld in the cited case. The delivery sheets contained the essential conditions of the bailment; they were signed by the bailee, or its agent appointed for that purpose; at the time of the delivery of the articles hired, a duplicate was retained by each party. We think it cannot be denied that "the person receiving the paper should as a reasonable man understand that it contained terms of the contract which he must read at his peril, and regard as part of the proposed agreement." See *Williston on Contracts*, vol. I, § 90a et seq. The distinctions pointed out in *Wilson v. Crown Transfer, etc., Co.*, 201 Cal. 701, 713, 258 P. 596, 601, are not present in this case, but, on the contrary, the language of this court in *Taussig v. Bode & Haslett*, supra, which is therein approved, is equally applicable here. "It [the condition] was printed plainly on the face of the receipt. The whole paper is extremely brief. It was the duty of respondents to take note of its contents, if they had the opportunity, and their opportunity was ample. The presumption, therefore, is, that they did read it. Against this presumption there is no evidence, and none, we think, would have been admissible to show that the respondents had failed to do what their duty required them to do."

[4] While appellant makes no separate point of the lack of authority of Zier and Reindl to sign the delivery sheets on its behalf, this argument is included in its statement of the facts. It is insisted that neither Zier, a salesman, nor Reindl, who was not an employee of the company but maintained a garage in the same building, had authority to contract for the company. The implied finding of the trial court that they

were the agents of the Mercedes-Benz Company in these transactions is amply supported by the evidence. Arzivian testified that Zier signed the first set of delivery sheets at the direction of Smith and in his presence; that the next two rugs were called for by a man with a Mercedes-Benz car after Arzivian had received a telephone call from the appellant company saying they required two rugs for the auto show and would send a man for them who would sign for them. Reindl admits signing the delivery sheets. The set of delivery sheets evidencing the hiring of the fourth rug were signed by Zier. Accepting this testimony as true, it will at least support a finding of an ostensible agency, in reliance upon which the plaintiffs turned over their rugs for use by defendant.

The judgment is affirmed.



5 Cal.2d 644

Ex parte MURDOCK.
Cr. 3956.

Supreme Court of California.
March 18, 1936.

1. Habeas corpus ☞113(3)

Final order of superior court in habeas corpus proceeding discharging accused held under warrant of extradition reciting that accused was charged with felony of escaping from Montana state prison held appealable by the people, where accused at time of escape was serving term for felony (Pen. Code, § 105, and § 1506 as added by St.1927, p. 1061; Rev.Codes Mont.1907, § 8222).

2. Extradition ☞30

For purposes of extradition between states, it is immaterial what motive induced departure from state where offense was committed (Const.U.S. art. 4, § 2).

3. Habeas corpus ☞103

In extradition proceeding it is not purpose of habeas corpus to substitute judgment of tribunal of state where accused is apprehended upon facts or law of matter to be tried, nor is it proper to be governed by speculation as to what ought to be result of trial in demanding state (Const.U.S. art. 4, § 2).

4. Extradition ☞30

Accused who escaped from Montana state prison, where he was confined for conviction of a felony, held a "fugitive from justice," and required to be returned to Montana upon demand from Governor of that state (Const.U.S. art. 4, § 2).

[Ed. Note.—For other definitions of "Fugitive from Justice," see Words & Phrases.]

In Bank.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Proceeding in the matter of the application of Shelby Murdock for a writ of habeas corpus. Shelby Murdock was discharged from custody, and the People appeal.

Writ discharged, and petitioner remanded to custody of sheriff.

Prior opinion, 50 P.(2d) 100.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and A. H. Van Cott, Deputy Dist. Atty., both of Los Angeles, for the People.

Harold Judson, of Los Angeles, for respondent.

THOMPSON, Justice.

A demand was issued by the Governor of the state of Montana for the return of petitioner, and he was taken into custody upon a warrant of rendition in which the crime stated was that of "Escape, a felony." The petitioner filed his petition for the writ of habeas corpus in the superior court in Los Angeles county, and, upon return being made thereto and the taking of evidence, the petitioner was discharged. An appeal was taken by the people to the District Court of Appeal, and, after decision of that court, the cause was transferred here for further consideration.

The petitioner having made a motion to dismiss the appeal, the first question with which we are confronted is whether an appeal may be taken by the people in such a situation. Prior to the passage of section 1506 of the Penal Code in 1927 (St.1927, p. 1061), an appeal would not lie after discharge on habeas corpus. Ex parte Zany, 164 Cal. 724, 130 P. 710. In other words, a discharge by the superior court was final and conclusive. However, in order to make it impossible for one convicted of an offense prosecuted by indictment or infor-

mation to escape punishment without giving the state a right to test the correctness of the ruling of the superior court, the Legislature enacted the section mentioned, which reads as follows: "An appeal may be taken to the district court of appeal by the people from a final order of a superior court made upon the return of a writ of habeas corpus discharging a defendant after his conviction, in all criminal cases prosecuted by indictment or information in a court of record, excepting criminal cases where judgment of death has been rendered, and in such cases to the supreme court; and in all criminal cases prosecuted by indictment or information in a court of record, where upon appeal or original application after conviction of the defendant an application for a writ of habeas corpus has been heard and determined in a district court of appeal, either the defendant or the people may apply for a hearing in the supreme court. Such appeal shall be taken and such application for hearing in the supreme court shall be made in accordance with rules to be laid down by the judicial council. If the people appeal, or petition for hearing in either the district court of appeal or the supreme court, the defendant shall not, in any case in which the judgment of conviction has become final be discharged from custody pending final decision upon the appeal or petition for hearing and he must, in such cases, be retaken into custody, if he has been discharged; provided, however, that in bailable cases the defendant may be admitted to bail, in the discretion of the judge, pending decision of the appeal or petition for hearing."

[1] It is not disputed that Murdock had been convicted of the offense of forgery, an offense prosecuted by indictment or information under the laws of Montana. Hence it becomes necessary for us to determine whether the language of the section is broad enough to cover the case of one who has been convicted of an offense and has committed a separate offense by effecting an escape. The crime of "escape" is defined by the statutes of Montana as follows: "Every prisoner confined in state prison for a term less than for life, who escapes therefrom, is punishable by imprisonment in the state prison for a term of not less than one year nor more than ten years; said second term of imprisonment to commence from the time he would have otherwise been discharged from said prison."

Rev. Codes Mont., 1907, § 8222. It is in all essentials the same as that stated in section 105 of our Penal Code. Two things must be observed: First, that, in order to be guilty of the offense, the person must first have been convicted and sentenced and confined in a state prison; and, second, the first term must be completed before the other can start to run. Hence, if the order of the superior court is final, the petitioner not only escapes trial on the second charge, but escapes serving the remainder of his term for the first offense. As we have already observed, however, the Legislature of this state has attempted to prevent a person from escaping punishment by a proceeding in habeas corpus in the superior court without giving the people an opportunity to test the correctness of the ruling in the appellate tribunals. While it is a fact that the warrant of rendition charged an offense of which petitioner had not been convicted, yet the situation presented is one falling within the letter of the enactment, and we think the purpose of the act will be served by holding that the case is one comprehended thereby. We entertain no doubt that, if a convict escaped from state prison in this state and were apprehended for escape, an appeal by the people would lie from an order of discharge (assuming of course, the necessity for such action), and there should be no difference in result simply because petitioner stands convicted in a sister state.

[2-4] We may therefor turn to the merits of the appeal. It is not disputed that petitioner was confined in Montana and escaped. It is difficult for us to understand upon what theory he could have been discharged. The sole ground urged for his release was that he was not a fugitive from justice and that he had been informed by the warden of Montana state prison by telegram and letter that he was not wanted. The demand for Murdock's return and the warrant of rendition are not attacked. It has long been understood that for the purposes of extradition between states it is immaterial what motive induced the departure from the state where the offense was committed. *Drew v. Thaw*, 235 U.S. 432, 439, 35 S.Ct. 137, 59 L.Ed. 302, and cases cited. It is sufficient under the Federal Constitution (article 4, § 2) if he be found in the state where the warrant is issued.

In *Roberts v. Reilly*, 116 U.S. 80, 92, 96, 6 S.Ct. 291, 300, 29 L.Ed. 544, it is said: "To be a fugitive from justice, in the sense of the act of congress regulating the subject under consideration, it is not necessary that the party charged should have left the state in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that, having within a state committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction, and is found within the territory of another." Whether the petitioner is guilty of an offense under the laws of Montana or whether he has a good defense to the charge by reason of the lapse of time or otherwise are questions for the courts of that state rather than for the tribunals of this commonwealth. In interstate extradition proceedings it is not the purpose of the writ of habeas corpus to substitute the judgment of a tribunal of the state where the accused is apprehended upon the facts or the law of the matter to be tried. *Drew v. Thaw*, supra. Nor is it proper to be governed by speculation as to what ought to be the result of the trial in the demanding state.

While the foregoing requires the reversal of the order of discharge, it is altogether proper to note that, while petitioner claims to have been traveling under his own name and was desirous of clearing his name so that he might be married, yet he admits that he was subsequently convicted in Oregon of "Assault with a deadly weapon, robbery and assault with a deadly weapon," and, about eight or nine months prior to this proceeding, was convicted of attempted burglary. The petitioner should be returned for proceedings in Montana in accordance with the demand of the Governor of that state.

It is ordered that the writ be discharged and that petitioner be remanded to the custody of the sheriff of Los Angeles county for rendition in accordance with the warrant issued by the Governor of California.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; LANGDON, J.

5 Cal.2d 641

PEOPLE v. BURKHART.

Cr. 3949.

Supreme Court of California.

March 17, 1936.

1. Criminal law Ⓒ295

Plea of former conviction sets up affirmative defense upon which burden of proof rests upon defendant.

2. Criminal law Ⓒ304(12)

Courts do not take judicial notice of contents of county ordinance which must be proved.

3. Criminal law Ⓒ295

In prosecution for driving automobile while under the influence of intoxicating liquor, plea of former conviction under county ordinance supported by stipulation held not sustainable, where stipulation failed to give contents of ordinance so as to afford basis for determination that offense denounced by ordinance was included in statutory offense of driving automobile while intoxicated (St.1929, p. 537, § 112).

4. Criminal law Ⓒ200(1)

Prior conviction under county ordinance of being in intoxicated condition on public highway in incorporated territory of county would not bar subsequent prosecution under statute for driving automobile while intoxicated (St.1929, p. 537, § 112).

In Bank.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Thomas H. Burkhart was convicted of driving an automobile while under the influence of intoxicating liquor, and he appeals.

Affirmed.

Prior opinion, 50 P.(2d) 97.

Frederic H. Vercoe, Public Defender, and Richard F. Bird, Deputy Public Defender, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

CONREY, Justice.

In the superior court defendant was accused of the crime of violation of section 112 of the California Vehicle Act (St.1923,

p. 553, as amended by St.1929, p. 537), a felony; it being specially set forth in the information that on March 7, 1935, he drove an automobile "along and upon a public highway while under the influence of intoxicating liquor." In addition to his plea of not guilty, defendant pleaded that he had previously been convicted of an offense included within the offense here charged, to wit, that in the justice's court of El Monte township "he was, on the 8th day of March, 1935, convicted of the offense of being drunk on a public highway, as defined in County Ordinance No. 1735; defendant further pleads that on the 8th day of March, 1935, in the same court, he was placed in jeopardy for an included offense, that is, included within the one now charged, to wit, that he there entered a plea of guilty to violation of the County Ordinance just mentioned in the plea of former conviction." The court found against defendant on said plea of former conviction, etc., and also found him guilty of the offense charged in this action. His appeal is from the judgment.

Appellant does not attack the finding of the court that he was guilty of the offense charged in the information. His sole ground of appeal is that his plea of former conviction should have been upheld, on the ground that every element constituting the offense in the justice's court is necessarily an element of the offense charged in the superior court, and therefore that the latter charge included the former.

[1-3] A plea of former conviction sets up an affirmative defense, on which the burden of proof rests upon the defendant. It is conceded that the courts do not take judicial notice of the contents of a county ordinance; that the same must be proved. At the trial of this case the county ordinance No. 1735, mentioned in defendant's plea, was not introduced in evidence. The only attempt to bring it in was by means of a stipulation tendered by defendant's attorney and accepted by the district attorney. The offered stipulation was "that this defendant, in connection with the transactions here testified to, was charged with and pleaded guilty to the offense of being drunk upon the public highway, as said offense is defined in Ordinance No. 1735 of the County of Los Angeles; the said plea of guilty was entered into by the

defendant on the 8th day of March in the Justice's Court, located in El Monte, California. Is that stipulation agreeable?

"Mr. McCartney: I have the file here.

"Mr. Bird: Does it state the facts correctly?

"Mr. McCartney: Drunk in an automobile on a public highway.

"Mr. Bird: I didn't know that was a part of it. Drunk in an automobile on a public highway. I will amend my stipulation to say drunk in an automobile on the public highway if that is agreeable.

"Mr. McCartney: Yes."

It will be observed that the stipulation covers the charge made in the justice's court and the defendant's plea of guilty, but does not attempt to give the contents of the ordinance. Therefore there is no legal basis for a determination by this court that the offense denounced by the ordinance is included in the offense of violation of section 112 of the California Vehicle Act.

[4] If, however, we should ignore the point last stated and assume that the contents of the ordinance were included in the stipulation, and that the language thereof has been correctly copied into the petition for hearing filed in the Supreme Court, we would find that the offense therein described is not that of being intoxicated on a public highway "in an automobile." If the defendant was in an automobile, that fact was not material to the charge of violation of that ordinance. Therefore, defendant may have pleaded guilty and presumably did plead guilty in the justice's court only to the offense of being in an intoxicated condition on some public highway in the unincorporated territory of the county. This charge is all that the justice's court had before it. There was no trial, but only the complaint and the plea of guilty. It seems perfectly plain and clear that defendant's conviction upon such charge and plea had no relation whatever to the entirely different offense of which he has been convicted in this case; namely, the crime of violation of section 112 of the California Vehicle Act, a felony, committed by driving an automobile upon a public highway while under the influence of intoxicating liquor.

For the foregoing reasons, this case does not furnish a proper occasion for discus-

sion of the numerous decisions, referred to in the briefs, upon the scope and effect of pleas of former conviction, or of former acquittal, or of former jeopardy, in relation to public offenses.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.; SHENK, J.



5 Cal.2d 545

SOUTHERN PAC. CO. v. CITY OF LOS ANGELES et al.

L. A. 14610.

Supreme Court of California.

Feb. 29, 1936.

Rehearing Denied March 30, 1936.

1. Appeal and error ⇨1011(1)

Where different courts, in actions by different plaintiffs involving same occurrence, reached opposite conclusions on substantially same evidence regarding defendants' negligence, rule that trial court's findings on conflicting evidence bind reviewing court *held* inapplicable, and Supreme Court could determine legal effect of evidence in both cases.

2. Appeal and error ⇨994(3)

Evidence ⇨571(3)

In action for damages caused by breaking of municipal aqueduct, opinion evidence of city's experts that aqueduct was constructed according to standard engineering practice *held* not conclusive either on trial court or appellate court; it being both proper and essential to examine opinions in light of physical circumstances and prior history of area involved.

3. Waters and water courses ⇨172

In railroad's action for damages caused by breaking of municipal aqueduct when filled with debris during heavy rain, city *held* negligent in leaving open aqueduct with considerable curvature and slow grade in position below large steep cone of loose materials, without provision for spillways or other drainage, in territory where heavy and sometimes torrential rains occurred.

4. Waters and water courses ⇨179(4)

In railroad's action for damages caused by breaking of city's negligently constructed aqueduct after several days' heavy rain in

region of which heavy rainfall was characteristic, fact that rain may have established local record for volume in inches held not to show that rain was unforeseeable or constituted act of God; there being no point at which expectable heavy rain becomes act of God merely because of unusual volume,

In Bank.

Appeal from Superior Court, Los Angeles County; Edward W. Engs, Judge.

Action by the Southern Pacific Company against the City of Los Angeles and others. Judgment for defendants, and plaintiff appeals.

Reversed.

For prior opinion, see 26 P.(2d) 896.

W. I. Gilbert and Kenneth Keeper, both of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Erwin P. Werner, former City Atty., Mark L. Heron and W. Turney Fox, Asst. City Attys., and Kenneth K. Scott, A. A. Scott and Harold L. Green, Deputy City Attys., all of Los Angeles, for respondents.

LANGDON, Justice.

A hearing was granted in this case, after decision by the District Court of Appeal, Second Appellate District, Division 1, in order that it might be considered and determined together with Inyo Chemical Company v. Los Angeles, 55 P.(2d) 850, this day decided. Both cases arise out of the same general event, the break in the Olancho division of the Los Angeles aqueduct on November 26, 1926. Both plaintiffs sought to recover damages alleged to have been proximately caused by the negligence of defendant city in the construction and maintenance of the aqueduct.

In the Inyo Chemical Company Case, tried before the late Judge Strother, the court found that the defendant city was negligent, and that its negligence was the proximate cause of plaintiff's injury. The District Court of Appeal, Fourth Appellate District, 34 P.(2d) 165, affirmed the conclusions of the lower court on the general issues of negligence and proximate cause, but reversed the judgment and remanded the cause for a new trial on the issue of damages. This court has adopted the said opinion of the District Court of Appeal, and thus has approved the determination of the city's liability.

In the instant case, the action was tried before the late Judge Engs. The court

found that the defendant city was not negligent, and also concluded that the accident was caused by a cloudburst of such unprecedented violence as to constitute an unforeseeable superhuman cause or act of God. Judgment was rendered against the plaintiff, and was affirmed by the District Court of Appeal, Second Appellate District. Thereafter a hearing was granted in this court.

Upon the hearing of these two cases, we were presented with thorough briefs analyzing and comparing the causes in detail from the point of view of pleading and evidence. We have carefully examined these briefs and have re-examined the earlier ones, and the conclusion is inevitable that the cases are in a practical sense identical. There were some differences in the personnel of the witnesses called by the parties, and in the manner of presenting the evidence. Thus, in the Inyo Chemical Company Case, there was detailed testimony as to the amount of curvature in the aqueduct and the grade thereof at the general area of the break, while in the instant case the references to this point were more general. In the Inyo Chemical Company Case the pleadings charged specific acts of negligence in some detail, while in the instant case the allegations of negligence were general in character. In the Inyo Chemical Company Case, two expert witnesses were produced by the plaintiff who testified that it was not good engineering practice to leave the aqueduct open at a place such as the one where the break occurred, without providing means for carrying away drainage water and debris. In the instant case the opinions of defendant's experts were challenged by evidence of the actual conditions at the place of the break, together with the history of previous rainfall and fills in the aqueduct. But aside from these few differences which would naturally occur in the trial of a cause by different counsel for different plaintiffs, the theories of negligence and proximate cause, and the proof offered in support of them, were substantially the same in each case. The known facts as to the surrounding area, the construction of the aqueduct, the place of the break, and the actual cause thereof are, of course, undisputed; and evidence as to previous rainfall in the area and previous filling of parts of the aqueduct with debris was presented by the plaintiffs in each case. Indeed, the defendant city in its briefs comparing the two cases has emphasized this very point of substantial similarity, and has

urged this court to exercise its reviewing power to harmonize the conflicting conclusions of the two District Courts of Appeal.

[1] It would be most anomalous for such decisions to stand, reaching diametrically opposite conclusions as to the legal effect of the same occurrence, where the essential facts are similarly presented, and are in most particulars undisputed. The rule that a reviewing court is bound by the findings of the trial court on conflicting evidence cannot apply to a situation such as this, where two lower courts, dealing with substantially the same evidence, have reached different conclusions of law, on the legal issue of whether from this evidence legal responsibility is imposed by the law upon the defendant. It is within the proper function of this court, upon petition for hearing, to eliminate this confusion, and to determine the legal effect of the evidence in both cases. This we have done in our adoption of the opinion of the District Court of Appeal in the Inyo Chemical Company Case, which fully reviews the evidence and reaches the conclusion that the defendant city is liable. We refer to that opinion for a complete discussion of the reasons for our present holding.

[2, 3] Two points may, however, be emphasized at this time. The first is that the testimony of defendants' experts that the aqueduct at the point of the break was constructed in accordance with standard engineering practice is, of course, only opinion evidence which is not conclusive either upon the trial court or an appellate court. The precise situation involved herein, with respect to the drainage area, the formation of the cone and its materials, the kind of rainfall in the territory, and previous experience with debris after rainfall, could hardly have been exactly duplicated elsewhere. The expert opinions were that in such territory with such history the aqueduct was constructed in accordance with standard practice, but because the con-

ditions to which such standard practice is applicable are necessarily variable, it is both proper and essential to examine these opinions in the light of the actual physical circumstances, and of the prior history of the area. Upon such examination, we think it must be concluded that to leave an open aqueduct with considerable curvature and a slow grade in a position below a large steep cone of loose materials, in a territory where heavy and at times torrential rains have been known to occur, without any provision for spillways or other drainage methods, constitutes negligence.

[4] The second point which deserves brief mention herein is that a rainstorm which is merely of unusual intensity is not a "superhuman" cause or act of God, superseding the original negligence as the proximate cause of the injury. There is nothing in the nature of the rainstorm involved in this case which makes it so totally unforeseeable as to act as a superseding cause. It was simply a heavy rain, commencing and continuing for several days, and perhaps it established a record for volume in inches in that region. But it cannot be concluded from this fact that the cause was wholly unforeseeable. Rainfall is foreseeable in most places, and heavy rainfall was characteristic of that region. There is no point at which an expectable heavy rain becomes an act of God by reason of its unusual volume. Both with respect to the issues of negligence and proximate cause, the foreseeability of unusual rainfall was clearly established by the evidence, and called for some precautions by way of overhead or underground drainage to meet the requirement of reasonable care under the circumstances.

The judgment is reversed.

We concur: WASTE, C. J.; THOMPSON, J.; SHENK, J.; SEAWELL, J.

5 Cal.2d 525

INYO CHEMICAL CO. v. CITY OF LOS ANGELES et al.
L. A. 14916.

Supreme Court of California.
 Feb. 29, 1936.

Rehearing Denied March 30, 1936.

1. Waters and water courses ☞179(4)

Evidence sustained findings of negligence in constructing and operating municipal aqueduct traversing alluvial cone at mouth of canyon, where heavy, prolonged rainfall enlarged gully across cone and filled aqueduct with debris causing it to break and precipitate waters onto adjacent leasehold.

2. Evidence ☞66

City and its agents having studied available rainfall records *held* charged with knowledge that unusual rains of varying intensity occurred in vicinity of break in municipal aqueduct, caused when heavy, prolonged rainfall filled aqueduct with debris, thereby precipitating waters onto adjacent leasehold, as regards contention that rainfall was so unusual that it could not have been anticipated.

3. Waters and water courses ☞179(3)

In action against city for damage to leasehold from breaking of municipal aqueduct when filled with debris by heavy, prolonged rainfall, evidence of fills at other times and places *held* of probative value.

Evidence was admitted to show that about 1913, near the time that aqueduct was completed, it was completely filled in for more than half a mile a short distance below point where break in question occurred in 1926, and that near same point it was again filled in 1914, that it was completely filled with sand and debris from flood waters in 1921, and that at various times between 1912 and 1926, it was partially filled by rocks, gravel, and sand falling from side of mountains on which aqueduct was constructed.

4. Waters and water courses ☞179(4)

Question of negligence in constructing and operating municipal aqueduct across alluvial cone at mouth of canyon without constructing spillways or adopting other means to exclude debris, which filled aqueduct during heavy rain, causing collapse and precipitating waters onto adjacent leasehold, *held* not dependent on expert testimony alone; question not being whether aqueduct in itself was safe.

5. Appeal and error ☞1048(3)

In action against city for flooding of leasehold when municipal aqueduct broke because filled with debris by heavy rain, error, if any, in admitting answers to defective hypothetical questions asking engineers whether construction of aqueduct was safe and prudent, instead of in accordance with good engineering practice, *held* harmless, where engineers had given detailed testimony regarding conditions observed on ground, and evidence apart from expert testimony sustained findings.

6. Waters and water courses ☞178(2)

In action for breaking of municipal aqueduct, precipitating waters onto lands leased from state and destroying part of unique deposit of trona thereon, lessee *held* entitled to present value of its lost profits on trona destroyed, based on selling price of processed trona less cost of production and state's royalty (Civ.Code, § 3333).

7. Waters and water courses ☞178(2)

In action for breaking of municipal aqueduct, precipitating waters onto adjacent leasehold and partly destroying trona thereon which lessee was engaged in processing and selling, allowance to lessee for increased operating expenses pending completion of repairs *held* proper; there being evidence supporting amount allowed.

8. Evidence ☞558(7)

In action for damages to leasehold caused by breaking of municipal aqueduct, cross-examiner's question asking city's expert whether he authorized construction of numerous spillways after break *held* proper for purpose of weakening expert's testimony by showing change in his former opinion, testified to on direct examination, that no drainage was necessary.

9. Trial ☞48

Evidence admissible for any purpose must be received, though improper for another purpose.

10. Trial ☞207

Where evidence is proper for one purpose and improper for another, adversary is entitled to instruction limiting purpose for which evidence may be considered by jury.

SHENK, J., dissenting in part.

In Bank.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by the Inyo Chemical Company against the City of Los Angeles and others.

Judgment for plaintiff, and defendants appeal.

Reversed, with direction.

For prior opinion, see 34 P.(2d) 165.

Erwin P. Werner, former City Atty., W. Turney Fox and Mark L. Herron, Asst. City Attys., K. K. Scott, A. A. Scott, and Harold L. Green, Deputy City Attys., Ray L. Chesebro, City Atty., J. M. Stevens, Asst. City Atty., Russell B. Jarvis, Deputy City Atty., and Jess E. Stephens, special counsel, all of Los Angeles, for appellants.

Young, Lillick, Olson, Graham & Kelly, Edwin L. Searle, and Edward R. Young, all of Los Angeles, for respondent.

LANGDON, Justice.

A hearing was granted in this case, after decision by the District Court of Appeal, Fourth Appellate District, in order that we might consider it in connection with the case of Southern Pacific Company v. City of Los Angeles, 55 P.(2d) 847, then pending in this court. Upon a full consideration of the record and briefs in both cases, and after further argument by counsel, we believe that the said District Court of Appeal has correctly determined the major issues of the case, and we accordingly adopt the following opinion of Mr. Presiding Justice Barnard as part of the opinion of this court:

This is an action for damages alleged to have been sustained by the plaintiff through and because of the breaking of an aqueduct maintained and operated by the defendants.

This break occurred in what is known as the Los Angeles aqueduct, which was completed about the year 1913 and which is operated by the defendants for the purpose of conveying waters from the Owens river, together with other waters, to the city of Los Angeles. In what is known as the Olancho division, in which this break occurred, the aqueduct is an open, cement-lined canal approximately 35 feet wide at the top, 12 feet deep, and 11 feet wide at the bottom. This section of the aqueduct is constructed along and upon the easterly slope of the Sierra Nevada Mountains which, immediately west of this portion of the aqueduct, rise to an elevation of from 8,000 to 13,000 feet. The aqueduct was designed to carry waters from the Owens river and also such waters flowing down the easterly slope of these mountains as might be intercepted and caught thereby, various openings being constructed in the upper or westerly bank of the aqueduct to facilitate the inflow of such waters. The flood and

surface waters flowing down the easterly slope of these mountains, thus intercepted by the aqueduct, carry certain amounts of sand, silt, and debris during times of heavy rainfall which are deposited in the bottom of the canal, reducing its capacity to some extent. No provision was made for keeping such deposits out of the canal, but at appropriate intervals the water was shut off and the accumulated debris removed. At some of the larger creeks spillways were constructed to carry flood waters over the aqueduct, one of these being at Cottonwood creek, about three and one-half miles north of where the break occurred. Gates were provided at the intake on Owens river by which all water could be shut off from the aqueduct, and provision was also made at certain points for spilling all water in the aqueduct into natural creek beds, one of these being at Cottonwood creek. The aqueduct was designed to have a capacity of 900 second feet at hydraulic grade line, which is 15 inches below the top of the aqueduct, and 1,115 second feet at the top of the concrete lining. The intervening space of 15 inches was intended to provide a safety factor to take care of any water coming down the slope of the mountain which might be intercepted. However, the defendants' rating tables disclose that the actual working capacity of the aqueduct near Cottonwood creek was 654 second feet at hydraulic grade and 875 second feet at the top of the concrete lining. There is evidence that this actual lower capacity was caused by the fact that there are 1,800 degrees of curvature in the aqueduct in the three and one-half miles next above where the break occurred; and that this resulted in such a slow movement of the water at this point that its velocity was not sufficient to move any sand or gravel which came in from above.

Immediately to the west of this section of the aqueduct there are a number of so-called canyons extending down the face of the steep easterly slope of these mountains. Below each of these canyons there is what is called a "cone," consisting of a large mass of sand, gravel, and rocks which in times past has been washed out of the canyon above it. Each cone has its apex at or near the mouth of its respective canyon and spreads out in a fan-shaped manner on down the slope. These cones vary in size and area and the canyons above them also vary in steepness and in drainage area. In its route along and upon the easterly slope of these mountains this aqueduct crosses

many of these cones, including the one involved in this action, which is called "Cone A," being immediately below what is termed "Canyon A." The aqueduct was built over Cone A at a point several hundred feet below its apex and is somewhat in the form of a semicircle as it passes around the sloping sides of the cone.

The plaintiff operated a manufacturing plant at Cartago, near the southerly end of Owens Lake and a short distance easterly from and below the point where the break in the aqueduct occurred, in which it produced calcined trona and a refined soda ash. Owens Lake has no outlet and the waters thereof are saturated with certain mineral substances. As the waters in the lake had lowered sodium bicarbonate or sodium hydrate, in a form called trona, was deposited on certain portions of the lake bed from which the water had receded. The plaintiff had leased from the state of California some 1,300 acres of land along the shore of Owens Lake, apparently part of the tract being covered by waters of the lake. Under this lease it was required to pay to the state an annual rental of \$2.50 per acre and, in addition, to pay a royalty of 50 cents for each ton of trona removed and a royalty of 25 cents for each ton of any other product removed or taken from the water or land. In conducting its business the plaintiff gathered dry trona from certain portions of the land which were not covered with water, hauled this trona to its plant on roads which it had constructed, and, after processing the same, sold the same as refined trona. It also pumped brine from the highly concentrated waters of the lake itself through a pipeline to its plant, using the material to manufacture soda ash. The brine thus pumped to the plant was also strengthened by adding thereto quantities of the dry trona which was taken from the banks of the lake. The deposit of dry trona varies in thickness and in purity and in some places was covered by or mixed with sand, but at one place on the lease there was an area of about 130 acres containing an especially thick deposit of high-grade trona.

A heavy rainfall began in the Owens valley on November 24, 1926, and continued at intervals until the morning of the 27th, being slightly heavier at a point three and one-half miles north of Cone A than at Independence, which is thirty miles north of this cone, and being particularly heavy during the last twenty-four hours of the storm. Some time during the night of the 26th-

27th the water coming out of Canyon A and flowing down Cone A extended and deepened a gully which had existed on the face of the cone and washed some 7,000 cubic yards of sand, gravel, and debris into that part of the aqueduct traversing this cone, with the result that the water in the aqueduct backed up and overflowed, washing out the foundations of the aqueduct and causing it to collapse and break. About 500 feet of the aqueduct was washed out and the combined waters flowed on down the slope of the cone scouring out a channel some 300 or 400 feet in width, and passing over a portion of plaintiff's lease and on into Owens Lake. Large quantities of dry trona were washed out and destroyed and other portions of the trona deposit were covered with sand and debris, in some places to a depth of several feet. The plaintiff brought this action to recover damages for the injury done to its trona beds and to certain of its roads, pipe lines, and power lines, and for its increased cost of operation during the time certain repairs were made. After a trial before the court without a jury, judgment was entered in favor of the plaintiff for \$236,251.96, from which judgment the defendants have taken this appeal.

While the transcripts contain about 2,300 pages, printed briefs totaling about 3,200 pages have been filed, supposedly for the assistance of the court, and it is neither practicable nor necessary to treat and comment upon, in detail, all of the matters thus presented.

[1-3] With respect to their liability in general, the appellants contend that the court's findings of negligence on their part in constructing, maintaining, and operating the aqueduct are without support in the evidence. The court made a number of findings in this regard, including the following, which are particularly attacked:

"The court finds that the defendants were negligent in the construction of the aqueduct or canal owned and operated by them, as hereinbefore described, in that they failed to construct necessary or proper spillways to carry storm or surface waters, which might reasonably be expected to fall upon the mountain slopes westerly of said canal or aqueduct, over and across or under said aqueduct or canal, and particularly that they were negligent and careless, and failed to exercise due care in the construction of said aqueduct in that they failed to make any provision, either by overhead or underground spillways or conduits in that certain

canyon referred to and described in the evidence and testimony introduced in this case as Canyon 'A,' to carry storm or surface waters which might reasonably be expected to fall on the watershed above said Canyon 'A,' over or under said canal or aqueduct, or to make provision so that such storm or surface waters carrying sand, gravel, silt and rocks would not be emptied into said canal."

"* * * the court further finds that defendants were negligent in the maintenance, care and operation of said canal or aqueduct in that defendants knew, or should have known from experience gained by the operation of said canal from the period extending from about the year 1913 to November 26, 1926, that heavy rains falling upon said mountain slopes westerly of said canal or aqueduct would cause storm or surface waters to flow down said slopes and into said canal or aqueduct, and would carry with them sand, silt, rocks and debris, and empty the same into said canal or aqueduct unless spillways or conduits were constructed to carry said surface waters and said sand, silt and rocks over or under said aqueduct or canal, and that defendants knew, or should have known if such storm or surface waters flowed into or were emptied into said canal or aqueduct and carried with them sand, silt, rocks or debris, they were likely to fill, or partially fill, said aqueduct or canal and cause the flow of water being maintained in said canal or aqueduct by said defendants, to be dammed up and to back up and overflow the easterly bank of said canal or aqueduct, and to wash away the fill or embankment upon which said canal or aqueduct was constructed, and to undermine the same, and the court finds that said defendants were particularly negligent in the maintenance, care and operation of said canal or aqueduct in that they failed to construct any spillway or conduit over or under said canal or aqueduct opposite or below that certain canyon referred to, described and testified to as Canyon 'A' in the testimony and evidence introduced in this case and that defendants were negligent in that they knew, or should have known, if said canal or aqueduct became undermined and collapsed that the waters flowing therein would flow down and upon, and be precipitated upon the bed of Owens Lake, and would deposit soil, silt, sand and debris upon the leasehold owned, operated and controlled by plaintiff; that defendants were negligent and careless, and failed to exercise due or proper care in the

maintenance and operation of said canal or aqueduct in that they did not maintain a proper or sufficient patrol or guard, and did not maintain adequate or sufficient inspection of said canal or aqueduct during the period of heavy rainfall that continued from November 24th to the morning of November 27th, 1926 * * *

It is argued that the only evidence appearing in the record which could possibly be taken as supporting a finding of negligence on the part of the appellants consists in the answers given by two expert witnesses to hypothetical questions asked of them, which evidence was improperly admitted since the form of the questions was improper and, further, that it conclusively appears from the evidence that the break in the aqueduct which resulted in this action was caused by such an unusual flow of water out of Canyon A and down Cone A that the same must have come from such a cloudburst or unusual rain as could not have been anticipated by the appellants and which must be held, as a matter of law, to have constituted an act of God and one for which the appellants cannot be held responsible. We are unable to agree with either of the contentions thus made.

While it appears from the evidence that the ordinary rainfall in the Owens Valley is light, it also appears that this area, including the easterly slope of the mountains along which this aqueduct runs, is subject to torrential rains at times; that such rains are especially heavy in spots; and that the places or spots where the rain is unusually heavy vary with the different storms.

According to the government records kept at Independence, thirty miles north of where the break occurred, it rained 1.12 inches on November 24, 1926; 2.51 inches on the 26th, and 1.06 inches on the 27th. According to records kept by the appellants at their Cottonwood creek gate, about three and one-half miles north of this break, their gauge showed .18 of an inch of rainfall on the morning of November 24, 1926, 1.79 inches on the morning of the 25th, .35 on the morning of the 26th, and 2.78 inches on the morning of November 27th. It should be noted that these last figures are from morning to morning of the respective days, while the preceding government figures are from midnight to midnight. With this in mind, while the rainfall during this storm may have been somewhat higher at the point where the break occurred than at Independence, it does not necessarily appear

that the difference was very great. The total for the storm at Independence was 4.68 inches, while the total at the Cottonwood gate was 5.01 inches. A number of witnesses testified that the heaviest rainfall during this storm occurred during the afternoon and evening of the 26th and the early morning hours of the 27th, and that while it was a very heavy rain it was no heavier than they had seen at that place several times in the past. It appears from the government records of rainfall at Independence that in December, 1867, it rained 3.90 inches on the 21st and 22d, 1.60 inches on the 23d, and 5.59 inches within a period of twenty-nine hours on the 25th and 26th, and there was a total rainfall of 12.19 inches during that month. During January, 1868, it rained 3.05 inches on the first and 1.04 inches on the 10th. During January, 1914, it rained 1.33 inches on the 24th and 3.51 inches on the 25th. The government records thus disclose that the rainfall at Independence on November 26, 1926, had been exceeded on four days since the government records were kept. The appellants argue, however, that it conclusively appears that a rainfall occurred on the night of the 26th-27th at Canyon A very greatly in excess of any that had ever occurred there before, since on this occasion the water coming from Canyon A washed great quantities of sand and gravel from Cone A into the aqueduct for the first time since it was constructed. It neither appears that the rain in question was heavier at this point on this occasion than had occurred there before the aqueduct was constructed, nor, necessarily, that it was heavier than the one in January, 1914. The manner in which rain fell, the condition of the cone at the time, the form of the gully already on the face of the cone, the manner in which the material had settled through the years, and many other things may have led to the concentrated washing and caving which occurred on this occasion.

It is also argued that this rainfall in Canyon A must have been greater than in the surrounding area since the drainage area in Canyon A is smaller than that in adjoining canyons, since Cone A is smaller in area than some of the cones near by, and since no such a slide or fill then occurred at the other cones crossed by the aqueduct. Not only is there testimony from witnesses justifying the inference that the rainfall at the point in question was not noticeably greater than in the surrounding country, but the fact that such a wash then occurred here for the first time, and here only, does

not conclusively show that a very unusual amount of rain fell at that time in Canyon A only. While it appears that the drainage area of Canyon A and the area of Cone A are smaller than some other similar canyons and cones below and over which the aqueduct passes, it also appears that Canyon A is steeper than the others, that its walls and sides and practically all of its drainage area consists, to a large extent, of light loose material and that Cone A stands apart from other cones in the vicinity as being composed of lighter material, light sand and gravel, and fewer and smaller rocks. Not only is it possible that such lighter material would wash more easily than cones composed of heavier material but the fact that this cone had been thoroughly soaked during the preceding two days, with the added steepness and narrowness of its canyon, and the fact that there was already a channel on the face of the cone, at least near the mouth of the canyon, may have concentrated the water and started the loose sand to slipping while larger cones near by may have absorbed and spread a larger amount of water without starting a concentrated erosion. When water once starts to cut a soft material the cutting is often rapid. There is some evidence that the condition and position of this cone and canyon were different from its neighbors and it cannot be said that the only possible inference to be drawn from the thing that happened is that the rainfall in that particular spot was enormously greater than that on either side. It further appears that the appellants had knowledge of and had studied the available rainfall records and they are to be charged with knowledge that unusual rains occurred in this vicinity and that they vary in intensity at different places. If it may be assumed that the trial court could have found to the contrary, it cannot be said that there is no evidence to sustain the court's finding that this storm was not so unusual as not to have been anticipated by the appellants and that it was not of such proportions as to constitute what may be termed "an act of God" in the legal sense.

The question of the appellants' negligence in constructing and maintaining this aqueduct should be considered in connection with the fact that such a storm as the one here in question should have been anticipated by them. Under such circumstances this aqueduct was constructed for a distance of several thousand feet across this cone of unusually light material, and there is evidence that it was constructed by cutting

down to grade on the slope of this cone through this light material and leaving on the uphill side of the aqueduct a perpendicular wall of sand and gravel standing four feet above the top of the west side of the aqueduct, from which point the cone sloped on up to its apex at a grade of between 20 per cent. and 25 per cent. In other words, this mass of sand, gravel and light material stood immediately above the aqueduct, with its lower edge standing four feet directly above the side of the same, and with nothing to take care of any water or material that might come down. Not only would any water that got started down this cone in a definite channel have a colossal carrying capacity, as testified by one of the engineers, but the very condition in which this cone was left, in itself, justifies a finding of negligence. A number of photographs showing the actual conditions at this point appear in the record and these, in themselves, furnish sufficient evidence to support the findings attacked. There was also evidence that about the time the aqueduct was completed it was completely filled in for more than half a mile a short distance below the point where this break occurred, that near the same point it was again filled in 1914, that it was completely filled with sand and debris from flood waters in 1921, and that at various times between 1912 and 1926 it was partially filled by rock, gravel, and sand falling in from these slopes. The appellants argue that evidence of such fills at other times and places is of no value because a fill had not before occurred at the identical spot involved here. This contention is without merit and this evidence tends to support the finding made.

[4,5] The appellants contend that the question of negligence with respect to the manner in which this aqueduct was constructed and maintained was entirely a question to be decided upon the testimony of expert witnesses and that the only material evidence upon this point which is properly in the record, consisting in the answers to hypothetical questions given by several expert witnesses put on by the appellants, is directly contrary to the court's findings. It is contended that none of the respondent's evidence on the question of negligence is material except for two hypothetical questions asked of engineers placed on the stand by the respondent. It is then argued that the evidence of these two engineers was inadmissible because of the form of the question asked of each and that

there is, therefore, no evidence in the record to sustain the finding of negligence. The hypothetical question asked of respondent's two engineers, after stating the general facts and circumstances disclosed by other evidence, concluded as follows: " * * * state whether in your opinion it was safe and prudent to construct said aqueduct of the dimensions and character and at the location mentioned, without providing means for carrying the drainage water (and) debris which might be expected to flow from said canyon west of the point where the fill occurred, so that such drainage water and debris would not be deposited in said aqueduct, state whether or not in your opinion it was safe?"

To this question one of the witnesses answered no, and the other witness answered as follows: "In my opinion it was imprudent and not good engineering. If the locating engineer was forced by some unknown reasons to me, to locate an open aqueduct across all these debris cones you have mentioned, and at the mouth of all the canyons you have mentioned, he should have provided for not only to protect the aqueduct by frequent overhead crossings, but in some places to protect the aqueduct by covering the same. That is based on my knowledge also of the country alongside and through which the aqueduct runs from Alabama Hills to below Little Lake."

It is appellants' contention not only that the question of negligence depended entirely upon expert evidence, but that the form of the question asked of these witnesses took away from the trier of fact the ultimate fact to be decided and that the court, therefore, erred in permitting the questions to be answered. It is argued that the witnesses should have been asked whether the manner of construction indicated was in accordance with good engineering practice, and not whether it was safe and prudent under the circumstances. In support of this contention the appellants rely upon the following cases: *Sappenfield v. Main Street R. R. Co.*, 91 Cal. 48, 27 P. 590; *Giraudi v. Electric Imp. Co.*, 107 Cal. 120, 40 P. 108, 28 L.R.A. 596, 48 Am.St. Rep. 114; *Luman v. Golden Ancient Channel Min. Co.*, 140 Cal. 700, 74 P. 307; *Parkin v. Grayson-Owen Co.*, 157 Cal. 41, 106 P. 210; *Mulholland v. Western Gas Const. Co.*, 21 Cal.App. 44, 131 P. 110, 113.

It may first be observed that no objection was made to the form of the question when it was asked of the second expert witness

put on by the respondent and that this witness replied that in his opinion the manner of construction, under the circumstances named, did not constitute good engineering. The respondent's expert witnesses had testified in great detail as to the existing conditions as they had seen them on the ground and as to the surrounding circumstances. One of the witnesses explained his answer by stating what, in his opinion, could have been done to meet the situation shown to exist. As pointed out in *Giraudi v. Electric Imp. Co.*, 107 Cal. 120, 40 P. 108, 28 L.R.A. 596, 48 Am.St.Rep. 114: "The cases do undoubtedly hold that an expert cannot be asked whether a structure is a safe one or whether certain methods are prudent, but all hold that facts may be elicited from the witness from which the conclusion inevitably follows." In that case, the court further said: "The difference is largely one as to the form of the question, and, while I do not mean to say that it is immaterial, or that such an error may never be cause for reversal, I do not think it should be so held here. The answer of the witness gave the facts in full, and explained what methods would have been safe. All this information might have been obtained by proper questions. And then it was not very material here. The negligence of defendant was fully proven by other evidence." In the instant case, no such technical question was involved as whether or not the aqueduct, in itself, was safe. If it be conceded that no layman is capable of passing upon the form of construction of such an aqueduct in order to give it the requisite strength to meet the strain to be placed upon it under the conditions under which it is to be operated, it does not follow that the other question as to the surroundings in which it was built and maintained and as to the danger that might lie in the great mass of light material immediately above it and under the canyon, is a question for experts alone. In our opinion the question presented was not one for experts alone, and there was ample evidence, aside from the expert testimony, to sustain the court's findings. We take it that the expert evidence upon this subject was admitted not as the only evidence which was material in that connection and not as passing upon the ultimate fact to be decided, but for the purpose of giving the court the assistance of the opinion of these experts, not as to whether the aqueduct was safe in itself but as to whether recognized principles of engineering had been followed with respect to where it was placed and with

respect to what other measures had been taken to safeguard its operation. This was recognized by one of the witnesses for the respondent who referred to good engineering in his answer and, as a practical matter, we think it is recognized by the appellants, who also asked their witnesses whether the manner of construction under the circumstances was safe and prudent, although they added thereto the phrase "and in accordance with good engineering practice." This added reference to good engineering practice technically improved their question, but it may well be doubted whether it made any practical difference in the evidence thus brought out. It affirmatively appears that the trial court took all of the evidence, expert and otherwise, into account in arriving at its decision and, we think, properly so. After a careful examination of the record, we are of the opinion that the defect in the form of these hypothetical questions was not fatal to the respondent's case and that the error, if any, in permitting these questions to be answered was neither prejudicial nor reversible. *Mulholland v. Western Gas Const. Co.*, 21 Cal.App. 44, 131 P. 110, 113; *Lemley v. Doak Gas Engine Co.*, 40 Cal. App. 146, 180 P. 671; *Bowen v. Sierra Lumber Co.*, 3 Cal.App. 312, 84 P. 1010.

The court's findings with reference to negligence in connection with the manner in which the aqueduct was operated on the night on which the break occurred also finds some support in the evidence. While there is some testimony that the appellants doubled their force of men that night by sending extra men to certain points at which men were regularly stationed and kept, the only evidence in the record is to the effect that the aqueduct was not patrolled and there is no evidence of anything material being done by these extra men except in one case where aid was given in repairing a floodgate which would not open. While this gate was repaired it was not opened until long after the damage was done. Although the rain had been particularly heavy during the preceding three days and was particularly heavy on the night in question, the aqueduct was kept running nearly full and there is evidence that nothing was done to discover what amount of debris had been washed into the aqueduct. There is some evidence that the break here in question occurred about 8:30 o'clock on the night of the 26th. The aqueduct was completely filled just below the break, the entire stream of water carried by the aqueduct was diverted down the hill across the respondent's

property, and the break was not discovered until some time early the next morning, although one of the appellants' men was stationed at a point two and one-half miles below the break and he testified that in the performance of his duty he made an examination of the aqueduct to see how much water it was carrying every hour during the night. The matter of negligence in connection with the operation of the aqueduct on the night in question is of minor importance as compared with the question of negligence in its construction and maintenance in general, but there is sufficient evidence in the record to support the findings as to each phase of negligence charged.

[6, 7] We will next consider the matter of damages. The court found that at the time of the break in the aqueduct there were on the lease owned and controlled by the respondent approximately 200 acres which were covered with deposits of trona varying in depth from twelve inches to four feet; that 130 acres of this was covered with high-grade trona; that the water flowing through the break in the aqueduct over and across the respondent's premises and the sand, soil, silt, and débris deposited thereon by said flow of water destroyed and rendered worthless 75 acres of high-grade and 80 acres of low-grade trona deposits; that said flooding washed away and destroyed approximately 90,000 tons of the highest grade of trona; that in addition to the destruction of such trona deposits the fresh water thus flowing and the soil, silt and gravel carried therewith reduced the purity and strength of the brine which had existed on respondent's leasehold so that it became necessary for the respondent to add large quantities of trona to such brine to bring the same up to a required gravity; that about two miles of a roadway which had been five and one-half miles long was washed out, rendering the whole roadway unless and valueless; that several hundred feet of pipe line and certain power lines were washed out; and that respondent was compelled to make certain repairs to its pipe lines, power lines and pumping plants, to build a longer road to its remaining trona deposit, to construct an extension to its pipe lines and to put in a new pumping plant. The court then found that by reason of the negligence of the appellants the respondent had been damaged in the sum of \$236,251.96.

The appellants attack this last finding, as to the amount of the damages, as being without support in the evidence. The only

support for the amount of the damages as found by the trial court is to be found in the testimony of one of the respondent's officers. This witness testified that the respondent's books disclosed that \$710.64 was spent in repairing pipe lines; that the entire road, a part of which was washed out by the flood, had cost \$6,767.50 when originally constructed about two years prior to November, 1926; that after the flood \$9,912.80 was spent in building a new road to the remaining trona deposit, in building a new pipe line for the brine supply, and in building a new pumping plant at the end of this pipe line; that while the repairs were being made it cost the respondent \$36,161.02 in increased operating expenses; and that for about three months prior to the break in the aqueduct the respondent had been making a profit of \$2.53 per ton on all trona sold. Applying this profit to the 90,000 tons of trona said to be destroyed this witness stated that the damage to the trona was \$227,700. The court reduced this last figure by \$45,000, deducting the royalty of 50 cents per ton which the respondent would have had to pay to the state in the event the 90,000 tons of trona destroyed had been removed by the respondent. Otherwise the court adopted the figures given by this witness, resulting in the judgment of \$236,251.96.

The largest item of damage was the injury done to the trona deposits on this land and the most important legal question presented on this phase of the case is as to the measure of damage properly to be applied in that connection. The appellants maintain that any injury done by them to the trona deposit was an injury to real estate and that the usual rule for measuring such damage applies, that is, the difference between the value of the land before and after the injury. On the other hand, the respondent contends that trona is a mineral, that a different rule applies where mineral land is injured or destroyed, and that the proper measure of damage here is the value of the destroyed trona less the cost of taking the same from the ground.

The parties have argued at some length the question as to which of these rules is appropriate to the determination of the damages suffered in the instant case. In our opinion, there is little to be gained from their consideration in an abstract form, or from a discussion of cases dealing with the ordinary situation of injuries to land. Plaintiff is admittedly entitled to an amount

"which will compensate for all the detriment proximately caused." Civ. Code, § 3333. There is authority to support the view that the rule governing injury to timber may be applicable to injury to ores, and that in such case the value of the property destroyed may be the measure of damages. See 4 Sutherland on Damages (4th Ed.) § 1019. But if that rule be not applicable, then the only other measure is the difference in value of plaintiff's leasehold before and after the damage, and it seems obvious that this depends upon the value of the trona which is destroyed. Plaintiff's lease was given solely for the purpose of taking this particular mineral from a deposit which was unique in character. Opinion evidence as to the difference in value of the leasehold before and after the injury could not be based upon values of similar land because there is no similar deposit known. Hence the value of the mineral destroyed, less the cost of producing and marketing it, is a fair measure of the damage. The trial court was therefore not in error in applying this rule.

Defendant objects that even under the rule applied the evidence was insufficient to show the value of the trona in place. On this point it appears, however, that there is no way to determine the value of the trona in place. Evidence was offered that there was no market for "raw trona" in place. It would seem, therefore, that in taking the selling price of the finished product, deducting the cost of producing it, and further deducting the royalty payable to the state, the court adopted the only possible method of arriving at the damage suffered.

Defendant attacks the allowance of \$36,161.02 for increased operating expenses during the period following the flood, but the finding on this item of damage is supported by sufficient evidence. A further objection of defendant, that the court duplicated certain items amounting to the sum of \$8,702.94, is conceded by plaintiff, and the judgment may be reduced by that sum.

We are accordingly satisfied with the general conclusion of the court below, together with the above concession by plaintiff; but in one important respect the judgment is erroneous and it must be reversed. We have approved the view of plaintiff, and permitted a recovery based upon its own past experience in cost of production and selling price, holding as we do that in spite of some speculative elements in this measure of damages it is the only one which can

practically be applied to this unusual situation. But there is another item in the past experience of plaintiff, namely, its rate of production and sale. There is evidence that at such rate it would take thirty-six years to process and sell the 90,000 tons of trona destroyed. The court awarded as damages the total profits which would have been made, according to past experience, during that period, and it awarded those profits as a lump sum, payable now. Certainly the present commuted value of those future profits is much less than the total which would be realized over the entire period. Herein lies the defect in plaintiff's position. It is true that the only way to make any reasonable determination of its losses is to consider the profits which would normally have been made from sale of the destroyed trona; in other words, there is no other fair way to determine the value of the trona in place, and thus the injury to plaintiff's leasehold. But plaintiff's profits from that particular trona would have been, at its present rate of production, yearly sums realized for thirty-six years, and such yearly sums represent the maximum damage proved. Plaintiff is, to be sure, entitled to have these sums commuted and awarded at their present value, but, in view of normal rates of return on money, this amount must be considerably less than that awarded. It is necessary, therefore, that the case be reversed in order that the lower court may take competent evidence to establish the present value of those profits. In other respects we are in accord with the method of computing the damages which the trial court employed.

[8-10] A point strenuously urged by defendant upon the hearing is that the trial court committed reversible error in permitting certain cross-examination of defendant's witness Van Norman. This witness was employed in the construction of the aqueduct and was in charge of maintenance and operation. On direct examination he testified to his inspection in 1921 of the territory surrounding the canyon where the break subsequently occurred, and declared that it was his opinion at that time that no overhead or underground drainage was necessary. On cross-examination he was asked whether he had authorized the construction of a large number of spillways after the break, and defendant's objection to the question was overruled. Defendant points to the settled rule that changes made or precautions taken after an accident are not admissible to show negligence at the

time of the accident. Counsel for plaintiff, however, made it clear that this questioning was not directed to the issue of negligence, but was for the purpose of weakening the testimony of defendant's expert witness by showing that he had subsequently changed his opinion as to the necessity of drainage. Whatever weight may be given to such a showing, it is clear that for this purpose, the question was not improper, and the rule is of course well settled that if evidence is admissible for any purpose, it must be received, even though it may be highly improper for another purpose. In such case the danger of prejudice is a practical risk which is unavoidable, though in jury trials the other party is entitled to an instruction limiting the purpose for which the evidence may be considered. See *Wagner v. Atchison, etc., R. Co.*, 210 Cal. 526, 292 P. 645; *Adkins v. Brett*, 184 Cal. 252, 193 P. 251. It follows that in the instant case the court committed no error in permitting the question to be asked.

The findings and conclusions of the court below on all issues, including all items of damage found, are approved in all respects except as follows: (1) The amount shall be reduced in the sum of \$8,702.94, in accordance with the concession of plaintiff; and (2) the damage to plaintiff's leasehold shall be computed by determining the present value of the sum found by the court below as the profit which would have been realized from the sale of the destroyed trona, in accordance with the views hereinbefore expressed.

The judgment is reversed for the sole purpose of determining this sum, and the trial court is directed to enter judgment for the plaintiff upon such determination, each party to pay its own costs on appeal.

We concur: WASTE, C. J.; THOMPSON, J.; SEAWELL, J.

SHENK, Justice (concurring and dissenting).

I concur in the opinion of the majority except in so far as it requires the trial court to compute, which I assume means to determine by calculation, the present value of the sum which the court found to be the damages for the destruction of the mineral, on some basis of "profits" to be realized from future production. I am unable to find authority or justification for any such rule in the law of damages for tort. When

the trial court has applied, and this court has now approved, the correct rule for the measure of damages in such cases, namely, the difference between the market price of the mineral refined and ready for market on the one hand, and the expense of mining and preparing the raw material for market, and the royalty to the state on the other, regardless of whether the mineral is to be mined now or next year or not at all at the owner's option, the result reached by the trial court would necessarily follow. The value of the mineral in place at the time of its destruction was the issue. It was established by competent evidence and the question of future profits was not properly in the case. It seems to me that the rule now laid down has injected into such cases elements and problems unknown to the law.



5 Cal.2d 511

**NELSON v. FERNANDO NELSON &
SONS (two cases).**
S. F. 15503, 15108.

Supreme Court of California.

Feb. 28, 1936.

Rehearing Denied March 26, 1936.

1. Vendor and purchaser ☞341(3)

In action to recover amounts paid on property which plaintiff's husband had purchased from defendant and agreed to convey to her under property settlement agreement and which defendant had conveyed to others, evidence held to support finding that defendant and plaintiff's husband had not canceled contract.

2. Vendor and purchaser ☞214(1)

Where husband contracted to purchase property from defendant which he agreed to convey to his wife under property settlement agreement, assignment by plaintiff's husband to her of his rights under contract operated to transfer his rights under the contract to plaintiff although the burdens of the contract still rested on him.

3. Vendor and purchaser ☞214(5)

Where defendant agreed to sell property to plaintiff's husband, which he was to convey to her under property settlement agreement, and husband assigned his rights under

agreement to plaintiff, after defendant had notice of assignment it could no longer deal with husband as owner of rights under contract and to foreclose plaintiff of her rights thereunder, defendant was required to have tendered deeds to her and demanded payment of balance due.

4. Vendor and purchaser ⇨341(3)

In action to recover amounts paid on property by plaintiff's husband, which he agreed to convey to her under property settlement agreement and which defendant conveyed to others, evidence supported finding that \$10,000 was paid on purchase price of property notwithstanding that such amount was borrowed on security of part of property which was up to that time the property of defendant and that defendant indorsed the note given for its payment and therefore rendered itself liable thereon.

5. Vendor and purchaser ⇨214(5)

Wife *held* entitled to recover entire amount of down payment made by husband on property purchased from defendant, which husband agreed to convey to wife under property settlement agreement and which defendant conveyed to others with knowledge of agreement.

6. Vendor and purchaser ⇨214(5)

Defendant's deliberate refusal to perform agreement to convey property which plaintiff's husband had purchased from defendant, and which defendant agreed to convey to plaintiff under property settlement agreement of which defendant had notice, *held* "bad faith" breach of agreement within statute authorizing recovery of difference between price agreed to be paid and value of property agreed to be conveyed at time of breach (Civ. Code, § 3306).

[Ed. Note.—For other definitions of "Bad Faith," see Words & Phrases.]

7. Vendor and purchaser ⇨341(3)

In action to recover amount paid on lots by plaintiff's husband which husband agreed to convey to plaintiff under property settlement agreement, and which defendant conveyed to others, admission of appraisal made by bank to establish value of three lots at time of conveyance by defendant *held* not error, in view of stipulation.

8. Trial ⇨105(1)

Incompetent evidence may be accepted in proof of issues of cause, where admitted without objection.

9. Evidence ⇨205(1)

In action to recover amount paid defendant on lots by plaintiff's husband which husband agreed to convey to plaintiff under property settlement agreement, and which defend-

ant conveyed to others, bank's appraisals originating in values set by defendant in application to bank for loan *held* admissible as admissions.

10. Evidence ⇨145

In action to recover amount paid defendant on lots by plaintiff's husband which husband agreed to convey to plaintiff under property settlement agreement, and which defendant conveyed to others, bank appraisals of value of property three years before sale by defendant *held* not too remote to form basis for finding as to value of property at time of sale, where defendant's president testified that value was about the same at time of appraisal and at time of sale, and property was sold at substantial profit.

11. Vendor and purchaser ⇨341(3)

In action to recover amount paid defendant on property by plaintiff's husband which husband agreed to convey to plaintiff under property settlement agreement and which defendant conveyed to others, evidence *held* to support finding of value of property found by trial court at time of sale by defendant.

12. Vendor and purchaser ⇨341(3)

In action to recover amount paid defendant on lots by plaintiff's husband which husband agreed to convey to plaintiff under property settlement agreement, and which defendant conveyed to others, evidence supported finding that plaintiff's husband had transferred to defendant property of net value greater than his monetary obligation to defendant after husband contracted to buy property from defendant.

13. Vendor and purchaser ⇨168

Under contract of sale, purchaser has obligation to pay price, notwithstanding that enforcement of obligation depends upon performance of concurrent condition by delivery of deed.

14. Vendor and purchaser ⇨341(4)

In action to recover amount paid defendant on lots by plaintiff's husband which husband agreed to convey to plaintiff under property settlement agreement, and which defendant conveyed to others, finding that plaintiff's husband transferred to defendant property of net value greater than monetary obligation to defendant *held* not conflicting with finding that parties allowed contract for sale to plaintiff's husband to continue in force without further performance by either of them.

15. Vendor and purchaser ⇨341(5)

Where husband transferred property to defendant corporation greater than his monetary obligation to defendant, after execution of contract for sale of lots by defendant to husband, and defendant conveyed property to

another with knowledge of husband's agreement to convey property to wife as part of property settlement, wife *held* entitled to recover property or its value without deduction for unpaid balance of purchase price on defendant's contract with husband.

In Bank.

Appeal from Superior Court, San Francisco County; Michael J. Roche, Judge.

Action by Mrs. Grace Deering Nelson against Fernando Nelson & Sons. From the judgment, plaintiff appeals and defendant cross-appeals.

Modified and affirmed.

Prior opinion, 46 P.(2d) 765.

Carroll Single and Stanley J. Cook, both of San Francisco, for Grace Deering Nelson.

W. P. Caubu, of San Francisco, for Fernando Nelson & Sons.

PER CURIAM.

A hearing was granted in this case after decision by the District Court of Appeal, First Appellate District Division 1. We now adopt the following portions of the opinion of Mr. Justice pro tem. Dooling as part of the opinion of this court:

Cross-appeals are presented herein from a judgment in favor of plaintiff for \$2,500 with interest from May 2, 1929. Plaintiff appeals on the judgment roll alone, claiming that under the findings she is entitled to a judgment for \$18,250 with interest. Defendant on its appeal presents a type-written transcript of the evidence and urges that the evidence does not support the findings in a number of particulars.

In 1926 plaintiff and Frank F. Nelson were husband and wife. Marital differences between them having become acute, on August 11, 1926, they entered into a property settlement agreement. As a part of said agreement Frank F. Nelson agreed to convey to plaintiff three certain lots of land, and to each of their two children one lot of land. Title to these five lots at the date of said agreement was in the defendant herein.

On August 12, 1926, defendant and Frank F. Nelson entered into a contract of purchase and sale of said five lots wherein and whereby defendant agreed to sell said five lots to Frank F. Nelson. By the terms of this agreement Frank F. Nelson was to make a total down payment of \$10,000 and

to give his note for the balance of the purchase price of one lot, which we shall designate as the Lincoln Way lot. As to the other four lots, the agreement was silent as to the time for paying the balance on the price of each or any of them, but the agreement recited in this regard: "The delivery to the Purchaser of a good and sufficient deed conveying title to said property and the payment of the balance of the purchase price are concurrent conditions."

The evidence shows that in order to finance the down payments on the five lots a bank mortgage of \$10,000 was placed on the Lincoln Way lot to secure a promissory note in that amount executed by plaintiff and Frank F. Nelson and indorsed by defendant. The \$10,000 thus borrowed was paid to defendant and applied as follows: \$7,000 on the purchase price of the Lincoln Way lot; \$1,000, respectively, on each of two other lots which by the terms of their property agreement Frank F. Nelson was to convey to plaintiff; and \$500, respectively, on each of the lots which by such agreement Frank F. Nelson was to convey to the children. As a part of this transaction, title to the Lincoln Way lot was conveyed to plaintiff forthwith.

On August 13, 1926, Frank F. Nelson assigned to plaintiff all of his rights in the aforesaid contract of purchase and sale, and covenanted with her to perform all of its obligations. On May 2, 1929, defendant herein conveyed one of the lots covered by its said contract of sale with Frank F. Nelson to a third party for \$5,000. On learning of this sale, plaintiff demanded of defendant that it pay to her the difference between the selling price to the third party and the price fixed in its agreement of sale with Frank F. Nelson, and defendant thereupon notified plaintiff that it recognized no rights in her under said contract on the expressed ground that the contract was with Frank F. Nelson. This suit followed, in which plaintiff sought to recover from defendant the amounts paid upon the four lots plus the difference between the selling price to Frank F. Nelson and the market value of the lots on May 2, 1929, the date of its repudiation of the contract. It further appears that defendant was a family corporation, the stock of which was all held by a father and five children, one of the children being Frank F. Nelson.

With this preliminary statement, we shall proceed to a consideration of the find-

ings of fact attacked by defendant as unsupported by the evidence. The court found that "from and after about said date of August 13, 1926, defendant knew and was informed of said assignment by said Frank F. Nelson to plaintiff." Plaintiff testified positively that in July or August, 1927, she personally presented the assignment to Fernando Nelson, the president of defendant corporation. Without affecting the rights of the parties in any way, we may accept this date as the date of first notice to the defendant. Accordingly this finding is ordered modified by changing the words therein "said date of August 13, 1926" to read "August, 1927."

[1] The court found that "after the execution of said contract, the down payment of \$10,000, defendant and said Frank F. Nelson and plaintiff, each and all of them, allowed said contract to continue in full force and effect without further performance by either of them"; and further that "it is untrue that defendant and said Frank Nelson mutually rescinded or canceled or terminated or abandoned said contract on August 14, 1926, or at any other time, or at all"; and that "said defendant Fernando Nelson & Sons, a corporation, did duly approve and execute said contract, and did at all times thereafter, until May 2, 1929, recognize said contract as being in full force and effect."

It is claimed by defendant that defendant and Frank F. Nelson mutually abandoned said contract in August, 1928, by oral agreement. Against this testimony plaintiff showed five bills sent by defendant to plaintiff covering taxes and sidewalk costs on these lots in 1927 and 1928, and on October 29, 1929, after its repudiation of the contract, defendant sent a letter to plaintiff purporting to cancel three such bills on the ground stated in the letter: "These bills were wrongly charged to your personal account as the contract on Lot 17 Block 3273 Lot 2 Block 2484 is with Frank F. Nelson, we are therefore charging his account." The account books of the corporation also show charges against plaintiff in connection with these lots which remained on the books unchanged until after the repudiation of May 2, 1929, and a charge against Frank F. Nelson on August 1, 1929, in connection with the contract for the purchase of the lots.

This evidence is ample to support the findings above set out. It is sufficient to support an inference that defendant recog-

nized plaintiff's interest in the contract until May 2, 1929, and recognized the contract as existing and in force between it and Frank F. Nelson even after that date, and is entirely inconsistent with the theory of a mutual abandonment by Frank F. Nelson and defendant in 1928.

[2,3] In addition to this, defendant had notice of the assignment to plaintiff in August, 1927. The effect of the assignment was to transfer all of Frank F. Nelson's rights under the contract to plaintiff (*Harris v. Miller*, 196 Cal. 8, 17, 18, 235 P. 981; *Kemp v. Enemark*, 194 Cal. 748, 756, 230 P. 441; *Laack v. Dimmick*, 95 Cal.App. 456, 469, 273 P. 50), although the burdens of the contract still rested upon Frank (*Lisenby v. Newton*, 120 Cal. 571, 52 P. 813, 65 Am.St.Rep. 203). It would be highly inequitable under such circumstances to permit Frank to surrender by agreement the rights in the contract which were no longer his property but had become the property of plaintiff by his assignment. After defendant had notice of such assignment, it could no longer deal with Frank as the owner of the rights under the contract. To foreclose plaintiff of her rights, it should have tendered deeds to her and demanded payment of the balance as was done in *Drips v. Moore*, 179 Cal. 249, 252, 176 P. 159. * * *

[4] Defendant also attacks the finding that \$10,000 was paid on account of the purchase price of the various lots. The basis of this attack is that the \$10,000 was borrowed on the security of the Lincoln Way lot which was up to that time the property of defendant, and that defendant indorsed the note given for its payment, and therefore rendered itself liable thereon. The primary liability to the bank, however, was that of the makers of the note, plaintiff and Frank F. Nelson, and the money was borrowed by them. In return for the payment of \$7,000 of this money and the agreement of Frank Nelson to pay the balance of the purchase price of this lot, the lot was conveyed by defendant. Neither the existence of defendant's vendor's lien for the unpaid balance on the purchase price of this lot, nor the secondary liability of defendant as an indorser of the note, can change the fact that the money was borrowed by plaintiff and Frank Nelson and by them paid to defendant. The mortgage has since been renewed, defendant again indorsing the note. We need not here determine what would be

defendant's rights in the event of default, foreclosure, and deficiency judgment against defendant as indorser. Suffice it to say that none of those contingencies was shown to have arisen.

The important questions before us relate to the extent of justifiable recovery by plaintiff for the following items: (1) Down payments on the lots; (2) profits and increased market value; (3) original purchase price.

[5] It is clear from the foregoing discussion that plaintiff is entitled to recover the total amount of all down payments made by Frank Nelson to the defendant corporation on the purchase price of the lots. These are as follows: West Portal lot, \$1,000; lot 17, \$1,000; lot 33, \$500; or \$3,000 in all. The trial court, as to these items of damage, only allowed \$1,000, representing the down payment on the West Portal lot. This was erroneous, and the judgment in favor of plaintiff in this respect must be increased by \$2,000.

[6] The next question is whether plaintiff may recover for profits and increased market value of the lots. As to the West Portal lot, its original purchase price was \$3,500; it was sold by defendant to a bona fide purchaser for \$5,000, or a profit of \$1,500. This sale was in repudiation of plaintiff's rights after notice thereof, and plaintiff was clearly entitled to the profit, which the lower court awarded to her. On this point the judgment of the court below was undoubtedly correct. The lower court found, in addition, that the other three lots had increased in market value from the date of the agreement to the date of repudiation by defendant. Specifically it found that lot 17 had risen in value to \$4,750, or an increase of \$1,000; lot 30 to \$4,000, an increase of \$1,000; and lot 33 to \$4,500, an increase of \$1,500. But the court did not include such total increase, namely, the sum of \$3,500, in the damages awarded to plaintiff, and of this plaintiff complains. We think her position is well taken. Defendant's deliberate refusal to perform the agreement, after full knowledge thereof, amounted to "bad faith" within the meaning of section 3306 of the Civil Code. See *Haight v. Marin Municipal Water District*, 208 Cal. 753, 284 P. 926; *Johnson v. Schimpf*, 197 Cal. 43, 239 P. 401. That section provides that, where there is bad faith in the breach of an agreement to convey an estate in real property, the damages shall include "the

difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach." In other words, under this section plaintiff is entitled to recover the increased value of the lots, as set forth above, and these must be added to her recovery.

[7-9] Objection is made, however, that the court's finding of such increased value is not supported by competent evidence. It appears that the plaintiff relied mainly upon certain appraisals made by the San Francisco Bank to establish the value of the three unsold lots as of May 2, 1929. These appraisals were of course hearsay, and could have been excluded upon proper objection. Not only was there no objection, but it was stipulated by counsel that the written memorandum of the bank's appraisals might be introduced in evidence, without any examination of the bank employee thereon. The rule is well settled that incompetent evidence, such as hearsay, may be accepted in proof of the issues of a cause where it is admitted without objection. *Holzer v. Read*, 216 Cal. 119, 13 P.(2d) 697; *Yule v. Miller*, 80 Cal. App. 609, 252 P. 733; *Powers v. Board of Public Works*, 216 Cal. 546, 15 P.(2d) 156. Moreover, the bank appraisals originated in values set by defendant itself in its application to the bank for a mortgage loan, and these figures given by defendant would seem to be admissions and competent evidence on the issue.

[10,11] It is further objected by defendant that the evidence is too remote; the bank appraisals being of the year 1926. On this point there is the testimony of defendant's president that there was a uniform demand for land from 1926 to 1929, and that the value was about the same. George Nelson, secretary of defendant, testified that there was a slight decline in land values during that period. However, it is to be noted that the West Portal lot was sold by defendant at a substantial profit. In this state of the record, it must be clear that there was competent evidence as to the value of the lots in 1929. The trial court did not accept the bank appraisals at their full amount, but in each instance found a lesser value. On lot 17, appraised at \$5,000, the court found a value of \$4,750; on lot 30, appraised at \$4,500, the court found a value of \$4,000; on lot 33, appraised at \$7,500, the court found a value of \$4,500. These findings must be approved, and, as already stated plaintiff is entitled to addi-

tional damages representing the increase in value.

[12-15] The final additional item of damage claimed by plaintiff is based upon the following finding of the trial court: " * * in 1927 Frank Fernando Nelson endorsed and defendant corporation took over 40 shares of Frank Fernando Nelson's stock and over 10 houses partially built by him of a net value greater than his monetary obligations to defendant." This finding is sufficiently supported by the evidence, and it appears therefrom that the defendant corporation, in taking back Frank Nelson's stock and the houses, wrote off his obligations to the corporation. If, therefore, Frank Nelson's obligations to the corporation were canceled, he owed nothing to the corporation on the lots in question, and plaintiff was entitled to the lots as his transferee without any further payment of the balances allegedly due thereon. It is objected that this finding, if so interpreted, is contrary to the other finding of the court that the parties "allowed said contract to continue in full force and effect without further performance by either of them." The theory of this objection is that the contract of sale was unperformed, that Frank Nelson could not be liable for the price unless a deed was tendered (the payment of the price and the delivery of the deed being concurrent conditions), and that consequently the payment of the balance of the price under the contract was not a "monetary obligation" of Frank Nelson to the defendant in 1927. There is no force in this reasoning. The duty of a purchaser under a contract of sale is to pay the price, and it is an obligation in any reasonable sense of the term, despite the fact that its enforcement depends upon performance of a concurrent condition, delivery of the deed. Moreover, it was so treated by the defendant, which maintained a ledger account which showed the amount due under the contract as one of the obligations of Frank Nelson, and which also billed him for such amount. It follows, therefore, that nothing was owed on these lots after the above-mentioned transfer by Frank Nelson of the stock and houses to defendant, and plaintiff was entitled to recover them or their value, without deduction for the unpaid balance of the price. This requires the addition of the sum of \$10,250 to plaintiff's judgment.

The judgment is modified by the addition thereto of the sum of \$16,000, making a total of \$18,250, with interest thereon at the rate of 7 per cent. per annum from and after May 2, 1929, and, as so modified, the judgment is affirmed.



12 Cal.App.2d 103

Ex parte BELLOTTI.

Cr. 2836.

Supreme Court of California.

March 24, 1936.

Criminal law ☞ 1134(3)

Supreme Court, in denying petition to review decision refusing, notwithstanding year spent in county jail and statute limiting county jail sentences for misdemeanors to one year, to release prisoner sentenced to pay fine for statutory felony of unauthorized taking motor vehicle with alternative of imprisonment in county jail, would not pass upon question whether sentence reduced offense from that of felony to misdemeanor, since point was not necessarily involved (Pen. Code, § 17; § 19a, as added by St.1933, p. 2217; St.1931, p. 2133, § 146).

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Victor Martin Bellotti, pleading guilty to a violation to section 146 of the California Vehicle Act (St.1923, p. 564, as amended by St.1931, p. 2133), was sentenced by the superior court to pay a fine of \$5,000, or, defaulting in such payment, to be "punished by imprisonment in the county jail" at the rate of one day for each \$3 of such fine not paid. Failing to pay the fine, he went to jail, remained there one year, and then brought a habeas corpus proceeding to procure his release, relying upon section 17 of the Penal Code, defining a felony, and section 19A, as added by St.1933, p. 2217, limiting a county jail sentence to one year, and contending that he could not be held in confinement in the county jail for any period longer than one year. To review a judgment of the district court of appeal [54 P.

(2d) 1115] reversing an order discharging him and remanding him to the custody of the sheriff, he petitions for a hearing.

Petition denied.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., Buron Fitts, Dist. Atty., Jere J. Sullivan, Deputy Dist. Atty., for appellant.

Frederic H. Vercoe, Public Defender, William B. Neeley, Deputy Public Defender, for respondent.

PER CURIAM.

In denying the petition for a hearing in this case, after decision by the District Court of Appeal, Second District, Division Two, we do not wish to be understood to be passing upon the question of whether the imposition of a fine, with the alternative of imprisonment in the county jail until the fine is satisfied, had the effect of reducing the offense from that of felony to misdemeanor. That point is not necessarily involved in this proceeding.



5 Cal.2d 628

CALIFORNIA TRUST CO. et al. v. KERCKHOFF-CUZNER MILL & LUMBER CO.

et al.

L. A. 15073.

Supreme Court of California.

March 17, 1936.

1. Mortgages ⇨27

Quieting title ⇨14

Unexercised option, executed by purchaser at sale under trust deed, permitting trustors to purchase property, *held* not "equitable mortgage," where trustors had been divested of title by foreclosure of trust deed; and hence plaintiffs deraigning title through trust deed foreclosure could maintain action to quiet title without foreclosing so-called "equitable mortgage."

[Ed. Note.—For other definitions of "Equitable Mortgage," see Words & Phrases.]

2. Trusts ⇨200(1)

Deed by trustee pursuant to trust deed in favor of deceased conveying realty to

"heirs or devisees" of deceased *held* not void for uncertainty in designation of grantee, where decree of final distribution had not been entered when deed was executed.

3. Executors and administrators ⇨129(3)

Where estate was in course of administration, determination of interests of parties claiming under estate *held* for probate court on final distribution, and not for trial court in action to quiet title to realty belonging to estate.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action to quiet title by the California Trust Company, executor of the estate of Roy W. Huntley, also known as R. W. Huntley, deceased and others, against Kerckhoff-Cuzner Mill & Lumber Company, John L. Kirkpatrick, and others. From a judgment for plaintiffs, defendant Kirkpatrick appeals.

Affirmed.

F. E. Davis, of Hollywood, and H. C. Millsap and H. L. Duckett, Jr., both of Los Angeles (Herbert Cutler Brown, of Hollywood, of counsel), for appellant.

Wendell P. Hubbard, of Los Angeles, for respondents.

SHENK, Justice.

California Trust Company, as executor of the estate of R. W. Huntley, deceased, brought the action to quiet title to certain lots situated in Los Angeles. Subsequently the heirs of the decedent were joined as party plaintiffs. Certain of the defendants filed disclaimers and otherwise waived any right to oppose the plaintiffs' claim of title. The trial proceeded on the issues raised by the complaint and the answer of the defendant John L. Kirkpatrick. The plaintiffs had judgment, from which John L. Kirkpatrick, who will be referred to as the defendant, has appealed.

The plaintiffs deraigned title through a trustee's deed delivered pursuant to a sale of the property under a deed of trust. On September 16, 1927, the property was owned by Thelma H. Davis, who on that day deeded it to Amanda E. Leshner. On the same day the last two named persons and F. E. Davis executed a deed of trust securing payment of the sum of \$8,500 to Ethel L. Purwin. At the sale held under that deed of

trust on November 15, 1930, Fred J. Eddy became the purchaser, and on November 17, 1930, he received the trustee's deed which was recorded on that day. On September 23, 1932, Eddy and his wife delivered to the plaintiff executor their deed running to the "heirs or devisees of R. W. Huntley, deceased"; the estate being then in the course of administration.

The defendant claimed title through a grant deed executed by Amanda E. Leshner on October 2, 1930, and which was delivered to him in January, 1932. In addition the defendant sought to have declared as an equitable mortgage a certain instrument executed in December, 1931, by Amanda E. Leshner, on the one hand, and Eddy and Huntley on the other, which purported to be a six months' option to purchase the property by Amanda E. Leshner for the sum of \$13,000, but which option was never exercised. All of the terms and provisions of the option need not be noted. It was the defendant's theory that the option to purchase should have been construed as an equitable mortgage and that the plaintiffs should have brought a foreclosure action instead of an action to quiet title. The trial court found that at the time of the delivery of the grant deed by Amanda E. Leshner to the defendant, the former was not the owner of the property but that all of her right, title, and interest had been foreclosed by the sale under the deed of trust. It found further that the option agreement was not in fact or in legal effect an equitable mortgage, that the option had not been exercised, and that the option instrument was no longer in force. Judgment was accordingly entered for the plaintiffs.

[1] The main contention on the appeal is that the trial court erred in concluding that the option agreement was not an equitable mortgage. The defendant relies on cases wherein deeds have been construed as mortgages when it appeared that it was the intention of the parties to transfer the interest as security for the payment of a debt. An analogous situation is not presented in this case by the execution of the option agreement. The option agreement did not transfer an interest in the land. The holder of the legal title had already received it through the sale proceedings under the deed of trust. Here the security for the payment of the debt was the deed of trust, and the trustors' interest and title had been foreclosed by the sale proceedings. The trial court was justified in taking the view that the further agreement between the parties

was merely for the purpose of according to the trustors a period within which they would be permitted to redeem the property if they so desired. Proceedings under the deed of trust had already been taken and completed. There was no need of further proceedings to effect the same end, viz., to divest the trustors of any title, inasmuch as that had already been accomplished by the sale. There was nothing in the evidence to show any intention, by the execution of the option agreement, to change the character of the transfer from the trustee to Eddy, i. e., that the latter should hold the title for purposes of security only, and thus subject the property to another foreclosure sale. The circumstances and the option instrument itself clearly negative any such intention. In cases where a conveyance is made for purposes of security only, a court is effecting the intent of the parties in treating the instrument of transfer as a mortgage. But there is no basis in fact in the present case for rewriting the option instrument as an agreement to hold the title already received on the sale proceedings as security for the payment of the purchase price mentioned therein, in the absence of any evidence indicating that the parties had such an intention.

[2, 3] Other contentions of the defendant require but brief notice. The deed to the Huntley estate ran to the "heirs or devisees" of Huntley. It was held in the case of *Schade v. Stewart*, 205 Cal. 658, 272 P. 567, that this constitutes a valid grant, where the decree of final distribution has not yet been entered. There was no necessity for the trial court in the present case to determine the interests of the plaintiffs in the property as among themselves. That was a matter for the probate court on final distribution. Since the appeal herein, the estate has been distributed and by assignment from the other heirs or distributees Marie T. Huntley has become the owner of the property here involved and the sole party plaintiff interested in the outcome of the action. The description of the property in the deed from Eddy to the estate was not uncertain so as to avoid the effect of the deed as a grant. It was the same description as that contained in the deed of Amanda E. Leshner to the defendant, pursuant to which the defendant claimed title to the property.

No other point requires discussion.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.

**FARMERS & MERCHANTS NAT. BANK OF
LOS ANGELES et al. v. PETERSON
et al.**

L. A. 14444.

Supreme Court of California.

March 11, 1936.

Rehearing Denied April 10, 1936.

1. Pleading Ⓒ129(2)

Creditor of company which had made assignment for benefit of creditors *held* entitled to maintain suit for accounting against trustees in behalf of all creditors, notwithstanding that each of creditors was not made party to suit and served with process, where facts alleged in conformity to statute authorizing suit were admitted by failure of trustees to deny them (Code Civ.Proc. § 382).

2. Assignments for benefit of creditors Ⓒ377

In creditor's action against trustees of debtor under assignment for benefit of creditors, trustees who had resigned prior to commencement of action *held* properly dismissed, where evidence showed that no judgment could have been rendered against them (Code Civ.Proc. § 382).

3. Assignments for benefit of creditors Ⓒ377

Creditor of company which had made assignment for benefit of creditors *held* entitled to maintain action for accounting against trustees, notwithstanding that company's vice president, who had guaranteed company's notes, had delivered personal note to creditor with company's unpaid notes as collateral security, since creditor was obligated to pursue company for payment and apply collections in reduction of vice president's note.

4. Corporations Ⓒ507(5)

In action by creditor against trustees of debtor under assignment for benefit of creditors, service of process on vice president of debtor *held* proper, where corporate existence of debtor was admitted (Code Civ. Proc. §§ 382, 411).

5. Appearance Ⓒ12

In action for accounting by creditor against trustees of debtor under assignment for benefit of creditors, trustee, who had not been named as party in complaint or amended complaint, *held* to have invoked jurisdiction of court by voluntary appearance, so as not to be entitled to deny jurisdiction of court to render judgment against all trustees (Code Civ.Proc. §§ 382, 416).

6. Assignments for benefit of creditors Ⓒ212

Judgment ordering removal of trustees under assignment for benefit of creditors, appointing new trustee to receive assets and books and records pertaining to administration of trust, awarding recovery against old trustees, and ordering disbursement of trust fund by new trustee, *held* proper under pleadings and evidence (Code Civ.Proc. § 382).

7. Judgment Ⓒ272

Failure of court to file findings and judgment within 30-day period prescribed by statute *held* not to render judgment void (Code Civ. Proc. § 632 (1), as amended by St.1933, p. 1876).

8. Judgment Ⓒ272

Statute requiring court to file findings and judgment within 30 days is directory and not jurisdictional (Code Civ.Proc. § 632 (1), as amended by St. 1933, p. 1876).

9. Assignments for benefit of creditors Ⓒ400

Where creditor sues on behalf of all creditors for accounting of trustees under assignment for benefit of creditors, court is permitted to provide for payment of attorney's fee out of money recovered for joint benefit of creditors, since allowance of fee does not increase amount of recovery against trustees nor subject them to payment of attorney's fees (Code Civ.Proc. § 382).

In Bank.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by the Farmers & Merchants National Bank of Los Angeles and others against Fred E. Peterson and others. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Fred E. Peterson and Hugh M. Foster, both of Los Angeles, for appellants A. Getty, C. B. Boothe, W. C. Lannin, and H. Jackson.

W. Wellington Farrow, of Inglewood (Vernon P. Spencer, of Inglewood, of counsel), for appellant Jewell M. Peterson.

Lawler & Degnan, of Los Angeles, for respondents Farmers & Merchants Nat. Bank of Los Angeles and Sherman, Clay & Co.

W. E. Lady, of Los Angeles, for respondent Swan Piano Co.

Cross & Brandt, of San Francisco, for respondent Sherman, Clay & Co.

SHENK, Justice.

The plaintiff Farmers & Merchants National Bank of Los Angeles, a creditor of the Bartlett Music Company, sued on its own behalf and on behalf of all the other creditors of that company to obtain an accounting and other relief from the trustees under an assignment for the benefit of the creditors of the music company. The Farmers & Merchants National Bank of Los Angeles will be referred to as the plaintiff, and the trustees under the assignment will be referred to as the defendants. From a judgment decreeing the removal of the defendants as trustees, appointing their successor, ordering the transfer of cash, books, and records to the new trustee, and for the recovery from them of certain sums, the defendants have appealed.

The facts are not in dispute. In September, 1925, by an agreement in writing, the music company transferred all of its assets to Fred E. Peterson, A. Getty, C. H. Mayer, H. Jackson, and W. H. Munson for the benefit of its creditors. In August, 1926, Mayer and Munson resigned as trustees, and the defendants W. C. Lannin and C. W. Jacks succeeded them. In July, 1929, Jacks resigned and C. B. Boothe took his place. The value of the assets of the company taken into the possession of the trustees shortly after the execution of the agreement was \$67,646.94. Liquidation of those assets was completed about July, 1927, and realized the gross sum of \$53,764.82. The court found that \$22,384.97 of said sum was properly paid out for expenses.

Commencing in November, 1926, the plaintiff, who was a creditor of the company to the extent of some \$60,000, made repeated demands on the defendants for an accounting or for some information concerning the receipts, expenditures, and balances of the trust property. The trustees declined to make any accounting or divulge any information except as to the approximate balance on hand and that the expenses, other than occasional advances for costs where suits were necessary, were restricted to office rental of \$25 a month and book-keeping and collection charges of \$15 per week. In May, and again in July, 1928, the plaintiff requested distribution of approximately \$30,000 then admitted to be in the trustees' hands for that purpose. No action in respect to such demands was taken except that in meeting the trustees decided to pay \$7,500 to the defendant Peterson on account of attorney fees for services

rendered. In February, 1929, the demand of twenty-two of the creditors for a distribution was received by the trustees. Twice in March, 1929, the plaintiff made demands for an accounting which was declined by the trustees in writing.

The present action was commenced on May 4, 1929. On May 10th following the trustees met and paid a retainer fee of \$2,500 to the defendant Peterson to resist the action for an accounting. In June, 1929, the trustees procured an audit of their accounts for their own benefit. On July 1, 1929, the trustees voted the payment of \$2,000 to each of Getty, Jackson, and Lannin for services to date, and an additional \$4,000 to Peterson on account of attorney fees. In March, 1930, they voted the payment of \$250 to each member of the committee for services rendered. In December, 1930, they voted \$1,600 more to Peterson for attorney fees and \$400 to each of the other trustees.

On February 23, 1931, the trustees met and resolved that a first and final dividend of $2\frac{1}{2}$ per cent. be paid to the creditors. Pursuant to this resolution they distributed to some of the creditors prior to the trial the sum of \$1,357.11, and the sum of \$3,572.74 remained in their possession for distribution.

In November, 1931, on the plaintiff's further demand the trustees by letter refused to permit the plaintiff to audit the accounts except at its own expense, and on condition that it accept the final dividend of $2\frac{1}{2}$ per cent. and dismiss the action for an accounting. On December 4, 1931, in meeting, the trustees considered the plaintiff's offer to audit the accounts at its own expense and, although the trustees then had an available audit, decided not to grant the bank's request, and again voted sums to Peterson for attorney fees and to each of the other members for services rendered.

The action was tried in October, 1932. The court found that Peterson had received a total of \$16,450, Getty, Lannin, and Jackson each \$3,000, and Boothe \$1,000 of the trust funds for their personal use; a total of \$10,000 to the trustees except Peterson; and a grand total of \$26,500 to all the trustees for purported services rendered, out of a fund of \$31,379.85 remaining for distribution after all expenses found to have been proper were discharged. The court found further that the sum of \$1,367.65 was the reasonable value of Peterson's services, and that the difference, or the sum of \$15,082.35, constituted an overpayment to him.

Also, that of the \$10,000 paid to the other trustees, \$8,632.35 constituted an overpayment. There was thus found the sum of \$27,285.34 which should have remained in the trustees' hands for distribution to the creditors. The court found specific acts of concealment and bad faith and that the defendants were unfit to continue as trustees. It ordered the removal of the trustees, and appointed George H. Naegle to succeed them and to receive from them the sum in their hands amounting to \$3,572.74 and the books and records pertaining to the administration of the trust. The court further provided for the recovery from the defendants jointly and severally of certain sums aggregating \$23,714.70. It ordered the disbursement by the newly appointed trustee of said sum of \$3,572.74 to those creditors who had not yet received a $2\frac{1}{2}$ per cent. dividend; it ordered the payment to the plaintiff of 5 per cent. of the sums received and recovered from the trustees as and for fees for services rendered by its attorney in the conduct of the action for and on behalf of all the creditors; and ordered the balance of the sums recovered from the defendants disbursed in accordance with the terms of the trust agreement.

On this appeal no serious contention is or can be made that the findings are not supported by the evidence or that there is any error prejudicial to the defendants in the accounting as found by the court. The appellants, in a voluminous brief, without any statement of the facts or the evidence, content themselves for the most part with attacks on the sufficiency of the pleadings, and contentions respecting claimed defects of parties. They also contend that the findings made and relief granted were outside the issues, and that the judgment is void because not filed within thirty days as required by section 632 (1) of the Code of Civil Procedure (as amended by St.1933, p. 1876). Some of the specific grounds of the appeal will be noted.

[1] It is the contention of the defendants that all the necessary parties were not before the court because each of the sixty-nine creditors on whose behalf the plaintiff brought the action was not made a party plaintiff and defendant and served with process. The plaintiff alleged facts which conformed to the requirements of section 382 of the Code of Civil Procedure and which, if true, entitled it to pursue the action on behalf of itself and all the other

creditors of the music company. These facts were all admitted by the failure of the defendants to deny them. The trial thereupon properly proceeded, the plaintiff acting on behalf of all the creditors. Code Civ.Proc. § 382.

[2] The court dismissed the action as to trustees Mayer and Munson who had resigned in April, 1926. It is claimed that this was error because, so it is stated, in so far as the record shows "they might have paid the entire claim of plaintiff, if any existed." The reverse of that statement is disclosed by the record, viz., that no sum was paid by them, that nothing was received by them for their own personal use, and consequently that no judgment could have been rendered against them. The order of dismissal was therefore proper.

[3,4] The defendants contend that the plaintiff was not the proper party to sue because W. F. Ball, who was vice president of the music company, had guaranteed the company's notes to the plaintiff, and before the commencement of the action had substituted his personal note for his guaranty note and delivered it to the plaintiff with the company's unpaid notes as collateral security; that is, that the company's obligation to the plaintiff was discharged and that Ball and not the plaintiff was its creditor. The execution and delivery of Ball's note to the plaintiff in compliance with his contract of guaranty did not disturb the plaintiff's status as a creditor of the corporation, or its right to sue as such and on behalf of the other creditors. Under its contract with Ball the plaintiff was still obligated to pursue the company for payment and apply the collections in reduction of Ball's note. Furthermore, the court found that the note of the company to the plaintiff was not paid or discharged. In this connection there is likewise no merit to the claim that service of process on the music company by serving Ball as its vice president was illegal. The defendants admitted the corporate existence of the music company and service on its vice president was proper. Section 411, Code Civ.Proc.

[5] The defendants complain that trustee Boothe, who appeared voluntarily and filed his answer, was not properly a party defendant because he was not named as a party in the complaint or the amended complaint, and that consequently the judgment against him is void. There is, of course, no merit to the point. Boothe invoked the judgment of the court by his voluntary ap-

pearance, and may not now be heard to deny the jurisdiction of the court to render such judgment. *Tyrrell v. Baldwin*, 67 Cal. 1, 4, 6 P. 867; section 416, Code Civ.Proc. His voluntary appearance must be deemed to be a waiver of any failure to name him as a defendant. *Eastern Outfitting Co., Inc., v. Myers*, 39 Cal.App. 316, 180 P. 669.

[6] Equally without foundation are other arguments offered by the defendants, namely, that the pleadings did not disclose the plaintiff's right to an accounting, nor a fiduciary relationship between the creditors and the trustees; "that no claim having been filed the plaintiffs disclose no right to an interest in the fund and the court acquires no jurisdiction;" and that the court had no jurisdiction to grant relief by the removal of the trustees, nor to order a money judgment against them, nor to order payment of such a judgment to the newly appointed trustee because he was not named as a party plaintiff. Numerous similar claims are wholly without merit and do not justify discussion. An examination of the pleadings, the evidence, the findings, and the judgment, as a mere statement of the facts herein discloses, indicates conclusively that all of the parties necessary to a complete determination of the subject-matter were before the court; that all of the relief granted was within the issues and within the equity jurisdiction of the court to grant (*Fatjo v. Swasey*, 111 Cal. 628, 44 P. 225; *Fox v. Hale & Norcross Silver Min. Co.*, 108 Cal. 475, 41 P. 328; *Wickersham v. Crittenden*, 93 Cal. 17, 28 P. 788; 1 Cal.Jur., p. 169); and that the findings and judgment of the court are amply supported by competent evidence.

[7, 8] The failure of the court to file its findings and judgment within the thirty-day period prescribed by section 632 (1) of the Code of Civil Procedure did not make the judgment void. The provisions of that section have been held to be directory merely and not jurisdictional. *City of Los Angeles v. Hannon*, 79 Cal.App. 669, 673, 251 P. 247, and cases cited. The findings and judgment were in accordance with the court's announcement of its decision at the termination of the trial, and not, as contended by the defendants, contrary thereto.

[9] The final contention to be noticed is that the plaintiff is not entitled to have five per cent. of the moneys received and recovered herein as an attorney's fee. That provision in the judgment does not increase

the amount of the recovery against the defendants nor subject them to payment of the plaintiff's attorney's fee. In cases such as this, where the plaintiff has prosecuted the action for the benefit of numerous persons, the court is permitted, and justly so, to provide for the plaintiff's attorney's fee out of the moneys recovered for their joint benefit. *Fox v. Hale & Norcross Silver Min. Co.*, supra, 108 Cal. 475, at page 477, 41 P. 328.

Counsel for the respondent call our attention to a clerical misprision appearing in the court's conclusion of law numbered VI, with respect to a reference therein to paragraph III of the conclusions of law. Examination indicates that this reference should have been to paragraphs III and IV. The conclusions of law therefore should be and they are amended by striking the words and numerals "Paragraph III" appearing in the third line of paragraph VI of the conclusions of law and substituting therefor the following: "Paragraphs III and IV."

The judgment is affirmed.

We concur: WASTE, C. J.; THOMPSON, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.



5 Cal.2d 480

LINDEMANN v. SAN JOAQUIN COTTON OIL CO. et al.

Sac. 4975.

Supreme Court of California,

Feb. 28, 1936.

On Modification March 10, 1936.

Rehearing Denied March 26, 1936.

1. Appeal and error ⇐989

On appeal from judgment on jury's verdict, court will consider only facts and inferences therefrom tending to establish correctness of jury's findings.

2. Automobiles ⇐245(87)

Facts shown in action for injuries to guest of defendant driving codefendant's automobile held not to establish plaintiff's contributory negligence in riding with driver as matter of law; whether driver was intoxicated

ed and plaintiff knew such fact, when he became aware thereof, and what he as reasonable man should then have done being for jury.

3. Negligence ⇨136(9)

Contributory negligence is law question only when reasonable men can draw but one inference, pointing unerringly to such negligence, from facts, and is fact question for jury in all other cases.

4. Automobiles ⇨245(50)

Whether intoxication of driver of automobile striking bulkhead of bridge proximately contributed to accident *held* for jury, in action for resulting injuries to his guest.

5. Appeal and error ⇨996

Where reasonable men's minds might differ on fact question, it is appellate court's province only to find whether there is sufficient evidence in record to support jury's finding thereon.

6. Damages ⇨212

Instruction in action for injuries to farmer that value of his time while disabled must be determined on direct evidence, while compensation for his loss of earning power was left to jury's sound discretion, *held* not erroneous as instruction to determine loss of earnings on direct proof, though no evidence was introduced as to value of his time while disabled or earning power, in view of his testimony as to his profits from grain crop and cultivation of increased number of acres after accident, personal charge of farming implements and repair thereof before injuries, and inability to do physical work required or carry on business thereafter.

7. Appeal and error ⇨1015(5)

Trial court's finding on motion for new trial because of juror's misconduct, as to which conflicting affidavits were filed, is binding on appellate court.

8. New trial ⇨42(1)

New trial may be granted because of juror's untrue answers to questions on voir dire, if it appears that moving party was not aware of falsity thereof when impanelment of jury was completed, and did not discover fact before rendition of verdict.

9. New trial ⇨44(1)

Motion for new trial because of juror's misconduct *held* properly denied, where supporting affidavit showed that alleged misconduct occurred during first day of trial and that moving party's counsel were made acquainted with facts almost immediately and called matter to trial judge's attention before court reconvened on same day, but did nothing further.

10. Automobiles ⇨244(26)

Facts shown in action for injuries to cotton farmer while riding as guest of defendant cotton oil company's district manager in such company's automobile *held* to justify jury's implied finding that entire journey was on mission of company.

11. Witnesses ⇨276

Questions, asked by plaintiff's attorney on examination of defendant under statute, as to his relations and acquaintance with attorney who drew and verified his answer, for purpose of showing whether denials therein for lack of information and belief were predicated on information furnished by, or made without consulting, defendant, who had personal knowledge of matters to which many allegations so denied were directed (Code Civ. Proc. § 2055).

12. Pleading ⇨304

Verified answer is presumed to contain facts which from nature of matter under investigation are within defendant's knowledge or belief, whether in form of denials or affirmative allegations.

13. Witnesses ⇨276

Defendant, going to trial on complaint verified by person without personal knowledge of facts known to parties only, stands on and sponsors verified answer, and cannot avoid effect of statutory examination as to why he stands on denials and allegations to which he could not truthfully subscribe (Code Civ.Proc. § 2055).

14. Automobiles ⇨242(8)

Burden of proving plaintiff's contributory negligence rested on defendants in action for injuries to one riding as guest of individual defendant in automobile owned by codefendant.

15. Automobiles ⇨244(56)

Evidence of automobile driver's intoxication to degree rendering him liable for injuries to guest in accident *held* not conclusive of question whether guest knew, or should have known, that driver was so far affected by intoxicating liquor as to defeat guest's claim for damages because of contributory negligence; it being fact triers' duty to place themselves in guest's position, shown by evidence, and give proper consideration to matters forming basis of, or ordinarily affecting, men's judgment in ordinary affairs of life.

16. Negligence ⇨65

Test for determining whether injured person was contributorily negligent is what reasonable person would have done in his position, seeing what he saw, knowing what he knew in light of circumstances, and affected by human propensities or elements ordinarily

entering into formation of and influencing judgment.

17. Trial ⇨139(1)

Subject to exercise of legal discretion, jury is sole judge of weight, effect, and sufficiency of evidence to establish fact.

18. Evidence ⇨588

Trial ⇨140(1)

Jury is sole judge of witnesses' credibility, and may believe all or part of witness' testimony or reject parts thereof.

19. Evidence ⇨588

It is jury's duty to reconcile conflicting evidence, where possible.

20. New trial ⇨70

Jury's findings cannot be set aside by court, unless found to be without support on full consideration of whole case.

21. Appeal and error ⇨930(1)

On appeal from judgment on jury's verdict, Supreme Court must consider evidence in aspect most favorable to appellee, so that judgment may be sustained.

22. Automobiles ⇨245(87)

Whether plaintiff in action for injuries sustained while riding as guest in automobile driven by defendant knew, or should have known, that defendant was intoxicated, and was negligent in continuing to ride with him when he insisted on driving at excessive speed, *held* for jury.

23. Appeal and error ⇨999(3)

Jury's verdict and judgment thereon for plaintiff in action for injuries sustained while riding as guest in automobile driven by defendant cannot be annulled by appellate court on ground of plaintiff's contributory negligence in failing to tell defendant that he was intoxicated and continuing to ride with him, unless plaintiff's conduct was contrary to rules governing that of reasonable men in ordinary affairs of life or violated some rule of law.

24. Automobiles ⇨224(5)

Duty of one riding as guest in automobile, driven by another, to remonstrate against excessive speed, is not absolute, but depends on circumstances of particular case.

25. Automobiles ⇨245(87)

Whether it is duty of one riding as guest in automobile driven by another to remonstrate against excessive speed is usually jury question.

26. Trial ⇨296(8)

Instruction on measure of damages will not be held erroneous by Supreme Court for

want of evidence as to value of plaintiff's time while disabled or his earning power, where jury was instructed that burden was on plaintiff to prove every essential element of case by preponderance of evidence.

27. Damages ⇨132(3)

Verdict awarding \$62,500 damages to middle-aged cotton producer for injuries causing shrunken hand and disfigurement of face, loss of teeth and palate, fractured jaw and cranium, and impairment of nervous system, confining him to hospital for month and requiring medical attention for some time thereafter, *held* excessive by \$12,500.

In Bank.

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Action by Rudolf Lindemann against the San Joaquin Cotton Oil Company, Thomas Ewing, and others. From a judgment for plaintiff against named defendants and an order denying their motion for judgment notwithstanding the jury's verdict against them, they appeal.

Modified, and affirmed as modified.

Prior opinion 43 P.(2d) 836.

Harry D. Parker and Raymond G. Stanbury, both of Los Angeles, and Chester O. Hansen, of Fresno, for appellants.

Kidd, Schell & Delamer and Francis J. Gabel, all of Los Angeles, J. Hampton Hoge and A. Dal Thomson, both of San Francisco, and Hugh B. Rotchford, Nourse, Betts & Jones, Joseph A. Spray, A. W. Ashburn, Horace W. Danforth, George L. Greer, and Joe Crider, Jr., all of Los Angeles, amici curiæ.

Bronson, Bronson & Slaven, Daniel W. Burbank, C. F. Laumeister, Sidney L. Weinstock, Cooley, Crowley & Supple, Hadsell, Sweet, Ingalls & Lamb, O'Connor, Fitzgerald & Moran, Redman, Alexander & Bacon, H. W. B. Smith, Jesse H. Steinhart, and John J. Goldberg, all of San Francisco, amici curiæ for Casualty Attorneys Ass'n of San Francisco.

C. Ray Robinson and James D. Garibah, both of Merced, for respondent.

Walter J. Little, of Los Angeles, amici curiæ.

SEAWELL, Justice.

We herewith adopt as a part of our opinion the opinion of the District Court of Appeal, Third Appellate District, by Pullen, P. J., except that portion which holds that

the judgment is not excessive. The question of excessive damages is disposed of by our views, which immediately follow the adopted portions of the District Court of Appeal opinion. The opinion of the District Court of Appeal follows first in order:

Respondent herein as plaintiff recovered a judgment in the sum of \$62,500 based upon a verdict by a jury in that amount against San Joaquin Cotton Oil Company, a corporation, and Thomas Ewing, its district manager, for personal injuries sustained while riding as a guest of defendant Ewing, in a car owned by San Joaquin Cotton Oil Company. These defendants appeal both from the judgment and from an order denying their motion for judgment notwithstanding the verdict.

As grounds for reversal appellants urge that the evidence is insufficient to support the verdict in that plaintiff was guilty of contributory negligence which proximately contributed to his injuries; that the verdict was excessive; that the court erred in its instructions to the jury upon the subject of damages; that the jury were guilty of prejudicial misconduct, as was also the attorney for the plaintiff; and that the evidence was insufficient to support the implied finding that defendant Ewing was acting as agent for the oil company at the time of the accident.

[1] In the following recital of the facts as gathered from the evidence this court will, in accordance with the well-established rule, concern itself only with those facts, and inferences therefrom, that tend to establish the correctness of the findings of the jury.

It appears that plaintiff was a farmer in the San Joaquin Valley, allotting a large acreage of his lands to the production of cotton. Defendant San Joaquin Cotton Oil Company operated a number of cotton gins throughout the valley, and was heavily involved, financially, in aiding the growers in its territory, including plaintiff, to produce and market their cotton crops.

[2-4] About April 22 or 23, 1933, defendant Ewing called plaintiff on the telephone and informed him that an important meeting of the San Joaquin Agricultural Labor Bureau was to be held in Fresno on April 24th, and urged him to come and bring with him as many of the representative farmers from his neighborhood as he could. Plaintiff accepted the invitation, and went to Fresno with Mr. Harry Fawcett, a neighbor. The meeting was held in the after-

noon, and was over by 4:30 p. m. After the meeting adjourned some informal discussion took place in the lobby of the Californian hotel, where the meeting had been held, after which a group, including plaintiff and defendant Ewing, adjourned about 6 o'clock to some place several blocks from the hotel where liquor was obtainable. Both plaintiff and defendant each had a bottle or two of beer and four or five highballs. While there, Mr. Fawcett, having another engagement, left; Ewing inviting plaintiff to remain and he would take him home. Plaintiff accepted the invitation of Ewing stating that he wanted to talk to him and get his advice on certain matters pertaining to his cotton crop. About 8 o'clock plaintiff and Ewing left the resort and went to a restaurant near the hotel where they had dinner. No drinks were had after they left the liquor establishment. About 9 o'clock they got into Mr. Ewing's car, he driving; plaintiff to go to his home in Los Banos, Ewing to Chowchilla. Apparently nothing unusual occurred until they had reached a point somewhere near Madera, whether to the south or north thereof is not entirely clear. Plaintiff stated at one place in his testimony it was between Madera and Califa that Ewing was trying to see how fast his new Ford would go, and plaintiff then said to him: "Don't let's be in a hurry, we don't have to be." Apparently the driver then slowed down, but subsequently on several other occasions plaintiff asked Ewing to drive more slowly, which apparently he did. In the meantime they were discussing finances pertaining to plaintiff's cotton crop and other matters affecting their mutual business interests. When they reached a point near Chowchilla, where the highway to Los Banos leaves the main highway, plaintiff suggested to Ewing that he would accompany Ewing to Chowchilla and would then drive from there to Los Banos alone, and return the car the following day. To this Ewing would not agree, and they continued on toward Los Banos. Plaintiff again warned Ewing two or three times about driving too fast, and he slowed down. At the time of the accident, which occurred about 10:30 or 11 o'clock in the evening, Ewing was driving along a main paved county highway 18 feet in width, at a rate of approximately 45 to 50 miles an hour on the straightaways, slowing down to about 30 miles an hour as he approached the bridge where the accident occurred. Just a very few minutes prior to the accident plaintiff had closed his eyes although he

was not asleep. On several occasions plaintiff warned Ewing about driving at an excessive rate of speed, and was asked: "After you warned him did he slow down," to which he answered, "He was then slowing down some with his driving so I was not worried about it any more." Then, owing to the blinding headlights of an oncoming car, as claimed by Ewing, he swung too far to the right, and struck the bulkhead of a small bridge, causing the injuries of which complaint is here made.

Not only by the finding of the jury, but by the plea of contributory negligence, is it determined that at the time of the accident the companion of plaintiff was intoxicated. This was not a case, however, of an intoxicated driver who proclaimed that fact abroad by boisterous, erratic, or maudlin speech or action. Defendant Ewing denied he was intoxicated at any time during the day or evening in question. Plaintiff was asked if, in his opinion, Ewing was intoxicated at the time he got into Ewing's car to go home, and he replied: "Not what I would call intoxicated—maybe talking a little bit louder—we just felt the drinks we had."

Dr. Lum, a witness called by the plaintiff, testified, in regard to the intoxication of Ewing, upon cross-examination as follows:

"Q. You had no difficulty in determining what Mr. Ewing was intoxicated, did you? A. Yes I did; he was not dead drunk; his speech was pretty good; his first concern manifested was for the injured man, but the appearance of abnormality made me think so; I think that the alcohol had probably altered or slowed his reaction to such an extent that it would come within the limit of the definition as given by the Judge.

"Q. By that you mean, Doctor, away within the limits, or just the border line? A. It would not be away within the limits, I would say fairly definite within the limits.

"Q. In other words, it was so much so that you had no difficulty in arriving at that conclusion? A. I did have difficulty, yes, that is because of the definition of intoxication, there are so many definitions and it was largely a question of definition whether or not it would arrive within that definition."

During the journey they discussed business and crop conditions, plaintiff testifying he had extensive acreage and a very heavy loan from the oil company which required close attention both on his part and on the

part of the oil company which was financing him.

With these general facts before us, appellants ask this court to declare that under the circumstances plaintiff was guilty of contributory negligence in riding with Ewing, as a matter of law. However, we would not be justified in so holding, nor does the law assume that responsibility in face of the evidence and the finding by the jury in favor of plaintiff.

As was stated in *Smellie v. Southern Pacific Co.*, 212 Cal. 540, 299 P. 529, 538: "Contributory negligence is a question of law only when the court is impelled to say that from the facts reasonable men can draw but one inference and that an inference pointing unerringly to the negligence of the plaintiff contributing to his injury. * * * In all other cases the question of contributory negligence is a question of fact for the jury."

So it was here for the jury to determine whether or not Ewing was intoxicated, whether that fact was known to plaintiff, and, if known, when he became aware of that fact and what should he, as a reasonable man, have then done under the circumstances; also, whether the intoxication of the driver proximately contributed to the accident.

Appellants have filed a carefully prepared brief setting forth numerous authorities in support of their contention that plaintiff was guilty of contributory negligence, but we do not believe the cited cases sustain their contention. In *Jones v. Pacific Gas & Electric Co.*, 104 Cal.App. 47, 285 P. 709, 712, plaintiff was riding as a guest with one Cottrell and was injured when the automobile collided with a pole belonging to Pacific Gas & Electric Company. Judgment was entered in favor of the power company. The plaintiff appealed from that judgment, which was affirmed; the court holding in effect that the evidence as to intoxication sustained the finding of the jury. The court said, "From what the testimony shows as to the carousing of the party, the jury was warranted in drawing the inference that the defendant Cottrell was seeing lights where there were none," and "what we have set forth is amply sufficient to justify the jury in coming to the conclusion that all of the men, at least, were under the influence of the intoxicating liquor."

In *Hirsch v. D'Autremont*, 133 Cal.App. 106, 23 P.(2d) 1066, 1067, plaintiff was a

guest of defendant in his automobile, going from Los Angeles to Santa Ana. The plaintiff was injured and sued her host. A verdict was returned by the jury in favor of plaintiff, but a judgment notwithstanding the verdict was entered by the court from which plaintiff appealed.

In its opinion the court clearly indicated that it was only after a clear case of intoxication had been manifested, and that thereafter plaintiff had had an opportunity to withdraw from the car at a well-lighted service station where she could have communicated with her friends by telephone, that she was as a matter of law held to be guilty of contributory negligence, the court saying: "The evidence is conflicting as to whether Word was or was not under the influence of liquor when the party left Los Angeles and as to whether or not such fact was known to plaintiff; and the question whether or not she was guilty of contributory negligence in commencing to ride to Santa Ana was clearly for the jury. We are also of the opinion that the question as to whether or not plaintiff should have left the car when it stopped at the railroad crossing to let the freight train pass, considering that it was among orange groves and in the middle of the night, even though she then knew that the driver was under the influence of intoxicating liquor, is one upon which reasonable men might well differ and was in consequence one for the jury to determine."

[5] The same rule was applied in the case of Connor v. Johnson, 132 Cal.App. 449, 22 P.(2d) 760. In Whitsett v. Morton, 138 Cal.App. 628, 33 P.(2d) 54, this court analyzed the evidence, determining it was sufficient to support the verdict of the jury, as was the situation also in the case of Lynn v. Goodwin, 170 Cal. 112, 113, 148 P. 927, L.R.A.1915E, 588. Appellants suggest that the case of Tomlinson v. Kiramidjian, 133 Cal.App. 418, 24 P.(2d) 559, 560, relied upon by plaintiff, can be distinguished from the case at bar in that in that case there was a cause of action for gross negligence as well as intoxication, whereas in the instant case plaintiff relied entirely upon intoxication, but a reading of that case seems to clearly indicate that the controlling question in the mind of the court was that of intoxication. It was there said: "From these facts we feel that it was a question for the jury to determine, under proper instructions (a) whether the defendant Christian was drunk or under the influence of intoxicating liquor as defined in *People v. Ek-*

stromer, 71 Cal.App. 239, 246, 235 P. 69, and whether, if drunk, or under the influence of intoxicating liquor, this was the proximate cause of the accident; (b) whether the deceased knew, or should have known, that defendant Christian was under the influence of intoxicating liquor when he last started to ride with him; and (c) whether the turning to wave at the passengers of the passing automobile while traveling at an excessive rate of speed was gross negligence, and whether such gross negligence, if so found, was the proximate cause of the accident. *Krause v. Rarity*, 210 Cal. 644-655, 293 P. 62, 77 A.L.R. 1327. From evidence that a person had been drinking intoxicating liquor and thereafter drives his car in a negligent manner, it does not follow as a matter of law that he was driving while under the influence of intoxicating liquor. There is no evidence in the record from which it can be said as a matter of law that deceased knew, or should have known, that Christian was under the influence of intoxicating liquor before he entered the automobile the last time, or that after discovering his intoxicated condition he had a clear chance to leave the automobile at a safe place. This clearly distinguishes the present case from *Hirsch v. D'Autremont* [133 Cal.App. 106], 23 P. (2d) 1066." Also, whether the factor of contributory negligence arose by reason of the intoxication or of the recklessness of the driver would make no difference in the application of the rule. Many other cases are cited to the same effect, but sufficient has been said to indicate that the rule undoubtedly is, that where the minds of reasonable men might differ, it is our province only to find whether or not there is sufficient evidence in the record to support the finding of the jury; the burden resting upon them to determine the disputed question of fact. * * *

At the time of the accident respondent was an able-bodied man forty-two years of age with a life expectancy of 26.7 years, supporting and caring for his wife and minor son. For many years he had carried on extensive farming operations and at the time of the accident was operating some 4,500 acres of land, 1,500 acres of which had been set aside for the growing of cotton, and approximately 3,000 acres of land planted to grain. The net income from the grain land that year was approximately \$20,000. We gather from the record that the accident interfered with the production of a cotton crop that year.

The accident occurred on April 24, 1933, and plaintiff remained in the hospital until May 21st, when he was removed to his home where he remained in bed under the care of nurses for approximately a month longer, when he was able to be about, but owing to his nervous condition his physician advised an ocean voyage which he took and which extended from November 6th to December 22d. At the date of the trial in March, 1934, plaintiff testified that although his nervous condition was improved he still became agitated and excited over small matters, and was unable to attend to his affairs or transact any actual business; a condition verified by the testimony of the doctors.

To enumerate except in the most general way the injuries sustained would unduly extend this opinion and encumber it with many technical terms, unintelligible except to a specialist. However, Dr. Lum, his attending physician, described fractures of the skull, fractures of the jaw, one of the fractures of the lower jaw going down through the first molar, severing it, and continuing through the mandible, fracturing off part of the alveolar process, fractures which caused a portion of the jaw to drop out of alignment, a fracture and separation of the frontal and nasal bones, a fracture extending into the left orbit and a fracture of the palate radiating back through the right antrum and into the floor of the frontal vault. Also a concussion of the brain and probably lacerations of the brain tissue and brain damage. Such injuries, Dr. Lum testified, causes hemorrhage in the brain and in healing leaves scars in that area interrupting the normal functions of the patient. Also there were multiple contusions about the body, a median nerve injury on the left hand causing a vandegriff or talon hand. In the chest there was a fracture of the seventh and eighth costal cartilages. As to the brain damage, Dr. Lum was asked as to the probable effect of that injury, and testified that such a severe injury could alter one's personality, making them less stable, and occasionally developed a preliminary epilepsy, due to increased unstable brain substance. As to what to expect with reasonable certainty there were many things the doctor said could happen. Although the various fractures and contusions had healed, the brain injury and the median nerve injury are permanent. The doctor also testified there was not a complete paralysis of the legs, and plaintiff's general facial appear-

ance was altered, the chin forced back, and there was a sag in the face. His nervous condition also was unstable, and he would never be able to do the physical work he did prior to the accident.

Dr. Sutton, a dentist, testified as to the injuries and repairs to the mouth and teeth, consisting of a compound fracture of the jaw, the splitting and breaking of the teeth and injury to the nerves of the teeth, and the correctional methods used. The doctor, when asked as to the pain and suffering caused by the appliances required to repair the damage said, "Well, I would say it was just awful," and that one particularly severe appliance remained in place for about six weeks. Dr. Sutton also testified that plaintiff would require practically a complete set of upper and lower artificial teeth. Dr. Fountain, who co-operated with Dr. Lum and Dr. Sutton, corroborated them in what was done and the effect upon the patient. Dr. McDowell, a specialist of the eye, ear, nose, and throat, testified he treated plaintiff after the accident and found his eyesight impaired, and prescribed the wearing of glasses. An examination of the hearing of plaintiff disclosed that that sense was approximately 30 per cent. deficient.

* * *

[6] Appellants criticise an instruction upon the measure of damages submitted by plaintiff and given by the court. The instruction as given reads:

"If you find that the plaintiff is entitled to recovery, the measure of his recovery is what is denominated as compensatory damages, that is, such sum as will compensate him for the injuries, if any, he has sustained.

"The elements entering into this damage are as follows:

"1. Such sum as will compensate him for the expense, if any, that he has reasonably and necessarily incurred for medical and hospital aid and assistance, not exceeding the amount alleged in the complaint for this purpose, to-wit: \$2,265.25.

"2. Such sum as will compensate him for the expenses, if any, it is reasonably certain he must reasonably and necessarily incur, if any, for medical aid, hospital expenses and nursing in the future, because of such injuries.

"3. The value of his time, if any, during the period he has been disabled by the injury.

"4. If the plaintiff's power to earn money in the future has been impaired by the inju-

ries, if any, such sum as will compensate him for such loss of power, if any.

"5. Such reasonable sum as the jury may award for physical pain and mental anguish suffered, if any, or reasonably certain to be suffered in the future, from the injuries, if any.

"The first three of these elements are the subject of direct proof and are to be determined by you upon the evidence you have before you, the last two elements are from necessity left to the sound discretion of the jury, but in any event the damages must be just, and cannot exceed the amount alleged in the complaint, to-wit: \$127,265.25."

Appellants criticise the last paragraph of this instruction, in that the jurors were instructed to determine the loss of earnings of plaintiff, if any, upon direct proof, whereas there was no evidence of any kind introduced as to the value of plaintiff's time while disabled, or to his earning power. The following is the evidence adduced upon the question of earnings:

"Q. Mr. Lindemann, referring to the question of your loss of earnings will you state whether or not it is true that last year off your grain crop, off of the land that was harvested after this accident, that you made a net profit of about \$20,000.00? A. Approximately so.

"Q. That was off your grain land was it not? A. Yes sir.

"Q. Is it or is it not true that since the accident and at the present time you have under cultivation some 300 or 400 more acres than you had last year? A. Yes sir."

Plaintiff also testified that as a farmer prior to his injuries he personally took charge of his tractors and farming implements, making the necessary repairs and doing the actual work, but since that time he gets agitated and cannot attend to business so far as the physical requirements are concerned, is unable to use his crippled hand, cannot walk enough, nor operate a car as he once did, and at the time of the trial was able to carry on no actual business.

The objections urged by appellant to the instruction are very similar to those urged to an almost identical instruction given in *Storrs v. Los Angeles Traction Co.*, 134 Cal. 91, 66 P. 72, which received the approval of the Supreme Court in a well-considered opinion delivered by Mr. Justice Harrison. To quote all of the pertinent parts therefrom would extend this opinion unduly, but reference is made thereto for a

complete answer to the contention of appellants.

Appellants attempt to distinguish that case or lighten its effect as precedent to the instant case, but we think without avail. The court there said: "The objection of the appellant that, as there was no specific testimony that the plaintiff was earning anything at the time of the injury, or of the amount that he was capable of earning, any verdict of the jury under this instruction would be merely conjecture, is untenable.

* * * The fact that he was not in the receipt of any salary or wages, but was attending to his own business, does not deprive him of right to compensation for the loss of his earning capacity, since it is what he was capable of earning, rather than what he was actually earning, that was to be considered by the jury. It may be conceded that, in the absence of all evidence tending in any respect to show an impairment of his earning capacity, the jury would not have been authorized to include any compensation therefor in their verdict, but it does not follow that it was necessary that there should be direct or specific testimony that he was in the actual receipt of wages, or capable of earning a specific sum in any particular employment. * * * If the circumstances which were before the jury show that by reason of the injury he has become unable to perform the labor or transact the business which he was accustomed to transact or perform prior thereto, he is entitled to recover damages therefor; and from the nature of the investigation the amount of such recovery must be left to the wise discretion of the jury. It needs no evidence to show that a plaintiff in full health and vigor, who has lost an arm or a hand by reason of the negligence of the defendant, has had his earning power greatly impaired; and in such a case a jury would not be limited to nominal damages, although there should be no evidence that he was in the receipt of wages at the time of the injury, but would be authorized to give substantial damages. *Chicago, etc., R. R. Co. v. Warner*, 108 Ill. 538; *Fisher v. Jansen*, 128 Ill. 549, 21 N.E. 598; *District of Columbia v. Woodbury*, 136 U.S. 450, 10 S.Ct. 990, 34 L.Ed. 472; *Gainesville, etc., Ry. Co. v. Lacy*, 86 Tex. 244, 24 S.W. 269; *Missouri, etc., Ry. Co. v. Vance* (Tex.Civ.App.) 41 S.W. 167. The rule for measuring damages is, however, the same, whatever may be the extent of the injury, but the measure of damages in any particular case will depend upon the facts in that

case. No testimony is required upon matters which are presumably within the knowledge or observation of all men of common intelligence. 'Juries are in many cases permitted to exercise their own individual judgments as to values upon subjects presumptively within their own knowledge which they have acquired through experience or observation, and the objection that no evidence was presented before them upon such subjects is insufficient to defeat their verdict.' *Cederberg v. Robison*, 100 Cal. 93, 34 P. 625."

This case has been cited with approval, and the principles there stated applied in the cases of *Girard v. Irvine*, 97 Cal.App. 377, 275 P. 840; *Campbell v. Bradbury*, 179 Cal. 364, 176 P. 685; *Holmes v. California Crushed Fruit Co.*, 69 Cal.App. 779, 232 P. 178.

[7-9] Appellants also urge misconduct of a juror as a ground for reversal. The record shows that a juror when asked upon her voir dire if she knew or was acquainted with plaintiff, or if she knew of plaintiff, by her silence indicated a negative answer.

By affidavits, one from the wife of defendant Ewing, appellants attempt to show a friendly greeting by the juror to the wife of plaintiff during an intermission in the course of the trial, and three from fellow jurors as to statements made in the jury room during their deliberations by the juror that plaintiff was changed in facial expression and disposition since the accident.

Counteraffidavits were filed by plaintiff, by the juror under attack, and by certain other jurors denying the allegations. These conflicting affidavits were before the trial court upon the motion for a new trial, and the finding there made is binding upon us. A new trial may be granted upon the ground a juror made untrue answers to questions asked upon his voir dire, if it appears the moving party was not aware of the falsity at the time of the completion of the impanelment of the jury, and did not discover such fact during the trial and before the rendition of the verdict. 20 Cal. Jur. p. 54. It appears from the affidavit of Mrs. Ewing that the circumstances related by her were alleged to have occurred at the noon recess of the first day of the trial, and by the affidavits of counsel for defendants it appears they were made acquainted with the facts set forth in the affidavit almost immediately, and, before court was convened that same day, called the matter to the attention of the trial judge, but did nothing

further in the premises. In *Sherwin v. Southern Pacific Co.*, 168 Cal. 722, 145 P. 92, 93, the court said, in a similar situation: "If the defendant or its attorneys had discovered these facts at any time during the trial, it would have been their duty, if they desired to take advantage thereof, to apply to the court for leave to reopen the examination of the jurors, elicit the facts, and thereupon offer a challenge to the juror guilty of the misconduct." It would obviously be improper to permit a party knowing of misconduct to withhold action and gamble on the outcome before making complaint. We cite the foregoing as an additional reason for upholding the action of the trial court in denying a new trial on the ground of misconduct of the jury.

As to the alleged misconduct of the attorney for plaintiff, we cannot find sufficient ground for a reversal. The alert and able counsel for appellants have emphasized the statements of counsel for plaintiff wherein he apparently went outside the record, but we cannot attach to these matters the importance that appellants do, nor can we believe the jury were influenced thereby, particularly in view of the admonition of the court.

[10] The last point to be considered is the claim that the evidence was insufficient to support the implied finding that Ewing was acting as an agent of San Joaquin Cotton Oil Company at the time of the accident. The following facts are in evidence: Ewing was the district manager of defendant San Joaquin Cotton Oil Company, with headquarters at Chowchilla, and whose territory covered the San Joaquin valley north of Fresno. Among his other duties were to solicit business from the farmers in that territory, settle accounts, arrange budgets and other details in connection with loans, and advise and counsel as to the production and sale of cotton. He had no fixed hours, but was on duty practically twenty-four hours a day. He also did a certain amount of contact and public relationship work as between his company and the farmers, creating and maintaining a friendly relationship between the company and the community.

The car involved in the accident belonged to the company, who paid for the gas and oil, except when the car was being used for the private business of Ewing, and there is no evidence that on this trip Ewing paid for any gas or oil. Plaintiff attended the meeting upon the invitation and solicitation of Ewing. This meeting was of the San Joa-

quin Valley Agricultural Labor Bureau, meeting for the purpose of fixing the general price for labor in cotton production for the approaching season, at which meeting Ewing was attending as a part of his duty as manager of the cotton company, and it was a part of his duty to see that the growers the company was financing attended these meetings. At the gathering after the meeting and before dinner it will be recalled that Mr. Fawcett, with whom plaintiff came to the meeting stated he was leaving, and plaintiff was preparing to accompany him when Ewing said to plaintiff he had no special reason to go home and offered to take him home later, to which plaintiff replied he would accept the invitation as "he wanted to talk and get some advice from him."

After dinner the two men, plaintiff and defendant Ewing, got in Ewing's car, Ewing driving, and they proceeded toward Los Banos, the home of plaintiff. Ewing admits they discussed plaintiff's business during the trip and almost up to the time of the accident. Plaintiff testified he already had a heavy loan with the cotton company and had an extensive acreage under cultivation, and an additional loan was necessary to cut weeds; hence the need of a discussion between plaintiff and Ewing.

It seems to be the contention of appellants that when Ewing deviated from the main highway at Califa, there taking the road leading from the main highway to Los Banos, he then abandoned the business of his employer and embarked upon a matter of his own business or pleasure. But here we have a customer of appellant, whose financial interests were closely interwoven with the oil company, attending a meeting upon the invitation and solicitation of Ewing, a manager of the company. Ewing was anxious undoubtedly, to retain plaintiff's co-operation, and in his capacity as ambassador of good will, keeping up his contacts and developing cordial relations between plaintiff and defendant, was impelled to make a 60-mile detour not on account of any close personal friendship between himself and plaintiff, but to advance the interests of his employer. We believe the facts and circumstances here show that the entire journey was on the mission of his employer, and the jury were justified in so finding.

Because of the united insistence that the trial court committed serious errors of law which were sanctioned by the District Court's decision, and the somewhat fear-

some tenor as to the result of the decision as expressed in the briefs filed by petitioners and a score of amici curiæ for a hearing in a cause which affords a prolific field for diversified views, particularly as to whether defendant Ewing was, at the time of and immediately prior to the accident, in a fit condition to drive said automobile, and, if not, whether his unfitness was so clearly apparent that an ordinary reasonable person in plaintiff's situation, in all the circumstances of the case, should have known of such unfitness, thereby barring his right to recover damages on the ground that plaintiff was guilty of contributory negligence and the driver's intoxication, by reason of that fact, was not the proximate cause of the injury or damage suffered by him, we were moved to grant the petition for hearing.

The defendants answered separately. Defendant Ewing's answer was verified by his attorney, Harry D. Parker, Esq.

San Joaquin Cotton Oil Company did not tender intoxication or any other issue as a defense to the action on the claim that plaintiff was guilty of contributory negligence. Defendant Ewing, by his answer verified by his attorney, did tender the issue in the most general terms. If he was not intoxicated, as it was repeatedly insisted both by answer and by his testimony that he was not, plaintiff could not possibly have been guilty of contributory negligence. His testimony, in accounting for the accident, was that he was blinded by the lights of an approaching truck or car, and he accounted for the accident on this theory and did not in any way suggest that plaintiff's presence in the car even remotely contributed to the accident.

San Joaquin Cotton Oil Company by its answer denied that plaintiff was riding as a guest with defendant Ewing, admitted that he was an occupant of the automobile operated by Ewing, but did not allege the nature of his occupancy. It denied that Ewing was intoxicated or was under the influence of intoxicating liquor, admitted that said automobile was wrecked but denied that it was operated in a careless or negligent manner, and denied for want of information and belief that plaintiff was injured at all. As an affirmative defense, it alleged upon information and belief that at the time of the accident plaintiff and defendant Ewing were engaged in the prosecution of a certain business in which they had a joint and common interest. Said company alleged that said accident was un-

avoidable and occurred without any fault on the part of said company. It admitted that said Ewing was an employee of said company, but denied that at the time of the accident he was an agent of said company or that he was then acting in the course and scope of his employment. All other allegations were denied for lack of information and belief.

[11] Defendant Ewing through his attorney, repeatedly denied that Ewing was under the influence of intoxicating liquor or that his condition in that respect contributed to the accident in any degree. Said answer denied on information and belief that plaintiff was injured in the manner alleged or at all. It affirmatively alleged that, *if any* accident occurred, it was the result of unavoidable circumstances. Practically all of the other material allegations, many of which were unquestionably within the personal knowledge of Ewing and could not have been denied by him, were denied by the attorney for want of information and belief.

For the reason that the subject has to do with the answer filed by Mr. Ewing, we will at this point dispose of the assignments of misconduct charged against plaintiff's counsel on account of certain questions asked of defendant Ewing, who was called under section 2055, Code of Civil Procedure, as to his relations and acquaintance with the attorney who had drawn and verified an answer on his behalf. The examination was germane to the denials and allegations set forth in the answer. The witness was asked if he had ever before trial seen the attorney who verified the answer on file, and he replied that he never had. Counsel then proceeded to ask the witness if he knew who he was and whether he had had any correspondence with the person who had verified his answer, and the court sustained objections to these and any further questions relating to the subject. We think it was perfectly proper for the plaintiff to show whether the denials and the allegations of the answer were predicated upon any information furnished by Ewing or were blindly made without consulting him. Many of the allegations denied for lack of information and belief were directed to matters that were unquestionably within the personal knowledge of Ewing, and they could not have been truthfully denied by him.

[12, 13] A verified answer, filed in an action, is presumed to contain facts which

from the nature of the matter under investigation are within the knowledge or belief of the adversary party, whether they be in the form of denials or affirmative allegations. Where a defendant, as here, is the actor and is in possession of all of the main facts, goes to trial on a complaint verified by another person who has no personal knowledge of the facts which are alone within the breasts of the plaintiff and the defendant, he thereby stands upon and sponsors such an answer, and he may not avoid the effect of an examination which requires him to explain why he stands upon denials and allegations which he could not have truthfully subscribed to. The questions which were assigned as misconduct were properly the subject of inquiry in the face of the many denials and allegations made on information and belief and which could not have been made by defendant Ewing. No misconduct is shown by the assignments. The other assignments of misconduct are too unsubstantial to require special mention. Moreover, the court fully advise the jury as to statements made by counsel not supported by evidence.

[14] The legal batteries of all of the petitioners and amici curiæ are leveled upon the primary question, to wit, Does the evidence as a matter of law convict plaintiff of contributory negligence? The burden of proving contributory negligence rested upon the defendants.

[15, 16] There is no merit in the suggestion or contention that the evidence which tended to establish the intoxication of defendant Ewing to the degree which would render him liable for the injuries and damages suffered by reason of the accident is necessarily conclusive of the question as to whether plaintiff had, or should have had, knowledge that Ewing was so far affected by intoxicating liquor as to defeat his claim for damages. If that is true, then every person riding as a guest would be defeated by proof of the single fact that the driver was not in a fit condition to drive the automobile. The question upon which liability depends is whether the plaintiff knew, or should have known, that defendant Ewing was not in a fit condition to drive his car on the occasion of the accident. In deciding questions of this character, it is the duty of the triers of fact to place themselves in the position that the plaintiff was in, as shown by the evidence, and to give proper consideration to the things and matters which form the basis of, or ordinarily af-

fect or influence, the judgment of men engaged in the ordinary affairs of life. Judgments formed upon what apparently appears to be the true relation of things often prove to have been erroneously formed. If, however, the circumstances were such as to justify a reasonable man in acting upon them, he will not be deprived of a remedy which the law provides if it afterward is proven that his judgment was fallaciously formed. The rule therefore is, What would a reasonable person have done in plaintiff's position, seeing what he saw, knowing what he knew in the light of the circumstances of his situation, and affected by the human propensities or elements which ordinarily enter into the formation of and influence the judgment.

No prejudice by reason of the fact that either or both of the parties involved in the accident had partaken of intoxicants should cause a court, where a legal right is involved, to lightly consider the rights of said parties, even though their unhappy plight may have been brought about by conduct which may appear to be highly censurable.

With the foregoing rules as guides, we will briefly, in addition to what has been said by the District Court of Appeal, add our concurrence to the views of the trial court and the District Court of Appeal in support of the conclusion that there exist grounds upon which the judgment may be affirmed.

Both parties to the accident are men prominent in the agricultural and business life of the communities in which they reside. Mr. Ewing was the manager of a large financial corporation which financed and advised with the cotton growers in planting, harvesting, and marketing their crops. He was therefore a man in whose judgment the cotton growers must have had confidence. Mr. Lindemann was a prominent cotton grower and grain farmer, operating 1,500 acres of cotton and approximately 3,000 acres of grain. That he was an influential and well-known citizen of the San Joaquin Valley is made clear by the fact that Mr. Ewing requested him to attend the meeting which he had arranged and to bring with him others engaged in cotton growing. The meeting was called by Mr. Ewing, to discuss with them problems of the cotton growers. Mr. Lindemann was indebted to the company in a large sum, and was negotiating for another advancement to be used in clearing his lands of weeds. That the San Joaquin Cotton Oil Company exercised a supervisory control over the

growers whom it financed there is no room to doubt. He, accompanied by Mr. Fawcett, a neighboring cotton grower, went to the Californian Hotel, the place of meeting, as Ewing's guest. The meeting opened at 2 o'clock p. m. and adjourned at 4:30 p. m. After adjournment, a number of those present spent some 30 minutes at the hall engaging in conversation. Some one suggested that the party, consisting of Mr. Lindemann, Mr. Steintorf, Mr. Fawcett, and Mr. Ewing go to a place some four or five blocks from the hotel where intoxicating liquor was sold. Evidently the suggestion did not come from Lindemann. Mr. Ewing seemed to be better acquainted with the location of the places which served refreshments than the others. At said place Mr. Fawcett drank several bottles of 3.2 per cent. beer, and Mr. Ewing and Mr. Lindemann each drank two bottles of beer and four whisky highballs. Mr. Fawcett had an appointment and left the place at approximately 7 o'clock p. m. Mr. Lindemann, at the insistence of Mr. Ewing, consented to ride home with him, as both lived in the same general direction and they wished to discuss business matters relative to Lindemann's crop problems. Ewing was anxious for him to remain and ride with him. Mr. Ewing and Lindemann returned to Mr. Ewing's automobile and were driven to an eating place known as "Tiny's Waffle Shop," where both ate a beefsteak or mutton chops and had coffee. No liquor was consumed with the meal nor carried by them. The homeward journey began at about 9 o'clock p. m. The evidence would undoubtedly sustain a finding that Mr. Lindemann was at no time affected with intoxicating liquor during the journey home. Both he and Mr. Ewing had drunk exactly the same kind and quantity of beverages during their stay at the place of purchase, to wit, two bottles of beer each and four or five highballs during a period of three hours, after which they ate a meal. All of the evidence is to the effect that Lindemann was not at any time perceptibly affected by what he had taken. Mr. Ewing was, no doubt, the dominant personage by reason of the responsible and commanding position which he held as manager of the financial institution to which Lindemann was indebted and from which he expected to obtain other advancements through the recommendation of Mr. Ewing. It would seem to be the natural thing for him to rely to some extent upon the assurance that a man of his type would not undertake to

drive a car unless he was able to do so in safety to himself and others. He had on several previous occasions ridden with Mr. Ewing. It is true that he related circumstances which occurred on the journey homeward that would indicate that at times he had misgivings as to whether Mr. Ewing was in a fit condition to drive the car. Mr. Ewing testified that he was not affected with intoxicating liquor, and that an oncoming motor vehicle occupied the center of the narrow bridge, and in an attempt to avoid a head-on collision he struck the right-hand abutment of the bridge.

Petitioners zealously contend that the same evidence which impliedly established Ewing's intoxication also inextricably enmeshed Lindemann in its skeins, and, notwithstanding the fact that the jury impliedly found that he was not guilty of contributory negligence, its implied finding is so entirely lacking in evidentiary support as to render such finding error as a matter of law. The intoxication of Ewing and Lindemann's knowledge of that fact were two distinct issues submitted to the triers of the facts.

[17-21] Subject to the exercise of legal discretion, the jury is the sole judge of the weight, effect, and sufficiency of the evidence to establish any fact for which it may be offered. The jury is the sole judge of the credibility of the witnesses, and may believe all of the testimony of a witness or believe a part and reject parts as it may be convinced of the truth or falsity of such testimony, whether it arises from willfulness or mistake. It is its duty to reconcile conflicting evidence where it is possible to do so, and its findings cannot be set aside by the court unless they are found to be without support upon a full consideration of the whole case. So, here, we must consider the evidence in its most favorable aspect to the end that the judgment may be sustained.

[22, 23] Mr. Lindemann testified that at the dinner table Mr. Ewing showed no signs of intoxication; that there was nothing unusual about his conversation; that the first time that he showed any signs of being affected with the use of intoxicants was after they had passed through Madera, which is 22 miles north of Fresno; that his opinion was largely based upon his insistence to show Mr. Lindemann the speed of the company's relatively new car. He was driving faster than Mr. Lindemann cared to ride and he said to him, "Don't let us be in too much of

a hurry." Mr. Lindemann further testified, in response to questioning, that he *believed*, "at the time when this accident happened," that Mr. Ewing was under the influence of intoxicating liquor. The following question put to Mr. Lindemann had a tendency to fix the time when he first formed the opinion that Mr. Ewing was affected by liquor: "Q. Now you can answer this question yes or no. Did you say that *just before* this accident happened Mr. Ewing was under the influence of liquor? A. I do." (Italics ours.) At another time he stated that it was "right around after we had left Fresno that he showed any signs of it." The drive from Fresno to Madera should not exceed 30 to 35 minutes. There was no suspicion in the mind of Lindemann as to Ewing's sobriety when he entered the car. His inclination to show Lindemann the speed of the car, which he would reduce at the suggestions of or on objections made by Mr. Lindemann, but in a few minutes thereafter would again drive faster than Lindemann cared to ride, was not of itself sufficient to establish intoxication. Ewing's testimony is that he drove at a speed of 45 or 50 miles per hour. Mr. Lindemann gave testimony to the effect that he did not speak to Ewing about "taking it easy" until they had passed Madera, which was the only stopping place on the road. In fact, all of the several suggestions made by Lindemann as to speed were made between Madera and Califa, a distance of 11 miles. Califa is a mere sign placed on the highway and indicates the point where the road known as Pacheco Pass leads westerly from the Golden State highway. It is not even a settlement or village. Lindemann said that he had reminded Ewing a few minutes before the accident occurred that they were in no hurry and to "take it easy," and Ewing slowed down the speed, and he was not "worried about it then." He temporarily closed his eyes, as he had done before on the journey, when the accident happened. Ewing testified that immediately before striking the abutment the speed of the car was 30 miles per hour. Lindemann further testified that they discussed matters bearing on his indebtedness to the company and his crop problems practically throughout the entire journey. Ewing may have talked a little louder than usual, "but nothing out of the ordinary"; he did not talk like an intoxicated man. It cannot be said with certainty that the testimony of Lindemann alone, without the testimony of Dr. Lum and Mr. Fawcett, which will here-

after be noticed—the burden being upon him—would have been deemed by the jury as sufficient to convict him of intoxication during the 55-mile drive. The jury may have considered that the tendency to speed was not an uncommon occurrence on the part of persons who habitually drive cars when on a practically straightaway such as the Golden State highway in the sparsely settled sections of the country. The jury may have concluded, well within its province, that notwithstanding Lindemann's testimony which was offered in an effort to fix responsibility on Ewing, nevertheless it did not meet the burden cast upon defendants of showing that Lindemann knew, or should have known, that Ewing was intoxicated, and, if he did know that fact, that he was negligent in continuing to ride with Ewing to the time the accident occurred.

In determining the question—conceding as we must, by reason of the jury's implied finding, that intoxication on the part of Ewing was the proximate cause of the accident—there was other evidence bearing upon the other issue as to Lindemann's alleged negligence which the jury was duty bound to consider in determining whether Lindemann in fact had reason to believe, or in fact was convinced by what he saw, that Ewing was in an unfit condition to drive his car.

On the question as to whether Ewing exhibited definite symptoms of intoxication, four witnesses were called. Dr. Lum, who was on the scene shortly after the accident, testified that he was of the opinion that alcohol had altered or slowed Mr. Ewing's reaction to such an extent that his condition would come fairly within the limit of the definition of intoxication as given by the court. He said his speech was pretty good, and that he exhibited interest in Lindemann's condition. The doctor said he had difficulty in arriving at the conclusion that Ewing's case came within the definition of intoxication because of the multiplicity of definitions on the subject. But whether a layman would have been able to diagnose his condition is quite another matter.

Two trained nurses at the hospital who administered to Mr. Lindemann saw and talked with Mr. Ewing separately for some considerable time, approximately an hour after the accident, and both testified that he appeared quite normal in every respect and exhibited no signs of intoxication. Mrs. Helen Lum, wife of Dr. Lum, the physician who attended Mr. Lindemann,

sat in the same seat with her husband and Mr. Ewing as they drove from the scene of the accident to the hospital, and she testified that Mr. Ewing conversed entirely rationally; that she detected the odor of liquor on his breath, but that there was nothing in his mental or physical appearance, so far as she was able to discern, which would indicate that he was affected with intoxicating liquor.

But, conceding that Lindemann discovered on the journey that Ewing appeared to be somewhat affected with intoxicating liquor, would the average reasonable man in the circumstances of the case have felt warranted in telling him he was intoxicated and getting out on the roadside? Lindemann went as far as he felt justified in going, measured by all that had occurred before the accident. His testimony would indicate, at the most, that prior to the accident, he was in an uncertain state of mind as to whether Ewing was in a fit condition to drive. He was comfortable when Ewing heeded his suggestion not to be in a hurry, but became uneasy when the speed was increased to the point where he thought it was too high. No accident or near accident happened in 55 miles of travel, and there is no evidence that there was any wobbling of the car or that his driving was unsteady.

Lindemann was not riding as an ordinary guest. He had been solicited by Ewing to attend the company's meeting and requested to bring with him the farmers in his locality. He had been especially impertuned by Ewing to ride with him. He was a debtor of the company and an applicant for an additional loan from the company. The company advised with its debtors as to its annual budgets. Both parties were anxious to discuss matters of business. Ewing was the manager of a well-known financial institution. Would a reasonable person, in the light of all the circumstances bearing on or affecting the situation as shown by the case, have told Ewing that he was intoxicated and unfit to drive the car, and, if he insisted on driving, as his manner indicated, have gotten out of the car on the roadside at a late hour at night and made his way the best he could along the highway? This question was for the jury's determination, and, unless the plaintiff's conduct was so far contrary to the rules which govern the conduct of reasonable men in the ordinary affairs of life, or violates some rule of law, the jury's verdict and the trial court's judgment are not subject to annulment by an appellate court.

[24, 25] Some comment adverse to plaintiff's action arises out of the fact that, when the parties approached Califa, five miles south of Chowchilla, the residence of Ewing, plaintiff suggested to him that, instead of turning into the Pacheco Pass highway, they proceed to Chowchilla, where Ewing could remain, and plaintiff would drive the car to Los Banos, and, as Ewing was to call at his home on the following day to look over his ranch, he could drive the car home and thereby save himself a night drive from Chowchilla to Los Banos; the round trip distance being approximately 60 miles. Mr. Ewing replied: "I would be glad to take you home, I don't care if I get home a little later." Mr. Lindemann then said: "Tom, if you feel that way it is all right." This does not sound like a man unduly apprehensive of the condition of his driver. Lindemann said that he made the suggestion with the expectation that Ewing would accept the proposition, as he would have felt easier driving the car himself. The jury, however, placed such construction upon and gave such weight to this testimony as it felt it merited or deserved. This criticism is placed on the ground that Lindemann did not strenuously remonstrate against what he thought to be excessive speed. It is the rule that the duty to remonstrate against excessive speed is not absolute but depends on the circumstances of the particular case, and usually presents a jury question. Huddy, *Ency. Automobile Law*, vol. 5-6, § 144.

The testimony of Lindemann was subject to the same scrutiny as the testimony of any other witness, and the jury was at liberty to accept it all, or a part only, or none, and, further, to consider whether or not the impression or opinion as expressed from the chair as to how Ewing appeared was formed on the night in question or whether it was the opinion or impression subsequently formed after reflection upon the accident itself colored by the expert opinion of his physician. The fact that Lindemann continued to ride with Ewing may have some evidentiary value either as a refutation of intoxication or as convicting him of negligence, as the jury may have determined in its discretion.

[26] It is urged that the court erred in instructing the jury upon the subject of the measurement of damages. The instruction given by the court was taken verbatim from *Storrs v. Los Angeles Traction Co.*, 134 Cal. 91, 92, 93, 66 P. 72, and has since

been repeatedly approved by this court and the District Courts of Appeal. Appellants admit that the instruction is correct as a general proposition of law, but contend that there was no evidence of any kind introduced as to the value of plaintiff's time while he was disabled or as to his earning power. We are of the opinion that there is evidence in the record from which the jury could have determined both elements of damage on the theories set forth in the authorities which discuss the proposition. Besides, the jury was instructed that the burden of proof was upon the plaintiff to prove every essential element of the case by a preponderance of evidence, and it cannot be presumed that the jury disregarded this admonition by including as damages elements which had no evidentiary foundation.

The evidence is conclusive on the issue that Mr. Ewing was the agent of the defendant San Joaquin Cotton Oil Company and was acting within the scope and course of his employment. The evidence on this issue is all one way and does not merit discussion.

Appellants have cited many cases in our own jurisdiction in which the intoxication of the driver of the car has been held to bar recovery by the injured guest. Upon examination it will be found that practically every one of said cases involved the affirmance of an order directing a verdict or an order for judgment notwithstanding the verdict of the jury. The facts of those cases are entirely different from the facts of the instant case. Many of them record nothing more nor less than orgies of intoxication in which the occupants of the automobiles went from one bootleg joint or private drinking place to another and the members of the party were in a maudlin condition when the accidents happened.

It is somewhat significant that the author of the District Court opinion under review and his associates are the authors or participated in the affirmances of a number of the decisions relied upon by appellants as furnishing precedents for the reversal of the instant case. The facts of the instant case are not the facts upon which the decisions in cited cases were made.

[27] This brings us to the question as to whether the verdict in the sum of \$62,500 is excessive. Appellants call to our attention cases which by way of comparison show that it ranks in amount among the highest ever awarded by the courts of this state. A number of cases are found in our

reports involving cranial and brain injuries, loss of sight, loss of limbs, and irreparable injuries to the nervous system in which the damages assessed were considerably under those awarded in the instant case. There is no doubt but that the plaintiff was very seriously injured, but it would seem to a layman that the prognosis is fairly good for a restoration to fairly good health. The effects of some of the injuries are permanent. His left hand has shrunk from the injury, and it is probable that he will never again regain complete use of it. His face has been disfigured by the breaking of several bones in both upper and lower jaws—the mandible and maxilla were injured to the extent that the spongy bones in which the teeth are set had to be dissected out. Of course, the teeth that were not knocked out by the impact will have to be extracted. The upper jaw sustained several fractures from the cheek bone to the upper gums. His jaws are somewhat out of line and the palate had to be removed. He also suffered several cranial fractures, and his nervous system has become seriously impaired. He was a strong vigorous man in middle life and was active in agricultural pursuits, especially in cotton production. He was confined in the hospital for a period of one month and required medical attention for some time thereafter, but was not bedfast. His close acquaintances testified that he is not the man he was before the accident.

It is most difficult to fix just compensation for personal injuries sustained in cases where cranial injuries have been sustained or the nervous system has received severe injury. One of the physicians testified to the possibility of cranial injuries eventually producing epilepsy. This possibility seems, under the prognosis, to be very remote. Just how much this possibility may have enhanced the verdict cannot be estimated. Upon a consideration of the entire record, we feel that the verdict is somewhat excessive and should be reduced in the sum of \$12,500.

It is ordered that, if the plaintiff within 30 days from the filing hereof file with the clerk of this court his written consent to a modification of the judgment by a deduction therefrom of the sum of \$12,500, leaving the judgment to stand for \$50,000 and costs of suit, said judgment be modified accordingly; such modified judgment to bear interest at the legal rate from the date of the entry of the original judgment in the superior court; but, if such consent be not so

filed within said time, the judgment shall be reversed.

It is so ordered.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; THOMPSON, J.

On Modification.

WASTE, Chief Justice.

The plaintiff and respondent herein having filed on March 6, 1936, his written consent thereto, pursuant to direction in the decision of this court filed February 28, 1936, it is hereby ordered that the judgment herein be modified by deducting therefrom the sum of \$12,500, leaving the judgment to stand for \$50,000 and costs of suit, such modified judgment to bear interest at the legal rate from the date of the entry of the original judgment in the superior court, and as so modified the judgment is affirmed.

We concur: SHENK, J.; SEAWELL, J.; THOMPSON, J.; CURTIS, J.; LANGDON, J.



12 Cal.App.2d 264

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. OIL WELL SUPPLY CO. OF CALIFORNIA.
Civ. 9650.

District Court of Appeal, Second District,
Division 1, California.
March 4, 1936.

Rehearing Denied March 31, 1936.

Hearing Denied by Supreme Court
April 30, 1936.

1. Judgment §181

Defenses that assignee's action on guaranty of note was premature because assignee had not determined amount due it under collateral agreement, and that guaranty was unenforceable because of assignee's failure to insist on payments under collateral agreement, raised no valid issues, and hence assignee was entitled to summary judgment, where guaranty was unaffected by collateral agreement except as amount due under guaranty would be diminished by payments under collateral agreement (Code Civ.Proc. § 437c, as added by St.1933, p. 1848).

2. Judgment §181

Debt need not necessarily be liquidated to entitle plaintiff suing thereon to summary

judgment under statute (Code Civ.Proc. § 437c, as added by St.1933, p. 1848).

3. Judgment ☞185

Motion for summary judgment was properly granted where defendant did not set forth in its affidavits in opposition to motion any facts supporting issue raised in pleadings (Code Civ.Proc. § 437c, as added by St. 1933, p. 1848).

4. Judgment ☞178

Summary judgment statute is procedural statute designed to protect plaintiff from harassing delays accompanying evasive, spurious, and meritless defenses (Code Civ.Proc. § 437c, as added by St.1933, p. 1848).

5. Appeal and error ☞837(1)

Whether trial court abused its discretion in granting summary judgment should be determined from inspection of pleadings and affidavits supporting and opposing motion for such judgment (Code Civ.Proc. § 437c, as added by St.1933, p. 1848).

6. Jury ☞31(7)

Witnesses ☞1, 266

Summary judgment statute *held* not unconstitutional as depriving defendant of right to trial by jury and right to subpoena and cross-examine witnesses (Code Civ.Proc. § 437c, as added by St.1933, p. 1848).

7. Appeal and error ☞113(2), 133

Orders granting motion for summary judgment and denying motion to vacate order for summary judgment *held* not appealable (Code Civ.Proc. § 437c, as added by St.1933, p. 1848).

8. Guaranty ☞36(9)

Allowance of attorneys' fees in action on guaranty of payment of note *held* error where guaranty made no provision for attorneys' fees.

9. Costs ☞234

Respondent *held* entitled to costs where judgment was directed to be modified in respect to evident errors which appellant failed to call to trial court's attention when motion for new trial was made, and was affirmed in all other respects.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by the Bank of America National Trust & Savings Association, a national banking association, against the Oil Well Supply Company of California. From the judgment, the defendant appeals.

— Affirmed with direction.

Joseph J. Rifkind, of Los Angeles, for appellant.

Freston & Files, of Los Angeles, for respondent.

DORAN, Justice.

The predecessors in interest of the plaintiff and respondent lent the Lakeview Oil & Refining Company the sum of \$140,000, secured by a note in the usual form, executed by said Lakeview Oil Company. On the same date, and in connection with said loan, and as a part of the same transaction, appellant guaranteed the payment of a portion of said loan in the sum of \$15,148, less 10.82 per cent. on any amount paid on account by the maker of the note, pursuant to a collateral agreement entered into between the maker and the bank and approved by the guarantors, by the terms of which agreement the maker was permitted to reduce the principal obligation from time to time before maturity.

This action is by the bank on the guaranty, the maker having defaulted.

Plaintiff made a motion for a summary judgment on the grounds that the answer set up no valid defense and that the defense pleaded was frivolous, sham, etc., and supported said motion by several affidavits, to which defendant and appellant filed counter-affidavits. The trial court granted the plaintiff's motion and judgment was entered accordingly. A motion to vacate the order for summary judgment was denied, whereupon defendant appeals from the judgment, the order granting the motion for summary judgment and the order denying the motion of defendant to vacate the order for summary judgment.

As a second separate and distinct defense, it was alleged by defendant on information and belief that plaintiff had not received nor determined the exact amount which said plaintiff was *entitled* to receive from the Lakeview Oil & Refining Company under the terms of the collateral agreement, and for that reason plaintiff could not determine what, if any, amount was due from the defendant; and, that the defendant could not pay plaintiff until defendant had received an account showing the exact amount to which plaintiff was *entitled* under said collateral agreement, for which reason the action was prematurely brought.

As a third separate, distinct defense the defendant alleged that plaintiff had neglected to use reasonable or any means, legal or

otherwise, in order that it might receive the proceeds referred to in said collateral agreement; that plaintiff had permitted the Lakeview Oil Company to use money for other purposes which should have been applied on the payment of the note, thereby voluntarily parting with the security to which it had first to resort, as a result of which it is urged by the defendant the guaranty was unenforceable.

As a fourth separate and distinct defense it was alleged that the complaint did not state a cause of action.

It is also urged by the appellant that the court abused its discretion in granting the motion for summary judgment because the sum sought to be recovered was unliquidated; and that for the reason that the defendant and appellant was denied the right to a trial by jury, the right to subpoena witnesses, and the right to cross-examine plaintiff's witnesses, the provisions of section 437c of the Code of Civil Procedure, as added by St.1933, p. 1848, is unconstitutional.

The note in question was in the usual form. The guaranty provides that the guarantors "hereby unconditionally guarantee (subject to the limitations as to amount as hereinafter stated) unto the Merchants National Trust and Savings Bank of Los Angeles," etc., and further quoting from the guaranty: "* * * Notwithstanding any agreements, extension or other stipulation which may be made or entered into by and between the Lakeview Oil and Refining Company and said Merchants National Trust and Savings Bank of Los Angeles or its successors or assigns and the undersigned hereby consent thereto without any diminution or change of liability hereunder."

The guaranty further provides, quoting therefrom, that: "The undersigned" (referring to the guarantors) "further agree that the Merchants National Trust and Savings Bank of Los Angeles may enter into any stipulation or agreement with the Lakeview Oil and Refining Company for the payment of the principal or interest or both at a time prior to the due date thereof as shown by the promissory note or renewal note herein mentioned." And further quoting from the guaranty: "This guarantee shall be binding unconditionally upon the undersigned, but that the undersigned shall be liable under this guarantee only to the extent of the amount set opposite the name of the respective guarantor, to-wit:

* * * Oil Well Supply Company of California \$15,148.00. * * * The liability under this guarantee to the extent of the amount set opposite the names of the guarantors herein shall, in event any payment is made on the principal by the makers of the note, or in the event any collection or recoveries from any other source by said Bank be decreased to the following extent, to-wit: * * * The liability of the Oil Well Supply Company of California shall be decreased by 10.82% of such amount paid or such recovery or collection, as the case may be."

The collateral agreement between the bank and the Lakeview Oil & Refining Company merely provided for the payment by the oil company to the bank of the income of certain oil wells, and, quoting from the agreement: "That this agreement is entered into for the purpose of enabling the second party to reduce the principal obligation before the date of maturity and further to further insure the ultimate payment of said note."

[1] The note, guaranty, and collateral agreement set out in full in the complaint are clear, certain, and unambiguous. The guaranty is unconditional and unaffected by the collateral agreement except to the extent that the amount due under the guaranty might be diminished. The separate defenses above referred to are pure sham, irrelevant, without merit, and raise no valid issue.

[2] The debt need not necessarily be liquidated to be subject to the provisions of section 437c, Code of Civil Procedure.

[3] The note, by indorsement on the back thereof, acknowledges the payment of certain amounts on the principal. The answer denies on information and belief that such amounts are the only amounts received by the bank on account of the principal. This denial presents the only issue raised by the pleadings.

The affidavits filed by plaintiff in support of its motion for summary judgment fully complied with the requirements of section 437c of the Code of Civil Procedure. Defendant filed three affidavits in opposition to the motion and nowhere in any of such affidavits does the defendant set forth any facts or evidence, direct or indirect, that support, or are available to support, the defense that the payments on the note as alleged in the complaint were not the only

payments made. The only reference to this subject is the following quotation from one of defendant's affidavits: "That the payments by the principal upon said promissory note were made directly to the bank and by reason thereof the dates, amounts and method of application upon said promissory note are not within the knowledge of this affiant or the Oil Well Supply Company. That affiant as an auditor states that the only way that the date, amount and method of application of any payments received upon said promissory note *can be verified* is by an examination of the books, records and accounts of the bank covering said transactions with said principal, or the books, records and accounts of the principal or the Receiver in Equity thereof." (Italics added.)

It was the defendant's privilege, under section 437c of the Code of Civil Procedure, to set forth the claim, by proper averments, that there was available at least the semblance of a defense; having failed to do this the trial court justly concluded that there was no defense to the action.

[4-6] Section 437c is purely a procedural statute, doubtless designed to protect the rights of the plaintiff, in actions of the character specified in the statute, from the harassing delays that ordinarily accompany evasive, spurious, and meritless defenses. It likewise promotes and protects the administration of justice, and none of the evils complained of by appellant can reasonably be attributed to its provisions. The only question that can possibly arise from its application is whether or not the trial court abused its discretion. The determination of this question is to be found from an inspection of the pleadings and the affidavits supporting and opposing the motion. The contention, therefore, that it offends the Constitution in the manner hereinbefore mentioned is without merit. Such legislation has been upheld uniformly as against constitutional attack of the same character relied upon by appellant. See *Peoples Wayne County Bank v. Wolverine*

Box Co., 250 Mich. 273, 230 N.W. 170, 69 A.L.R. 1024.

The objections pointed out by appellant do not follow from the alleged inherent invalidity of the section, but from the improper application of its provisions. Its inappropriate application is but an error of judgment or abuse of discretion, for which, without disturbing the validity of the section, the law affords adequate protection.

[7] As hereinbefore stated, appellant, in the lower court, moved to vacate the order for summary judgment, which motion was denied, and an effort is made to appeal from this order as well as from the order granting the motion for summary judgment. These orders are not appealable. Appellant's only remedy under the circumstances is an appeal from the judgment. The disposition of the action by the trial court was a trial under the law and the so-called motion to vacate the order granting the summary judgment was, in legal effect, a motion for a new trial. This motion was denied and the order denying such a motion is likewise not appealable. The appeals, therefore, from the orders above mentioned, are dismissed.

[8,9] The judgment allows attorneys' fees, which was error, as the guaranty makes no provision therefor; there is also an error of \$259.32 in favor of plaintiff in computing the 10.82 per cent. of the amount paid on the note. These errors are evident, and it does not appear that appellant called them to the attention of the lower court at the time the motion for a new trial was made; therefore, as to these items, appellant has accomplished nothing by this appeal that could not have been accomplished without appeal, as a result of which respondent is entitled to costs and it is so ordered.

The judgment is affirmed, with the direction that it be reduced in the two amounts above specified.

We concur: HOUSER, P. J.; YORK, J.

12 Cal.App.2d 542

PEOPLE v. RAMBOUT et al.

Cr. 291.

District Court of Appeal, Fourth District,
California.

March 19, 1936.

Criminal law ⇨1024(2)

Order dismissing action on defendants' motion after verdict of conviction had been returned against them, and after trial court had granted their motion for a new trial, held not appealable by the people (Pen.Code, § 1238).

Appeal from Superior Court, Imperial County; Roy D. McPherrin, Judge.

Proceeding by the People against Rene Rambout and Manuel Avalos. From an order dismissing the action on motion of defendants after verdict of conviction had been returned against them and after trial court had granted their motion for a new trial, the People appeal. On motion to dismiss appeal.

Appeal dismissed.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Elmer W. Heald, Dist. Atty., and R. I. French, Deputy Dist. Atty., both of El Centro, for the People.

Edgar B. Hervey, of San Diego, Hugh S. MacKinnon, of Calexico, and R. B. White-law, of El Centro, for respondents.

JENNINGS, Justice.

This is a motion by defendant to dismiss an appeal taken by the people from a certain order made and entered by the trial court or to affirm the order. The ground of the motion is that the order from which the attempted appeal has been taken is not an appealable order.

The order sought to be attacked by the appeal is an order dismissing the action on motion of the defendants after a verdict of conviction had been returned against them and after the trial court had granted their motion for a new trial.

Section 1238 of the Penal Code specifies the cases in which an appeal may be taken by the people. The order from which the people have here attempted to appeal is not included in the orders designated in the above-mentioned section. It is not an order setting aside or in any manner attacking the indictment returned against the defendants

and upon whose allegations they were tried. It is neither an order arresting judgment nor one made after judgment, since it is conceded that no judgment was pronounced. The motion is therefore in order and must be granted. People v. Knowles, 27 Cal.App. 498, 506, 155 P. 137; People v. Cordosco, 77 Cal.App. 780, 246 P. 461; People v. Newman, 113 Cal.App. 679, 298 P. 1044.

The attempted appeal from the order is dismissed.

We concur: BARNARD, P. J.; MARKS, J.



12 Cal.App.2d 434

PEOPLE v. GALLAGHER.

Cr. 1865.

District Court of Appeal, First District,
Division 1, California.

March 13, 1936.

Rehearing Denied March 28, 1936.

Hearing Denied by Supreme Court
April 10, 1936.

1. Poisons ⇨4

Possession required to sustain conviction for possession of narcotics need not be personal, and constructive possession is sufficient if it is immediate and exclusive and under dominion and control of violator.

2. Poisons ⇨9

Evidence that defendant directed officers to place where morphine was concealed, gave them keys to premises, and admitted that morphine belonged to him, sustained conviction of possession of morphine, notwithstanding that another person had access to premises.

3. Criminal law ⇨1036(1)

Defendant who made no objection to admission of evidence of flight could not complain on appeal of admission of such evidence.

4. Witnesses ⇨380(5)

Admission of evidence on behalf of state impeaching its own witnesses held not error, where prosecution was taken by surprise by failure of such witnesses to testify in accord with former statements.

5. Criminal law ⇨1170½(1)

Failure of prosecution to lay proper foundation for evidence impeaching its own witnesses does not constitute reversible error, where entire record shows that there has been no miscarriage of justice.

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Matt Gallagher was convicted of possession of a preparation of morphine, and he appeals.

Affirmed.

John H. Corning, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

TYLER, Presiding Justice.

Appellant was charged by information with violation of the State Narcotic Act (St.1929, p. 380, as amended), in having in his possession a preparation of morphine. It was also charged that appellant had suffered three prior felony convictions, one of which was a violation of the Harrison Narcotic Act, as amended, 26 U.S.C.A. §§ 1040-1054, 1383-1391. Appellant pleaded not guilty to the offense charged, but pleaded guilty to the prior convictions. The jury returned a verdict of guilty. The main contention of appellant is that the verdict is contrary to the law and the evidence. It is also claimed that the court erred in the admission of certain evidence.

There is testimony to show that certain police officers had been watching a particular residence in Redwood City where they suspected a delivery of morphine would be made. Appellant and his wife approached the residence in a Ford coupé. Narcotics were found upon the person of the wife. Both were arrested and taken to jail in Redwood City. The officers informed appellant that they had followed him all day and had witnessed him make deliveries of the morphine to various people. They accused him of being an extensive distributor of morphine and demanded that he give them information as to the location of his plant; that if he failed to do so they would visit the places where appellant had made deliveries and procure the information. Appellant, in order to protect his customers, thereupon referred the officers to a certain

lodging house in San Francisco and furnished them with keys to the premises, instructing them at the same time to look in the mattress of the bed and they would find the morphine which appellant owned. The officers repaired to the designated premises and found the morphine in the place indicated. They interviewed a man and his wife who were the owners of the lodging house. The wife informed the officers that the room where the morphine was found was rented by a woman who paid the rent for the first month. The husband testified that he received the second month's rent from a man. He was shown a photograph and recognized it as being appellant. At the trial both husband and wife refused to identify appellant, who denied that he had ever used the room.

[1,2] In support of his contention that the verdict is contrary to law, appellant argues that the evidence is insufficient to show possession within the meaning of the law, as such possession must be personal and exclusively under the dominion and control of the person charged. It has been frequently held in this state that the possession denounced by the act need not be a personal one, it being sufficient if such possession is constructive, so long as it is immediate and exclusive and under the dominion and control of the violator. *People v. Sinclair*, 129 Cal.App. 320, 19 P.(2d) 23; *People v. Torres*, 5 Cal.App.(2d) 580, 43 P.(2d) 374. Here, as above indicated, there is evidence to show that appellant directed the officers to the place where he had the narcotics concealed and gave them the keys to obtain entrance to the premises. There is also evidence that appellant admitted the morphine contained in the room was his. This evidence is amply sufficient to support the verdict.

The further argument is made that unlawful possession may not be sustained for the reason the evidence shows that another person had equal right and facility of access to the premises. The principle invoked can afford appellant no relief. There is testimony to the effect that appellant admitted the narcotics belonged to him.

[3] After appellant's arrest he became a fugitive from justice and was located in Salt Lake City, where he was apprehended and returned to San Francisco for trial. The court permitted evidence of flight, which act is assigned as error for the reason that there was no evidence to prove ap-

pellant was listed as a fugitive, nor to prove that any attempt had ever been made to notify appellant to appear for further proceedings, nor to prove that the case had ever been called in court when appellant was absent. Had objection been made to the question, proof of these facts might have been supplied. No objection having been made appellant is in no position to complain of the admission of the evidence.

[4, 5] And, finally, appellant claims that the court erred in receiving evidence that impeached respondent's own witnesses. The owners of the lodging house refused at the trial to identify appellant as the person who paid rent for the premises. The prosecution then recalled the police officer who testified that he had shown the owners a photograph of appellant and they identified him as the man who paid the second month's rent and who had occupied the room in question. The prosecution was taken by surprise by the refusal of the witnesses to identify appellant. The prosecution had a right to suppose the witnesses would adhere to the statements made to the officers and being taken by surprise at their refusal to do so, the district attorney had a right to show that they had made contrary statements. Moreover, even assuming that no proper foundation had been laid for the question, the admission of the evidence does not constitute reversible error for a reading of the entire record, including the evidence, shows that there has been no miscarriage of justice.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.



12 Cal.App.2d 277

**HAMMOND LUMBER CO. v. CITY OF
LOS ANGELES (two cases).**
Civ. 10091, 10092.

District Court of Appeal, Second District,
Division 1, California.
March 4, 1936.

Hearing Denied by Supreme Court
April 30, 1936.

1. Landlord and tenant ☞149

Obligation to pay taxes rests on landlord where lease executed between private par-

ties is silent as to whether landlord or tenant shall pay taxes.

2. Taxation ☞80

Possessory interest, such as a lease, is personal property, and may be severally assessed from freehold.

3. Municipal corporations ☞61

Rule that governmental capacity of municipality cannot be considered when municipality acts as private party does not mean that municipality must, when acting in private capacity, take affirmative action to advise another person, artificial or natural, that such person does not have benefit of law enacted wholly for benefit of governmental agencies.

4. Taxation ☞183

City owning land is not required to pay taxes so long as land is used by city, although private party owning land is responsible for taxes whether land is used by himself or by third person.

5. Taxation ☞80

Possessory interest of private lessee from city of tide lands held subject to taxation.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Two actions by the Hammond Lumber Company against the City of Los Angeles, a municipal corporation. From judgments for the defendant, the plaintiff appeals.

Affirmed.

Holbrook, Taylor, Tarr & Horton, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., F. Von Schrader, and Robert F. Shippee, Asst. City Attys., and Clyde M. Leach, Deputy City Atty., all of Los Angeles, for respondent.

ROTH, Justice pro tem.

The above-entitled cases were separately tried in the court below. Separate appeals have been taken from the judgment in each case. Since the primary question involved on both appeals is the same, the appeals are by stipulation argued in a single set of briefs and will be disposed of in a single opinion.

On April 30, 1921, and May 4, 1923, appellant, Hammond Lumber Company, pursuant to four several written harbor board

orders, obtained from the city of Los Angeles, respondent herein, acting in its proprietary capacity, the use of certain parcels of tide lands. These orders, it has been decided, were leases in legal effect. *Hammond Lumber Co. v. County of Los Angeles*, 104 Cal.App. 235, 240, 285 P. 896; *San Pedro, etc., R. Co. v. City of Los Angeles*, 180 Cal. 18, 19, 179 P. 393. The leases were silent as to which party should pay the taxes. Appellant paid taxes under protest on the parcels in question; and these actions are brought against respondent to recover the money so paid. Judgment in each was in favor of respondent.

[1] It is admitted that when a lease is executed between private parties and it is silent as to which party shall pay taxes, the obligation to pay the taxes rests upon the landlord. *Pacific Palisades Ass'n v. Menninger*, 219 Cal. 257, 265, 26 P.(2d) 303. Appellant's theory is that since the city in this case acted in its proprietary capacity, its status is the same as a private party; that "there is not one law for the sovereign and another for the subject," and that the city is, therefore, in its capacity of landlord, under obligation to pay the taxes. *Chapman v. State*, 104 Cal. 690, 694, 38 P. 457, 43 Am.St.Rep. 158. Respondent concedes that it acted in a private capacity, concedes the general rule urged by appellant, but contends that there is an exception to the same, and "that when there is a lease of land owned by a municipality, the reversion being exempt from taxation, in the absence of agreement to the contrary, the duty to pay taxes on the usufructuary interest acquired by such private individual or corporation is upon the lessee, and not upon the municipal lessor." The claims of appellant in both actions aggregate the sum of approximately \$80,000. The court found as a fact in both actions "that * * no taxes were levied or assessed against the real property as owned by the defendant * * * and that the taxes which were levied and assessed and referred to in plaintiff's complaint * * * were levied and assessed against the *possessory interests* of the plaintiff. * * *" (Italics ours.)

[2] There is no doubt that a possessory interest, such as a lease, is personal property, and may be severally assessed from the freehold. In *Graciosa Oil Co. v. Santa Barbara County*, 155 Cal. 140, at pages 143 et seq., 99 P. 483, 485, 20 L.R.A.(N.S.)

211, a case in which an oil lease was separately assessed, the court said:

"It is no doubt the general rule, regarding land held under an ordinary lease for years giving the right to hold the land for usufructuary purposes only, that, in the absence of contrary statutory provisions, there is to be but one assessment of the entire estate in the land, and that this assessment should include the value of both the estate for years and of the remainder or reversion. 27 Am.&Eng.Ency. of Law, 678; *Chicago & A. R. Co. v. People*, 153 Ill. 409, 38 N.E. 1075, 29 L.R.A. 69; *State v. Mississippi B. Co.*, 109 Mo. 253, 19 S.W. 421. Section 3887 of the Political Code recognized this rule, and provided that 'the mortgagor or lessor of real estate is liable for the taxes thereon.' This section was repealed in 1880, but, so far as we are advised, the practice of making but one assessment of such land and covering therein the entire value of all interests and estates, has been uniformly followed in this state, since its repeal as well as before. * * *

"It can be easily seen that the reasons for the rule applicable to ordinary leases for the use only that the entire estate should be assessed to the lessor are entirely lacking here, and that it would be a more just and reasonable adjustment of the burden of taxation of such oil leases to assess each party separately with the value of his right or estate in the land. There is no statute forbidding it. On the contrary, we think the statute at least permits it, if it does not require it. If it is permitted, the respondent cannot complain. The suit is based on the provisions of section 3804 of the Political Code which give a right of recovery only when the assessment is absolutely void. Mere irregularities in procedure which do not invalidate the assessment do not absolve the taxpayer from his obligation to pay the taxes nor give him any right to recover taxes already paid." See, also, *San Pedro, etc., R. Co. v. City of Los Angeles*, 180 Cal. 18, 23, 179 P. 393.

[3-5] In the case at bar, it is admitted that the land comprised in the leases, while held by the city for its own use, was not taxable. It is admitted that the reversion is not taxable. It is found as a fact that the only property assessed was the "possessory interest" of the lessee. The leases have many more years to run. The practical effect of appellant's contention is that it

is entitled to the use of the land for the payment of taxes—indeed, that it may be entitled to a refund year after year for the payment of taxes on land which is tax-free if used by the city, if such taxes should run more than the rental agreed upon. It is true that the governmental capacity of respondent cannot be considered when it acts as a private party, but this does not mean that a municipality must, when acting in a private capacity, take affirmative action to advise another person, artificial or natural, that such person does not have the benefit of law enacted wholly for the benefit of government agencies. There is a significant practical difference between the obligation of a city owning land and the obligation of a private party owning land. In the former case no taxes are paid so long as the land is used by the city. In the latter, the owner is responsible for taxes whether the land is used by himself or another.

We feel that the case of Hammond Lumber Co. v. County of Los Angeles, 104 Cal. App. 235, 285 P. 896, is decisive of the primary question here involved. We are mindful that in that case the court was not concerned with who was responsible for the taxes as between the lessor and the lessee. The primary question involved in that case was the validity of any tax, and, if valid, whether the assessor's valuation was the correct one. In that case, however, the court said, 104 Cal.App. 235, at pages 239 and 240, 285 P. 896, 898: "A leasehold interest is in this state assessable as personal property under section 3820 of the Political Code. San Pedro, etc., R. R. Co. v. County of Los Angeles, 180 Cal. 18, 179 P. 393. When land held in private ownership is leased, both the leasehold and the reversionary interest are ordinarily assessed together to the owner; the value of the lessee's estate being treated as a constituent of the valuation of the larger interest belonging to the owner of the freehold. Instead of splitting the interests, it operates fairly as a rule to make a single assessment against the lessor as the beneficial owner not only of the freehold, but also of all lesser estates, and the incidence

of the tax then becomes a matter of agreement between the lessor and the lessee. Usually in the case of short leases the lessor pays the entire tax, and with such charge in view he fixes his rent accordingly. Graciosa Oil Co. v. County of Santa Barbara, 155 Cal. 140, 143, 144, 99 P. 483, 20 L.R.A.(N.S.) 211. When, however, there is a lease of land owned by the state or a municipality, the reversion being exempt from taxation, *the usufructuary interest alone is subject to tax in proportion to its value; and in the absence of agreement to the contrary, the tax necessarily falls upon the lessee.* While the instrument executed between the plaintiff and the city of Los Angeles is denominated a 'permit,' it is not, as plaintiff asserts, a mere license. It grants to plaintiff for a fixed period the right to the exclusive use of the premises on prescribed terms. It embodies an agreement having all of the characteristics and qualities of a lease, and entitles plaintiff to the exclusive control and enjoyment of the premises for the full term specified, subject only to fulfillment of the terms and conditions expressed. On the termination of the tenancy, improvements constructed by the occupant are to become the property of the city, but so long as plaintiff complies with its covenants, plaintiff remains secure in its possession throughout the agreed term." (Italics ours.)

It is conceded that appellant cites respectable authority for its contention. Boston Molasses Co. v. Commonwealth, 193 Mass. 387, 79 N.E. 827; People ex rel. International Nav. Co. v. Barker et al., 153 N.Y. 98, 47 N. E. 46; Purcell v. City of Lexington, 186 Ky. 381, 216 S.W. 599. Such authority is undoubtedly persuasive, but it is not controlling upon this court, and has not yet been adopted as the law in this state. Further, the terms of the leases in those cases indicate an intention *not to hold* the lessee for taxes.

Therefore, the judgment is affirmed in each case.

We concur: YORK, Acting P. J.; DORAN, J.

12 Cal.App.2d 473

DUNLAP v. PACIFIC ELECTRIC RY.

CO. et al.

Civ. 9601.

District Court of Appeal, Second District,
Division 1, California.

March 16, 1936.

Hearing Denied by Supreme Court

May 14, 1936.

1. Trial $\Rightarrow$ 165, 178

Nonsuit or directed verdict may be granted only when, disregarding conflicting evidence, and giving plaintiff's evidence proper value, and indulging in every legitimate inference deducible therefrom, evidence is insufficient to support verdict for plaintiff.

2. Railroads $\Rightarrow$ 307 (3, 4)

In action for death of passenger in automobile which ran into train passing over crossing, railroad held not negligent in running its cars across highway on foggy night without providing flagman, red flares, or other warnings.

3. Appeal and error $\Rightarrow$ 105

No appeal lies from an order of "directed verdict."

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Action by Glenna Dee Dunlap, also known as Glenna Dee Meade, a minor, by her guardian ad litem, Sarah T. Dunlap, against the Pacific Electric Railway Company and others. From a judgment entered upon a directed verdict for defendants, plaintiff appeals.

Affirmed.

Samuel A. Rosenthal, of Los Angeles, for appellant.

Frank Karr, E. E. Morris, and C. W. Cornell, all of Los Angeles, for respondents.

WHITE, Justice pro tem.

This is an appeal by plaintiff from a judgment entered upon a directed verdict. Plaintiff is the minor daughter of Gussie Dee Dunlap, whose death ensued from a collision between an automobile in which deceased was riding as a passenger and an electrically propelled train of freight cars and caboose operated by defendants Pacific Electric Railway Company and its employees.

The fatal accident occurred about 11 o'clock on a very foggy night on Truck boulevard at Dominguez Junction, in Los

Angeles county, on the road to Long Beach. The defendant railway company operates a line of railway from Long Beach to Los Angeles along its private right of way and over several highway crossings, including the highway crossing here in question. It was testified at the trial that the wigwag signals for trains northbound, the direction in which the train was traveling at the time of the accident, start operating when a train is either 1,938 feet from the crossing or a distance of 625 feet from the crossing. These signals are automatically operated by the trolley's coming in contact with a brush installed on the trolley wire. The signals cease to operate when the engine or head car reaches a point 108 feet north of the center of the highway at the intersection. The automobile in which the deceased was riding was traveling in a southerly direction towards Long Beach, and ran into the side of the train; the impact throwing the decedent out of the automobile and injuring her, from the results of which injuries she died. At the trial plaintiff sought to establish that the automobile collided with one of the boxcars, while the defendant introduced testimony that the automobile came into collision with the rear end of the caboose or last car of the train, and that part of the automobile bumper was removed from the rear steps of the caboose. It was also testified that the step on the rear end of the caboose was bent.

The driver of the automobile testified that visibility was very poor; that at times he could see about 15 or 20 feet ahead with his lights, and at times the fog was so thick that it just rolled in and he could barely see at all; that his best visibility was between 15 and 20 feet; that with his headlights he could not see more than 15 or 20 feet ahead. The heaviness and thickness of the fog and the very poor visibility were conceded by all the witnesses at the trial. The driver of the automobile further testified that the first warning he had that any train was in front of him was when his headlights revealed to him the sight of a boxcar; that at no time did he see any lights or hear any wigwag working. Other witnesses gave similar testimony. The motorman gave positive testimony that he did blow the train whistle several times before reaching the crossing where the accident happened. He also testified that there is what is called a "home board" about 500 feet south of the crossing, which

is a signal that controls the movements of trains over the Southern Pacific tracks at this junction; that before he proceeded over this Southern Pacific crossing he blew one long blast of the whistle to attract the attention of the towerman, and that, when the latter gave the motorman a green signal to proceed, he acknowledged it with two short blasts of the whistle. The motorman's testimony that he blew the whistle, rang the bell, and that the wigwag was working was corroborated by the testimony of other witnesses.

Appellant assails the judgment mainly upon the ground that in the face of this conflict of evidence the trial court fell into error in taking the case from the jury and directing a verdict for defendants. In this connection it should be noted that there is no conflict in the evidence with respect to the operation of the train after the head car had passed through and beyond the intersection and while the remaining freight cars and caboose were passing through the intersection.

[1, 2] It appears to be the well-established and settled law of this state that the power of the court to direct a verdict is absolutely the same as the power of the court to grant a nonsuit; that a nonsuit or directed verdict may be granted only when, disregarding conflicting evidence, and giving the plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, that the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff if such verdict were given. *Estate of Flood*, 217 Cal. 763, 768, 21 P. (2d) 579; *Estate of Lances*, 216 Cal. 397, 14 P. (2d) 768. The question presented to us, therefore, is whether the trial court was correct in its conclusion that "the evidence was not sufficient to show any negligence on the part of the railroad company." The court's ruling on this question finds abundant support in the evidence, and is in entire accord with the weight of authority as to the law.

Appellant earnestly insists that it was a debatable question of fact, upon which reasonable minds might disagree, as to whether or not the defendant railway company was negligent in running its cars across the highway on a dark and foggy night without providing a flagman, red flares, or some other means of warning to travelers at the

intersection; but the authorities seem to hold that railway companies, through their agents, in the reasonable management of their trains which are rightfully upon a crossing, are not chargeable with knowledge that an automobile, bearing headlights of sufficient power to enable the driver to avoid an obstruction in the road, was nevertheless likely to crash into a moving train unless a danger signal or flagman with a lighted lantern was stationed in the highway. *Gage v. Boston & M. R. R.*, 77 N. H. 289, 90 A. 855, L.R.A.1915A, 363. In the instant case the defendant's cars were rightfully occupying the crossing, and the trainmen were exercising due care, so far as the management of the train in approaching and passing over the crossing was concerned.

The accident was not caused by the train running into the automobile in which the deceased was riding, but by the automobile running into defendant's freight train as the latter was slowly passing over the crossing. It was not occasioned by any mismanagement of the train. In the case of *Mabray v. Union Pac. R. Co.* (D.C.) 5 F.Supp. 397, 400, it was held that a railroad company has a right to occupy a crossing in the conduct and operation of its business, and that such obstruction is in itself notice of danger, so that the railroad company is not bound to give any further warning; and that, after a train has reached a crossing, the duty of a flagman ends as to that train, since then the train itself is a sufficient warning. This doctrine also finds support in 52 Cor. Jur. p. 189, and *Brown v. Southern Ry. Co.* (Pennington v. Southern Ry. Co.) (C.C.A.) 61 F. (2d) 399.

No question of the giving of a warning of the approaching train is here involved, because at the time of the accident the engine had passed the crossing and was several hundred feet north thereof. "All crossing signals are intended to protect the traveler against approaching trains and have been so regarded by our courts." *Mabray v. Union Pac. R. Co.*, supra.

[3] The attempted appeal from the directed verdict is dismissed, since no appeal lies from an order of "directed verdict"; and for the foregoing reasons the judgment appealed from is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.

12 Cal.App.2d 345

LINDSEY v. COMMERCIAL DISCOUNT CO.

Civ. 10316.

District Court of Appeal, Second District,
Division 1, California.

March 10, 1936.

Rehearing Denied April 7, 1936.

Hearing Denied by Supreme Court

May 7, 1936.

1. Trover and conversion ⇨4

Any act of ownership or exercise of dominion over property of another in defiance of the owner's rights is "conversion."

[Ed. Note.—For other definitions of "Conversion," see Words & Phrases.]

2. Chattel mortgages ⇨176(4)

Automobile dealer, by whom automobiles on floor and sold on conditional sale contracts, were mortgaged to finance company, had burden to prove conversion of automobiles by finance company after repossession thereof according to terms of finance agreement.

3. Chattel mortgages ⇨176(4)

Finance company's storage of repossessed automobiles on premises of wholesaler at which they were tagged *held* not to show conversion of automobiles by offering them for sale contrary to terms of finance agreement, in absence of showing of inscription which tags bore.

4. Chattel mortgages ⇨176(4)

Newspaper advertisement that automobiles repossessed by finance company under chattel mortgages were for sale *held* insufficient to establish conversion of automobiles, in absence of showing that advertisement was inserted in newspaper by finance company or by its agents.

5. Evidence ⇨381

In action by automobile dealer for conversion of automobiles which had been properly repossessed by finance company, newspaper advertisement of automobiles for sale *held* improperly admitted, in absence of foundation showing that advertisement was inserted by finance company or its agents.

6. Chattel mortgages ⇨169

Where financing agreement provided that automobile dealer was to be allowed 30 days to resell automobiles, after repossession by finance company, removal of automobiles by finance company before expiration of 30-day period *held* not to entitle dealer to recover against finance company for conversion, where dealer was authorized to sell automobiles, but none were sold during 30-day period.

7. Chattel mortgages ⇨176(4)

Evidence *held* insufficient to support judgment against finance company for conversion

of automobiles removed from dealer's premises and sold pursuant to provisions of chattel mortgages, on ground that finance company had agreed to extend terms of finance contract covering various automobiles whereunder automobiles were removed and sold.

8. Chattel mortgages ⇨236

Evidence *held* insufficient to support judgment awarding automobile dealer recovery on contract with finance company whereunder finance company was to pay dealer amount withheld by company when contracts covering automobiles were paid in full.

9. Chattel mortgages ⇨236

To recover amount held by finance company under contract providing that amount withheld would be paid to dealer when contracts covering automobiles were paid in full, automobile dealer would be required to allege and prove that amount claimed had actually accrued under contract and that demand had been made therefor.

10. Appeal and error ⇨733

Order denying motion for entry of judgment notwithstanding verdict would be affirmed where appealed from generally, and not as to each separate cause of action, where motion should have been granted only as to one cause of action.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by J. B. Lindsey, doing business as the Garden Court Motors, against the Commercial Discount Company. Judgment for plaintiff, and defendant appeals.

Reversed and remanded.

Don S. Irwin, Edward F. Parker, and Don L. Warner, all of Los Angeles, for appellant.

Laurence W. Beilenson, Robert H. Dunlap, and George R. Larwill, all of Los Angeles, for respondent.

ROTH, Justice pro tem.

Plaintiff and respondent, hereinafter called dealer, in the conduct of a used-car business, had made arrangements with the defendant and appellant for financing in connection with the operation of the said business. These arrangements contemplated the financing of cars which were on dealer's premises, classified as "floorings," as well as the financing of cars which were sold by dealer on conditional sales contracts, classified as "contract purchases." To secure appellant for its loans on floor-

ings, dealer executed to appellant certificate of ownership duly indorsed and a bill of sale, or a conditional sales contract, or a time draft and trust receipt, the legal effect of which, irrespective of which of the said forms of instruments was severally or jointly executed, is conceded to be that of a chattel mortgage. *Pacific Finance Corp. v. Hendley*, 103 Cal.App. 335, 284 P. 736, 285 P. 1048; *Bonestell v. Western Auto-Motive Finance Corp.*, 69 Cal.App. 719, 232 P. 734. To secure appellant on its contract purchases, dealer assigned to appellant the conditional sales contracts under which the cars were sold, in which assignment dealer guaranteed the terms of the respective conditional sales contracts. In addition to the specific written instruments mentioned, one or more of which accompanied each separate transaction, there was an additional understanding governing generally the relations between dealer and appellant, the nature of which, so far as it is pertinent here, specified the discount at which appellant would purchase the conditional sales contracts, set forth the reserve that appellant might hold for moneys due the dealer, and provided for a "hold out" account which was a special or additional reserve account which appellant was authorized to set up on those transactions in which appellant felt that the car sold by the dealer was sold for more than a reasonable sales price, and as a consequence of which the purchaser's equity in the car was nil or so small as to make such a contract more than a usual hazard. The various instruments referred to gave to appellant the right to take possession of all cars covered thereby upon breach of any of their terms, the detailed nature of which it is not necessary to set out, since it is conceded in this action that appellant had the right to take possession when he did. Sections 2927, 2973, Civ. Code; *Harper v. Gordon*, 128 Cal. 489, 61 P. 84; *Bank of Woodland v. Duncan*, 117 Cal. 412, 49 P. 414; *Paladini v. Durchman*, 216 Cal. 212, 13 P.(2d) 731.

On November 7, 1933, pursuant to its right to possession, appellant entered dealer's place of business and repossessed eleven cars, eight of which were floorings and three contract purchases. After taking possession, dealer asserts that appellant converted the eleven cars, and as a consequence of this alleged conversion (which put dealer out of business) this action was brought in three counts, the first alleging conversion and asking damages, the second alleging usury and asking treble damages, and the

third alleging balance due to the dealer on the reserve and holdout accounts, and asking for the amount of such balance. The jury before which the case was tried brought in a verdict for dealer on all three counts. On motion for new trial, the judgment entered on this verdict was reduced, with dealer's consent, by striking out the amount which constituted the judgment on the second count, and deducting fixed sums from the judgments entered on the first and third counts. During the trial, appellant had moved for nonsuit on the three causes of action and also for directed verdict, and for judgment notwithstanding the verdict; all of said motions being severally denied. This appeal is from the judgment as reduced by consent of the respondent and from the order denying appellant's motion for judgment notwithstanding the verdict.

[1] On the question of conversion, dealer, to use his own language, "relies upon * * * the offering of the automobiles for sale before anything was due, and also, as to one Buick, the driving of the same upon the streets of Los Angeles." In fairness to dealer, it should be added that, while only suggestively comprehended in said statement, it clearly appears from his brief that he relies also upon such facts as moving the automobiles to the premises of a wholesaler in used cars, placing tags thereon, and advertising some of them for sale. Generally speaking, it may be conceded that "any act of ownership or exercise of dominion over the property of another, in defiance of his rights, is a conversion of that property." *Bancroft-Whitney Co. v. McHugh*, 166 Cal. 140, 143, 134 P. 1157, 1158; *Dodge v. Meyer*, 61 Cal. 405, 420; *Lowe v. Ozmun*, 3 Cal.App. 387, 394, 86 P. 729; *Steele v. Marsicano*, 102 Cal. 666, 36 P. 920; *Horton v. Jack*, 126 Cal. 521, 58 P. 1051; *McCaffey Canning Co. v. Bank of America*, 109 Cal.App. 415, 294 P. 45; *Jackins v. Bacon*, 63 Cal.App. 463, 218 P. 1027; *Vuich v. Smith*, 140 Cal.App. 453, 35 P.(2d) 365; *Hull v. Laugharn*, 3 Cal.App.(2d) 310, 39 P.(2d) 478. In treating the question of conversion, we are, for present purposes, accepting dealer's theory that appellant had the right to take possession of the cars, but had no right "of any dominion over the property inconsistent with the rights of the mortgagor or with the relation which he justly sustains to the property. * * *" 11 Cor.Jur. 589. In other words, appellant had the right to take possession of the prop-

erty and to hold it, but at the time in question could do nothing further in enforcing its rights to collect its obligations. According to dealer's theory, "the conversion occurred at the time of the offering of the automobiles for sale, which, according to the evidence, was at least as early as November 9 when the cars were all found in the wholesale dealer's with tags on them exposed for sale with other automobiles, and certainly not later than November 17 when three cars were advertised for sale in the Los Angeles Evening Herald."

[2-5] There is, however, no evidence sufficient to support the implied finding of the jury that the cars were offered for sale. It is undisputed that the cars were moved to the premises of the wholesaler and that tags were placed on them. What inscription the tags bore is left to the imagination. The record is entirely silent on this phase of the situation. The tags might have indicated that the cars were to be held. The fact that they were in the wholesaler's lot is no more inconsistent with the desire of appellant to store them than if they had been kept in a storage garage. There is no presumption of law that appellant intended to do more than it had a legal right to do. The burden of proof is upon the dealer, and, with reference to these items, the dealer has proved nothing except that appellant did what it had a legal right to do. It is also undisputed that an advertisement appeared in one of the newspapers advertising three of the cars for sale. This would undoubtedly under the authorities constitute a conversion of these three cars, if it were proved that appellant were responsible for the advertisement, but there is no such proof. There is no evidence (at least, our attention has not been directed to any, either in accordance with the rules governing appeals or otherwise) which shows authorization or ratification on the part of appellant, or any facts from which an authorization or ratification can be inferred in connection with such advertisement. There is no evidence to which our attention has been directed that those who did insert the advertisement were the actual, implied, or ostensible agents of appellant for that purpose. In fact, the advertisement, to the introduction of which in evidence objection was properly and seasonably made, was improperly introduced in evidence for lack of a sufficient foundation. As a consequence, there is no proper evidence that the cars were advertised.

[6] Of the eleven cars repossessed, eight were floorings and three were contract purchases, as already stated. Under the arrangement between appellant and dealer, when a car covered by a conditional sales contract was repossessed, dealer was to be allowed 30 days in which to resell the same, and, if unsuccessful, such repossessed car at the expiration of the 30-day period was to be reclassified as a flooring. When appellant took possession of the eleven cars on November 7, this 30-day period as to the three cars in question had not yet expired. Dealer, however, was notified by appellant that he might, if he desired, sell these three cars, or any or all of the eleven, and he actually did sell one of the cars and received the money therefor. It thus affirmatively appears that dealer's right to sell was not in any way violated as to said three cars by appellant's action in taking physical possession of the same on November 7. Furthermore, it affirmatively appears from the record that none of the cars repossessed was sold until more than 30 days, or December 5, 1933, on which date three were sold. The three cars sold on said date were "floored" cars.

[7] The whole question of conversion arises by reason of dealer's claim that an accord and satisfaction had been reached between dealer and appellant on October 19, 1933, by the terms of which their interest accounts were settled to that date and for 30 days in the future. Dealer asserts that, as a part of said accord and satisfaction, appellant agreed to give him a 30-day period of grace as to each of the contracts involved. Whether this 30-day period of grace applied to the principal due on the several contracts and to all the terms of the several contracts, or to just the principal and not any of the other terms, or to the principal and some of the other terms, does not appear. In fact, the evidence is decidedly meager as to whether or not the extension was ever granted, even as to the principal, and there is no question about the fact that the principal on each of the several contracts covering the eleven cars was in default on the date of November 7, when possession of the said cars was taken, and for some time prior thereto. There is no question, according to dealer's own statement, that, irrespective of such extension agreement, the mere taking of the cars on November 7 did not constitute conversion, since appellant could take such possession under covenants of its several contracts

covering each respective car other than that which gave the right to possession for default in payment of interest or principal. The effect of this concession on the part of respondent is to admit that there was no 30-day extension granted as a part of the accord and satisfaction agreement or otherwise as to all of the terms of the several contracts, but that, at most, the extension agreement was granted only as to the principal of the several contracts. In short, if it were not for the so-called extension agreement, which the jury impliedly found to have been made in accordance with dealer's contention, dealer, except as to three of the eleven cars which were "contract purchases," would have no basis whatsoever upon which to base a claim of conversion. As heretofore pointed out, the evidence on the accord and satisfaction and on the extension agreement arising therefrom is not satisfactory. A dispute existed as to who owed whom, which resulted in testimony as follows: "* * * We went over the figures together, and Mr. Trapp doing most of the figuring, and where they said we owed them about \$400 when we went in, and we claimed they owed us \$200, it ended up by us giving them a check for \$95.90. * * *" The dealer then asked: "Now, Louie, does that pay everything?" to which appellant replied: "Yes, it pays interest up to the next month 30 days. Yes." According to dealer, the following also took place: "I don't see how we could possibly owe you that much money, but I am going to advise him to pay it on the understanding that this pays all the interest, *renews the flooring for thirty days.* * * *" (Italics ours.)

It is also worth noting that in the conversation which took place between the agents of appellant and dealer on November 7, 1933, at the time when appellant took possession of the eleven cars to which evidence our attention is specifically directed, nothing was said by dealer calling attention to the extension, which he now claims. In our opinion, the most that can be said for the so-called extension is that appellant agreed that it would not declare a default and exercise its rights because of nonpayment of principal. Indeed, the record shows that the facts actuating appellant

in its cause of action were an alleged misrepresentation by dealer of the amount of a down payment received by dealer on a "contract purchase" and the unsatisfactory manner in which dealer conducted its business, resulting in a failure to comply with other terms of the contracts covering the various cars. There is nothing to warrant a finding that the other terms of the contract were extended. These other terms granted ample authority to appellant to take possession when it did, which authority appellant concedes, and in addition authorized appellant to do any of the things which are now complained of as a conversion.

[8,9] The judgment on the third cause of action was reduced by the trial court with the consent of dealer from \$2,000 to \$1,184.49. Without going into detail as to the facts, an analysis of the record reveals that there was admittedly \$346.98 held for dealer in the reserve account, and that dealer, according to his testimony, would be entitled to \$837.51 from the holdout account, if the contracts covering the cars were paid in full. On the latter item there is no proof whatsoever that the contracts ever were paid in full. The only proof of anything due to dealer at the time of trial in excess of \$346.98 is the admission in paragraph II of appellant's "2nd cause of action in counterclaim" that there was a total credit in dealer's favor of \$690.38. Dealer, before he can recover the amount of \$1,184.49, must allege and prove that it had actually accrued under the contracts and that demand had been made therefor. *Monson v. Fischer*, 118 Cal.App. 503, 5 P.(2d) 628; *Tatum v. Ackerman*, 148 Cal. 357, 83 P. 151, 3 L.R.A.(N.S.) 908, 113 Am.St.Rep. 276, 7 Ann.Cas. 541; 1 Cal.Jur. 378; 6 Cal. Jur. 482.

[10] The order denying motion for entry of judgment notwithstanding the verdict is appealed from generally and not as to each separate cause of action. Such order is therefore affirmed. The judgment is reversed, and the cause remanded for a new trial.

We concur: YORK, Acting P. J.; DO-
RAN, J.

12 Cal.App.2d 493

**HANSEN et al. v. FARMERS AUTOMOBILE
INTER-INSURANCE EXCHANGE.**

Civ. 1726.

District Court of Appeal, Fourth District,
California.

March 17, 1936.

1. Costs ☞199

Where remittitur was filed on August 23, 1934, after reversal of judgment, memorandum of costs filed on September 12, 1934, held not premature, as against contention that there was not then a final judgment in the action.

2. Costs ☞220

Parties liable for costs, by not objecting to memorandum of costs within time and in manner authorized by statute, waived right to object to any part of memorandum which complied with statute (Code Civ.Proc. §§ 1033, 1034).

3. Costs ☞219

Although objection to memorandum of costs was not properly made, memorandum including cost for printing of briefs on appeal in an amount exceeding statutory limit was required to be reduced by amount of excess (Code Civ.Proc. §§ 1033, 1034).

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Maria Hansen and others against the Farmers Automobile Inter-Insurance Exchange. From an order striking out the entire memorandum of costs filed by the defendant, defendant appeals.

Order reversed, with directions.

Morgan J. Doyle and Norman J. Ronald, both of San Francisco, for appellant.

H. E. Barbour and Tarance S. Magee, both of Fresno, for respondents.

BARNARD, Presiding Justice.

This is an appeal from an order striking out the entire memorandum of costs filed by the appellant.

[1] A judgment in favor of the respondents was reversed on appeal. Hansen v. Farmers' Automobile Inter-Insurance Exchange, 139 Cal.App. 388, 34 P.(2d) 188. The remittitur was filed on August 23,

1934, and on September 12, 1934, the appellant served and filed its memorandum of costs; the various items totaling \$452.-93. On November 23, 1934, the respondents served and filed a notice of motion to tax costs. After a hearing the court entered an order striking out the entire memorandum of costs on the ground that the same had been prematurely filed and that there was not then a final judgment in the action. This appeal followed.

On the authority of Markart v. Zeimer, 74 Cal.App. 152, 239 P. 856, and upon the reasoning set forth in the opinion therein, we hold that the memorandum of costs here in question was not prematurely filed. It follows that the order striking out the same in its entirety was erroneously entered.

[2] A further consideration is that the respondents, by not objecting within the time and in the manner authorized by section 1033 of the Code of Civil Procedure, must be held to have at least waived their right to object to any part of the memorandum of costs which complied with the provisions of section 1034 of this Code.

[3] Irrespective of any waiver on the part of the respondents, the appellant's right to such a recovery of costs is based upon and controlled by section 1034 of this Code. The appellant has appealed on the ground that the trial court and the respondents have not complied with this section and with section 1033. But the appellant has itself failed to comply with section 1034, in that the memorandum of costs filed includes \$317.11 for the printing of briefs upon appeal while the statute expressly limits this item to \$100. The appellant is not entitled to have its entire cost bill restored including this excess to which it has no right under the statute. While the order appealed from should be reversed, the amount of the costs claimed should be reduced by the amount of this excess, which was expressly forbidden by the statute.

The order is reversed, and the amount of the memorandum of costs is reduced by the sum of \$217.11, leaving a balance of \$235.82 for which amount judgment should be entered.

We concur: MARKS, J.; JENNINGS, J.

12 Cal.App.2d 257

ORPHEUM CIRCUIT, Inc., v. LOS ANGELES COUNTY.

Civ. 10013.

District Court of Appeal, First District,
Division 2, California.

March 4, 1936.

1. Taxation ☞535

Where taxpayer is entitled to refund because of overassessment resulting from clerical error, it is mandatory upon board of supervisors to order such refund (Pol.Code, § 3804).

2. Taxation ☞535

Action of board of supervisors in rejecting taxpayer's claim for refund is reviewable (Pol.Code, § 3804).

3. Taxation ☞535

Where building had been assessed in excess of its full cash value because of clerical error, taxpayer held entitled to refund of taxes paid upon such assessment under statute authorizing such refund where assessment was in excess of "actual cash value," since "actual cash value" was no greater than "full cash value," "full" meaning complete, entire (Pol.Code, §§ 3617, 3627, 3650, 3804; Const. art. 11, § 12).

[Ed. Note.—For other definitions of "Actual Cash Value," "Full" and "Full Cash Value," see Words & Phrases.]

4. Taxation ☞535

Statute authorizing refund of taxes paid upon excessive assessment occurring because of clerical error should be liberally construed, since it is remedial (Pol.Code, § 3804).

Appeal from Superior Court, Los Angeles County; Lewis Howell Smith, Judge.

Action by the Orpheum Circuit, Incorporated, against County of Los Angeles. Judgment for defendant, and plaintiff appeals.

Reversed and remanded, with directions.

S. Laz Lansburgh and S. Joseph Theisen, both of San Francisco, for appellant.

Everett W. Mattoon, Co. Counsel, and Gordon Boller, Deputy Co. Counsel, both of Los Angeles, for respondent.

SPENCE, Justice.

This action was brought under the provisions of section 3804 of the Political Code to recover certain alleged excess taxes paid by plaintiff in the years 1927, 1928, and 1929 on certain real property located in the city of Los Angeles. From a judgment in favor of defendant, plaintiff appeals.

Said section 3804 reads in part as follows: "Any taxes, * * * heretofore or hereafter * * * paid upon an assessment in excess of the actual cash value of the property so assessed by reason of a clerical error of the assessor as to the excess in such cases, * * * may, by order of the board of supervisors, be refunded by the county treasurer."

[1,2] It may be stated preliminarily that there is practically no dispute concerning the facts and there is no dispute on certain legal questions. Appellant concedes that unless the admitted facts brought the case within the provisions of said section, then appellant was not entitled to the refund. On the other hand, respondent concedes that if the admitted facts brought the case within the provisions of said section, then it was mandatory upon the board of supervisors to order the refund (*Associated Oil Co. v. County of Orange*, 4 Cal.App.(2d) 5, 40 P.(2d) 887; *Hayes v. County of Los Angeles*, 99 Cal. 74, 33 P. 766), and that the action of the board in rejecting the claim for refund was subject to review in this action. *Cunning v. County of Humboldt*, 204 Cal. 31, 266 P. 522. It is further conceded that the law required the assessor to assess the property at its "full cash value" (Const. art. 11, § 12; Pol.Code, § 3627), and that the term "full cash value" means "the amount at which the property would be taken in payment of a just debt from a solvent debtor." Pol. Code, § 3617.

Turning to the facts, it is admitted and the trial court found that there was an overassessment of the property in each of said years resulting from a clerical error of the assessor. This clerical error occurred in the computation of the cubic content of the building. The method adopted by the assessor of Los Angeles County in assessing appellant's building and all similar buildings was to compute the cubic content thereof, determine the value per cubic foot and multiply the cubic content by the value per cubic foot. The figure

thus obtained was taken as the "appraised value" and thereafter the "assessed value" or "full cash value" was fixed by the assessor at 50 per cent. of said "appraised value." In determining the "full cash value" of appellant's building for said years, it is admitted and the trial court found that the assessor made an error in his computation and determined the cubic content of said building to be 420,741 cubic feet in excess of the actual cubic content. The trial court also made the following findings in this connection: "On the basis of said erroneous computation of said cubical contents said Assessor in 1927 assessed said building at a full cash value of \$719,360.00, instead of \$638,580.00 as he would have done if he had based said valuation upon the true cubic contents of said building, constituting an over-assessment of \$80,770.00 for said year. In 1928 and 1929 said Assessor assessed said building at a full cash value of \$611,460.00 instead of \$542,790.00, being an over-assessment of \$68,670.00 in each of said years." The trial court thus found that the building had been assessed in each of said years at a figure in excess of its "full cash value" and respondent concedes this to be the fact. But the trial court further found "That the actual cash value of said building was approximately the true appraised value, or \$1,277,160.00 at twelve o'clock M. on the first Monday of March, 1927; and \$1,085,580.00 at twelve o'clock M. on the first Monday of March of each of the years 1928 and 1929. The assessment of said building so made in the amount of \$719,360.00 for the year 1927, and \$611,460.00 for each of the years 1928 and 1929, was not an assessment in excess of the actual cash value of said building at twelve o'clock M. on the first Monday of March of the particular years."

From what has been said, it is apparent that the trial court construed the term "actual cash value" as used in section 3804 of the Political Code, to mean something greater than the term "full cash value," as used in section 3627 of the same Code. Appellant contends that the trial court erred in so construing said term "actual cash value" and in our opinion this contention must be sustained.

The term "actual cash value" is not defined by statute, and we do not find said term employed in any statute of this state other than section 3804 of the Political Code. On the other hand, the term "full cash value" is defined by statute as above

set forth. Pol.Code, § 3617. Our attention is called to the fact that other terms are found in our Constitution and statutes, such as "actual value" (Const. art. 13, § 16 [4], as adopted Nov. 6, 1928; Pol.Code, §§ 3617, 3627 and 3627a), and "true value" (St.1931, p. 1372), but these references are not helpful as the word "cash" does not appear in said terms. That the term "actual value" has a somewhat different meaning from the term "cash value" for the purposes of our taxation statutes is clearly indicated in section 3650 of the Political Code requiring the assessor to prepare an assessment book showing "5. The *cash* value of real estate. 6. The *cash* value of improvements on such real estate. * * * 8. The *actual* value of all notes, debentures, shares of capital stock. * * * 9. The *actual* value of all solvent credits. * * * 10. The *cash* value of all other personal property, and money." (Italics ours.) It is also apparent from a reading of the above-mentioned sections, that the "cash value" of property referred to in said section 3650 of the Political Code is the same as the "full cash value" thereof referred to in the Constitution, article 11, § 12, and in sections 3617 and 3627 of the Political Code.

The basic words in the terms "full cash value" and "actual cash value" are identical and there is no doubt that the use of the word "cash" was intended to make said terms convey a somewhat different meaning from such terms as "full value" and "actual value." In *Richardson v. Howard*, 23 S.D. 86, 120 N.W. 768, it was held that there was a marked distinction between the terms "full and true value" and "full and true cash value," and that the omission of the word "cash" in the oath of the assessor constituted a failure to make a substantial compliance with the statute. But we are here concerned only with the relationship between the terms "full cash value" and "actual cash value." Was the word "actual" as used in said section 3804 intended to mean something greater than "full" as used in said section 3627? We think not. It would appear that the two terms under discussion were intended to be synonymous, but it is only necessary here to decide that the "actual cash value" within the meaning of said section 3804 is no greater than the "full cash value" within the meaning of said section 3627. While decisions of other states under different statutes are not decisive of the question, it has been held that "actual cash value"

is practically synonymous with "fair cash value" and "true cash value." State v. Woodward, 208 Ala. 31, 93 So. 826; Citizens' Nat. Bank v. Baker County Board of Equalization, 109 Or. 669, 222 P. 341; see, also, authorities in Words and Phrases, First, Second, Third and Fourth Series, defining actual cash value. None of these terms would seem to imply anything greater than the "full cash value." In discussing similar statutes, the decision in State v. Virginia & T. R. Co., 23 Nev. 283, 46 P. 723, 35 L.R.A. 759, uses interchangeably the terms "actual cash value," "full cash value," and "true cash value." It is also of interest to note that respondent introduced in evidence a copy of an ordinance adopted by the city of Los Angeles transferring to the officers of the county of Los Angeles the functions of the city relating to the assessment of property. In said ordinance, the term "actual cash value" is used in the place of and as synonymous with "full cash value" as follows:

"Section 1-A. The practice of the Assessor of Los Angeles County and of other officials of Los Angeles dealing with the assessing of property for the purposes of taxation within the City of Los Angeles, of determining the *actual cash value* thereof by first determining the fair market value of such taxable property and by using an amount not exceeding fifty per centum of such fair market value as determined by said Assessor, is hereby confirmed and ratified.

"Section 1-B. The valuation of property within the City of Los Angeles for taxation for municipal purposes shall be and is, the *actual cash value* thereof, and the said *actual cash value* shall be arrived at by the assessor by first determining the fair market value of such taxable property and using not exceeding fifty per centum of such fair market value as the actual cash value." (Italics ours.)

[3,4] To hold that "*actual cash value*" is greater than "*full cash value*" would result in a contradiction of terms. The adjective "full," means "complete, entire" (Webster's International Dictionary, 2d Ed.) and the substitution of the adjective "actual" in the place thereof can convey no greater meaning. We see no necessity for adopting a liberal construction of said section 3804 in order to hold that the "*actual cash value*" is no greater than the "*full cash value*" but it should be borne in

mind that as said section is "a remedial statute, it should be liberally construed so as to carry out its intent and object." Pacific Coast Co. v. Wells, 134 Cal. 471, 474, 66 P. 657, 659. Said section would be of little value to the taxpayer if it were construed to permit recovery thereunder only when property is assessed through clerical error at a figure in excess of twice the "full cash value" of such property and then only for such excess.

We therefore conclude that the trial court's findings to the effect that there were overassessments in said years in excess of the "full cash value" are inconsistent with its findings to the effect that said assessments were not in excess of the "actual cash value." The judgment should therefore be reversed, and, as it is conceded that all other issues have been determined by the trial court, we deem it proper to direct a judgment in favor of appellant.

In view of these conclusions, it is unnecessary for us to consider appellant's claim that there was an "erroneous assessment of improvements on real estate not in fact in existence" within the meaning of said section 3804 of the Political Code.

The judgment is reversed, with directions to the trial court to reframe its findings in accordance with the views expressed herein and to enter judgment in favor of appellant.

We concur: NOURSE, P. J.; STURTEVANT, J.



12 Cal.App.2d 311

ABBEY v. ZIMMERMAN et al.

Civ. 1612.

District Court of Appeal, Fourth District,
California.

March 9, 1936.

Rehearing Denied April 7, 1936.

Hearing Denied by Supreme Court

May 7, 1936.

1. Executors and administrators ⇨129(3)

Evidence held insufficient to sustain finding that conveyance of realty, which administrator of deceased grantor sought to have set aside as fraudulent, was made without consideration.

2. Fraudulent conveyances ⇨160

Where grantee participated in the actual fraud in consummating a conveyance of real-

ty with intention of hindering, delaying, and defrauding creditors of grantor, transfer was void as to creditors, even though valuable consideration may have been paid.

3. Appeal and error ⇨1010(1)

Whether conveyance of realty was made with fraudulent intent of hindering and defrauding creditors was question of fact for trial judge whose finding thereon was binding upon district court of appeal, where supported by substantial evidence (Civ.Code, § 3442).

4. Fraudulent conveyances ⇨179(1)

A transfer, void as to creditors of grantor because of fraud, has effect of leaving title in grantor as fully as though no attempted transfer had been made (Civ.Code, § 3439).

5. Fraudulent conveyances ⇨172(1), 179(1)

A grant made in fraud of creditors is valid between parties and all others except as to creditors of grantor, and grantee takes whatever interest grantor had qualified only by interest of creditors and, after their claims are satisfied, is usually entitled to any surplus remaining.

6. Fraudulent conveyances ⇨184(1)

Notwithstanding conveyance of realty was set aside because of fraudulent intent participated in by grantee to hinder and defraud creditors of grantor, grantee *held* entitled to have a valid pre-existing debt and lien securing it revived by judgment of cancellation (Civ.Code, §§ 3439, 3442).

7. Fraudulent conveyances ⇨183(2)

Where conveyance of realty was set aside as fraudulent, grantee was entitled to have deducted from rents and profits received by him during period of possession such sums as he paid out on debt of grantor and for taxes delinquent at time he received deed.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by E. R. Abbey, public administrator, as administrator with the will annexed of the estate of Ida Mae Zimmerman, deceased, against Dr. Allen E. Zimmerman and another. Judgment for plaintiff, and defendants appeal.

Reversed.

Thomas L. McFadden, of Anaheim, and Perry F. Backus, of Los Angeles, for appellants.

George H. Gobar, of Fullerton, and Dee Holder, of Los Angeles, for respondent.

MARKS, Justice.

This is an action to set aside a conveyance executed on January 12, 1932, by Ida Mae Zimmerman, now deceased, purporting to convey to defendant Zimmerman title to about forty-one acres of improved land in Orange county.

Ida Mae Zimmerman died testate in Orange county on May 12, 1932, and E. R. Abbey, public administrator of that county, was appointed and qualified March 31, 1933, as administrator with the will annexed of her estate. Claims against the estate in an aggregate amount of several thousand dollars were presented, allowed, and approved. The total assets of the estate which the administrator could reduce to possession were of a value of less than \$100, and upon request of one of the creditors he instituted this action to set aside the deed to defendant under the authority of section 579 of the Probate Code. Judgment went for plaintiff, and defendants have appealed.

The complaint contained three causes of action, two of which were expressly abandoned by plaintiff during the trial. The one remaining alleged the conveyance was made with the express intent on the part of deceased and defendant Zimmerman to hinder, delay, and defraud creditors of deceased and was without valuable consideration. In a supplemental complaint it was alleged that defendant Zimmerman conveyed the property to defendant Westbrook without consideration.

The answer of Zimmerman denied the fraud and alleged the conveyance was made upon a consideration of more than \$75,000. In a special defense he alleged that at the time of the transfer of title deceased was indebted to him in excess of \$15,000 under a written contract and for money loaned her, and in the added sum of \$60,000 which was secured by a lien on the real estate in the nature of a mortgage. He alleged that following the conveyance he had expended several thousand dollars in paying delinquent taxes and in principal and interest of debts of deceased some of which were evidenced by notes of deceased which he had signed as accommodation maker. Zimmerman offered to restore title to plaintiff if he could be placed in the position he occupied at the time title to the real property was conveyed to him.

Defendant Westbrook denied all the allegations of the complaint, but not of the supplemental complaint, and consented to be

bound by any judgment that might be rendered against Dr. Zimmerman.

The trial court found express fraud on the part of Dr. and Mrs. Zimmerman and that the conveyance was made without consideration. The judgment canceled the deeds from deceased to Zimmerman, and from Zimmerman to Westbrook; decreed the title to the real estate to be in the estate of deceased free and clear of the claims of defendants; enjoined defendants from asserting any right, title, or interest in or to the property; decreed that if plaintiff be permitted to sell the property in the probate proceedings for the purpose of satisfying the debts of deceased he shall receive from such proceeds sufficient money to pay the debts of deceased and the creditors of her estate and that any balance remaining be paid to defendant Westbrook; that if sufficient money be not recovered from such sale to pay the creditors, defendants, within thirty days from the time they receive notice so to do, pay to plaintiff "all and each and every part of the rents, issues and profits received by said defendants, and each of them, from said real property since the 12th day of January, 1932, to the extent necessary to satisfy the indebtedness of said estate to said creditors thereof, and each and all of them." The lien of Zimmerman on the real estate for \$60,000 which he had when deceased conveyed it to him was not reinstated.

Deceased and defendant Zimmerman were married on June 5, 1903, and separated in 1922. Their assets at that time were the real estate here involved and a dental office operated by Dr. Zimmerman in Los Angeles. On February 9, 1922, they executed a property settlement. By its terms Dr. Zimmerman agreed to execute a deed conveying the real estate to Mrs. Zimmerman, he retaining a lien upon the property, in effect a mortgage, to secure the payment of \$60,000, without interest, to him in fifteen years. The property was encumbered by a mortgage securing a note for \$7,500 which Mrs. Zimmerman agreed to pay out of the income from the property. She also agreed to pay him one-third of the net profits from the property as long as the \$60,000 remained unpaid. It was also agreed that the parties each owned one-half of the dental office and that in lieu of one-half of the profits from it Dr. Zimmerman would pay her \$100 per month. In case of the sale of the office Mrs. Zimmerman was to receive one-half of the sale price, whereupon the monthly payment to her would cease. It was agreed that if Dr. Zimmerman died first, and before the

\$60,000 was paid, Mrs. Zimmerman would pay \$30,000 to his estate within two years and be released from paying the balance. Should Mrs. Zimmerman die first, it was provided that Dr. Zimmerman would become the owner of one-half of the real property besides receiving the \$60,000. Dr. Zimmerman executed the deed and made the payment of \$100 per month up to and including the payment due January 1, 1932. The parties had been divorced subsequent to the execution of this contract.

Mrs. Zimmerman was not a success as a business woman. The mortgage on the real property was first increased to \$10,000, Dr. Zimmerman being required to sign the note and mortgage because of his lien for \$60,000. In November, 1928, this encumbrance was increased to \$15,000 with Dr. Zimmerman again being required to sign the necessary instruments. Mrs. Zimmerman signed an affidavit, which was recorded, reciting that the obligation was given for her benefit, with Dr. Zimmerman as accommodation maker, and agreeing to hold him harmless under it. The encumbrance was increased to \$25,000 in May, 1931. Mrs. Zimmerman signed a declaration that she received the proceeds of that loan and that Dr. Zimmerman signed only for her accommodation.

At the trial Dr. Zimmerman produced canceled checks payable to Mrs. Zimmerman for a total of \$10,719.20, which he testified represented advancements made to her to assist her in her financial difficulties. He also testified that he advanced \$2,000 in cash to get her out of what he termed a "jam" in a neighboring city. As accommodation maker he also signed for her a promissory note for \$10,000, part of which he had to pay after January 12, 1932. This evidence stands undisputed in the record.

Mrs. Zimmerman's financial affairs became acute in 1931. Frances Hargrove secured a judgment against her for \$5,681, and other creditors were pressing for payment. Mrs. Zimmerman gave Dr. Zimmerman a note for \$11,000 secured by a crop and chattel mortgage on her automobile and the orange crops on the real estate. It is probable that this was used as collateral to the \$10,000 note we have just mentioned. She also gave him an order in a like amount on the packing house handling the crops.

An attachment issued in the Hargrove case was levied on the safe deposit box of Mrs. Zimmerman in which were found six promissory notes totaling \$2,400 each signed by Dr. Zimmerman, each dated January 1,

1931, due two years after date and payable to Mrs. Zimmerman. These were released to Dr. Zimmerman on his third party claim supported by an affidavit of Mrs. Zimmerman to the effect that the notes were given her by Dr. Zimmerman to be negotiated and that she had no interest in them and that they did not belong to her.

On January 12, 1932, Mrs. Zimmerman executed a grant deed to the real estate to Dr. Zimmerman and also a bill of sale to the ranch tractor and tools. On February 23, 1932, she gave him a bill of sale to the furniture and furnishings in the dwelling house on the property. Under date of January 18, 1932, the parties executed an agreement which recited that Mrs. Zimmerman had been indebted to Dr. Zimmerman in an amount in excess of \$75,000 and which released the lien of \$60,000 on the real property. This instrument further recited that Mrs. Zimmerman had been unable to pay Dr. Zimmerman any part of the money due him under the separation agreement of February 9, 1922, and particularly any part of the net profits from the orange grove. Under date of January 27, 1932, the parties executed a contract which recited numerous debts of Mrs. Zimmerman and canceled the property settlement agreement of February 9, 1922. It transferred the dental office to him and released him from the payment of \$100 per month in lieu of half the net profits and bound Dr. Zimmerman to pay her \$100 per month for her support during the rest of her life. These documents were seemingly all executed as part of one transaction.

[1,2] The trial court found that the conveyance of the real estate on January 12, 1932, was made by Mrs. Zimmerman to Dr. Zimmerman without any consideration. This finding is not only unsupported by the evidence but is contrary to all the evidence in the record. However, this finding is not necessary for the support of the judgment as the trial court further found that in consummating the transaction we have outlined, the actual fraud was participated in by Mrs. Zimmerman, the grantor, and Dr. Zimmerman, the grantee, with the intention of hindering, delaying, and defrauding the creditors of Mrs. Zimmerman. In *Rosen v. Villanueva*, 175 Cal. 632, 166 P. 1004, 1005, it is said: "Where the transferee participates in the fraudulent intent, the transfer is void as to creditors, even though a valuable consideration may have been paid."

[3] The finding of actual intent to defraud the creditors of Mrs. Zimmerman which actuated both parties in making the conveyance of the real property is the important finding here. There is no good purpose to be served in detailing the rather long and laborious evidence which was introduced to support such a finding. We have studied the record and have reached the conclusion that there is sufficient evidence to support the inference drawn by the trial court of an actual fraudulent intent on the part of both parties. The question of a fraudulent intent is one of fact to be decided by the trial judge and not one of law to be decided by us. Section 3442, Civ. Code. Where, as here, there is substantial evidence in the record of actual fraud on the part of both the grantor and grantee, meager though it be, we cannot disturb the finding on appeal.

[4-6] Having reached the conclusion that the finding of actual fraud on the part of both parties to the transaction has some evidentiary support we must proceed to a consideration of the legal soundness of the judgment actually rendered. It must be borne in mind that the judgment quieted plaintiff's title to the property as against both defendants and only permitted Dr. Zimmerman's grantee to participate in the returns from its sale after the legal debts were paid. Under the judgment, if the property were not sold, neither defendant could ever claim any interest in it. The complaint alleged the property to be worth \$70,000. The trial court found it worth \$100,000. The encumbrance on the property remaining after the release of Dr. Zimmerman's lien was \$25,000. The debts of deceased remaining unpaid after Dr. Zimmerman had applied several thousand dollars upon them subsequent to January 12, 1932, and after Mrs. Zimmerman's death, do not clearly appear, yet it would seem they should not greatly exceed \$5,000. Under the judgment rendered, if, during probate, the property could be mortgaged for a sufficient amount to pay the existing encumbrance and approved debts it would then be distributed under the will of Mrs. Zimmerman and neither Dr. Zimmerman nor his successor would have any interest in it.

It is an established fact that from February 9, 1922, to at least January 12, 1932, Dr. Zimmerman was the owner of a valid, existing, and unimpeachable debt of deceased in the sum of \$60,000, to be reduced to \$30,000 only in the event that he prede-

ceased her, which debt was secured by a lien in the nature of a mortgage on the real estate. The trial court so found and all the evidence supports the finding. This cannot be questioned by plaintiff and the creditors for the very title of Mrs. Zimmerman by which they hope to benefit arose in the transaction in which this debt and the lien securing it was created. Because of the finding of fraud on his part, must Dr. Zimmerman be penalized by the cancellation of this valid pre-existing debt and the pre-existing lien securing it?

A conveyance made in fraud of creditors is void. Section 3439, Civ.Code; *Rossen v. Villanueva*, supra; *Vogel v. Sheridan*, 4 Cal. App.(2d) 298, 40 P.(2d) 946. A transfer void as to creditors of the grantor because of fraud has the effect of leaving the title in the grantor as fully as though no attempted transfer had been made. *First National Bank v. Maxwell*, 123 Cal. 360, 55 P. 980, 69 Am.St.Rep. 64; *Scholle v. Finnell*, 166 Cal. 546, 137 P. 241.

The case of *Ackerman v. Merle*, 137 Cal. 169, 69 P. 983, 984, is particularly in point on the question of the voiding of Dr. Zimmerman's lien. In that case the plaintiff, who was the administrator of his intestate's estate, brought suit to set aside conveyances made to defraud creditors of the decedent grantor. The trial court found that two conveyances had been fraudulently made and canceled them. One of the parcels conveyed was encumbered by a prior mortgage which had been paid by the grantee after he received the deed. The trial court in its judgment revived the released mortgage and subrogated the grantee, who had paid it, to the rights of the mortgagee. The plaintiff appealed from this judgment. In affirming it the Supreme Court said: "The creditors were entitled to subject to the payment of their claims only the property fraudulently conveyed. This property consisted of decedent's interest in the land, which was that of a mortgagor with a right to redeem from the mortgage. The interests of the mortgagee and the mortgagor in land are for many purposes considered as separate and distinct, and they are each the subject of separate and independent conveyances. By the fraudulent deed in this case, the defendant did not acquire the interest of the mortgagee in the land, but she acquired that interest by borrowing money, and paying off the mortgage debt. This was an independent transaction, in no way tainted with fraud, nor accompanied with an intention to avoid creditors, for it is clear that this interest of the mortgagee could

not be subjected to the claims of the creditors of the mortgagor. She having paid off this mortgage debt, the trial court treated the defendant as entitled to be subrogated to the rights of the original mortgagee, and that the creditors' claims must be secondary, and subject to those rights in the hands of the defendant, just as they had been when the mortgage interest was in the original mortgagee. Of this the creditors cannot be heard to complain in a court of equity. Their rights in the property are not enlarged or extended by the fraudulent transfer. They can get nothing for the mere sake of punishing the fraudulent grantee, and are entitled in equity only to have such interest in the property applied to the satisfaction of their claims as has been fraudulently conveyed away. The principle involved in the case is aptly illustrated by a quotation from the case of *Hamilton Nat. Bank v. Halsted*, 134 N.Y. 520 [31 N.E. 900, 30 Am.St.Rep. 693], as follows: 'Should A. convey his farm to B. subject to a valid pre-existing mortgage of five thousand dollars held by a third party, and B. subsequently dispose of it for a larger sum, out of the proceeds of which he pays the mortgage, he cannot be required to pay to the creditors the full value of the farm without deducting the amount due on the mortgage, for as to that sum the creditors have no equity. If the fraud had not been consummated, only the value of the property in excess of the mortgage could have been made available in payment of the claims of the creditors. As to that interest secured by the mortgage, no wrong was done them. Having no right to such interest, no principle of equity exists on which to found a claim for an appropriation of any benefit, on account of it, from a fraudulent grantee of the equity of redemption.'

In the case of *McKinney v. Wright*, 105 Cal.App. 401, 287 P. 506, the plaintiff, a trustee in bankruptcy, brought suit to cancel a conveyance because it had been made in fraud of the creditors of the bankrupt. A judgment which permitted the grantee to remove a house from the premises was affirmed on appeal.

Under these authorities we are of the opinion that the creditors of deceased had no right to benefit by a cancellation of the lien on the property held by Dr. Zimmerman at the time of its conveyance to him. The debt and this lien should have been revived by the judgment.

A grant made in fraud of creditors is valid between the parties and to all the

world except as to the creditors of the grantor. *First National Bank v. Eastman*, 144 Cal. 487, 77 P. 1043, 103 Am.St.Rep. 95, 1 Ann.Cas. 626; *Moore v. Schneider*, 196 Cal. 380, 238 P. 81. The grantee takes whatever interest the grantor had qualified only by the interest of the creditors and after their claims are satisfied is usually entitled to any surplus remaining. *Goldberg, Bowen & Co. v. Demick*, 77 Cal.App. 535, 247 P. 261. The case of *Emmons v. Barton*, 109 Cal. 662, 42 P. 303, 304, was an action to cancel a conveyance allegedly made to defraud the creditors of the grantor. There the Supreme Court announced the following rule: "It is to be observed, however, that in a case like this the judgment should be that property fraudulently conveyed, or so much thereof as is necessary, be applied to the satisfaction of the debts, and that the residue, if any, go to the grantee. It is not to go into the assets of the estate for any purpose other than the payments of the debts. The residue does not go to the heir, for he stands in the shoes of the fraudulent grantor." Section 580, Probate Code.

[7] The judgment of the trial court requires defendants, under certain circumstances, to pay to plaintiff all the rents, issues, and profits from the real estate received after January 12, 1932. It is clear from the record that several thousand dollars of such receipts were paid out by Dr. Zimmerman on debts of deceased, and for taxes delinquent at the time he received the deed. It may be that other deductions should be made from these receipts. Dr. Zimmerman should be entitled to one-third of the net income of the property, if there should prove to be any. Before final judgment, evidence should be taken to determine the amount of money, if any, in the hands of either of the defendants which should be paid to plaintiff out of the receipts from the property, should it be necessary to resort to this fund.

Defendants argue questions of rulings of the trial court on objections to the admission in evidence of declarations of deceased. The proper rules are laid down in *Emerson v. Barton*, supra, and, *Allan-MacMaster Co. v. Exterstein*, 126 Cal.App. 757, 15 P.(2d) 184.

The judgment is reversed.

We concur: BARNARD, P. J.; JENNINGS, J.

12 Cal.App.2d 517

**PEOPLE v. ONE FORD V8 TUDOR SEDAN,
ENGINE NO. 18-568204.**

Civ. 9864.

District Court of Appeal, First District,
Division 1, California.

March 18, 1936.

1. Forfeitures ☞10

Failure of conditional seller of automobile, used in illegal transportation of narcotics, to investigate responsibility, character, and reputation of buyer, *held* to preclude seller from establishing priority of its claim against state claiming a forfeiture (St. 1933, p. 788, § 15 (e)).

2. Statutes ☞109

Title of statute may be general and need only disclose general nature of subject of legislation, and need not give substance of bill, nor express all details found in body of act, nor embrace an abstract of contents, nor consist of index of all provisions, so long as provisions not mentioned in title are germane to general subject expressed.

3. Statutes ☞110½(4)

Title describing act as one "to regulate the sale, possession, distribution and use of habit forming, narcotic and other dangerous drugs and substances, and providing penalties for the violation thereof," *held* sufficiently broad to include right of forfeiture of vehicle used in transportation thereof, regardless of any lien on vehicle, unless lien was created after reasonable investigation of character of offender (St. 1933, p. 788, § 15 (e); Const. art. 4, § 24).

4. Forfeitures ☞2

Provision of State Narcotic Act providing for forfeiture of vehicle used in transporting narcotics, regardless of any lien on vehicle, unless claimant proves his interest in vehicle was created after reasonable investigation of character of offender, *held* constitutional (St. 1933, p. 788, § 15 (e); Const. art. 4, § 24).

5. Forfeitures ☞2

Word "offender," as used in State Narcotic Act providing for forfeiture of vehicle used in transporting narcotics, regardless of any lien upon vehicle, unless claimant proves his interest was created after reasonable investigation of character of offender, *held* not uncertain, as word was obviously intended to designate incumbrancer or conditional

sales buyer (St.1933, p. 788, § 15 (e); Const. art. 4, § 24).

[Ed. Note.—For other definitions of "Offender," see Words & Phrases.]

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Proceeding by the People against one Ford V8 Tudor sedan, engine No. 18-568204, in which a finance company, holding a conditional sales contract covering purchase of such automobile, filed a claim. From a judgment for claimant, the People appeal.

Reversed.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

Wm. B. Hornblower and Raymond H. Schubert, both of San Francisco, for respondent.

KNIGHT, Justice.

This proceeding was instituted by the state under the authority of the State Narcotic Act (St.1929, p. 380, as amended) for the forfeiture of the automobile above described, which the state seized while it was being used admittedly for the unlawful purpose of transporting narcotics. At the time of the seizure the automobile was subject to a vendor's conditional sales contract upon which there was an unpaid balance; and pursuant to the provisions of section 15 (e) of said act (St.1929, p. 388, as amended by St.1933, p. 788) the finance company holding the sales contract filed an answer asking for the release of the automobile. Upon trial, judgment was entered in its favor, and the state appeals.

[1] The ground upon which the appeal was taken was that the record discloses no evidence showing compliance by the claimant or its assignor with the provisions of said section 15 (e) declaring in substance that in order to establish priority of lien against the state in cases such as this, the claimant must prove, among other things, that his right, title or interest in the vehicle "was created after a reasonable investigation of the responsibility, character and reputation of the offender"; and in view of the decision rendered in the recent case of *People v. One Harley-Davidson Motorcycle* (Cal.Sup.) 53 P.(2d) 970, the state's contention must be

sustained. However, it is not necessary to comment further on this assignment for reversal, because respondent has made no attempt to dispute any of the points made by the state in this behalf nor otherwise to justify the trial court's decision upon the ground that it is supported by the evidence. Instead, respondent challenges the constitutionality of the provisions of section 15 (e) above quoted; it being contended in this regard that the subject-matter thereof constitutes an attempted regulation generally of the business of vending automobiles and other vehicles, which goes beyond the purposes of the Narcotic Act as they are expressed in its title (section 24, art. 4, Const. of Cal.); also, that said provisions are uncertain and unreasonable.

The main argument made against the sufficiency of the title is based largely if not altogether upon certain language used by the District Court of Appeal in affirming the judgment rendered by the trial court in favor of the claimant in the *Harley-Davidson Motorcycle Case* above referred to, when the appeal therein was before the District Court of Appeal for determination. 45 P.(2d) 244, 245. In this regard the court stated: "The plaintiff [the State] contends: 'That it was the intention of the Legislature to require the investigation to be in reference to the purchaser's moral responsibility, character, and reputation is clearly shown by the type of statute in which the forfeiture provisions are contained.' * * * The error in this contention rests in the confusion of two classes: (1) Vendors of narcotics, and (2) vendors of motor vehicles. The statute in its title and in all of its parts regulates the first class. It does not and, under article 4, § 24 of the Constitution, it could not also purport to regulate the second class." However, subsequent to the decision of the District Court of Appeal and the filing of respondent's brief herein the appeal in that case was taken over by the Supreme Court, which later, and contrary to the decision of the District Court of Appeal, upheld the state's contention and reversed the trial court's judgment. *People v. One Harley-Davidson Motorcycle* (Cal.Sup.) 53 P. (2d) 970. And while the latter decision evidently did not turn on the constitutional objection suggested by the District Court of Appeal, nevertheless the Supreme Court by its decision in effect sustained the validity of said section 15 (e) by declaring that proof of compliance with its provisions is

a necessary prerequisite to the establishment of a claimant's right of priority against the state in forfeiture proceedings brought by the state under the authority of said act.

[2, 3] Entirely aside, however, from the effect of the decision in that case, we cannot agree with respondent's contention that the inclusion of the provision in question in said act violates the constitutional requirement that the subject of every act shall be embraced in its title. As stated in California Jurisprudence (vol. 23, p. 653), it is well settled that the title of an act may be general, and need not contain anything beyond what is necessary to disclose the general nature or character of the subject of the legislation. The title is not required to give the substance of the bill, as that would make it almost as cumbersome as the bill itself and would tend to defeat rather than to accomplish its purpose. Nor need it express all of the details found in the body of the act, as the details provided for the accomplishment of the general purpose of an act will be regarded as necessary incidents thereto. So, also, the title need not embrace an abstract or catalog of the contents of a statute, or consist of an index of all the provisions thereof. It is sufficient if provisions not mentioned in the title are germane to the general subject expressed. In other words, as said in *Ex parte Hallawell*, 155 Cal. 112, 99 P. 490, in sustaining the sufficiency of the title to the Poison Act, which was the predecessor of the present Narcotic Act, it was never expected that the title to an act should be an index to all of its provisions, and therefore so long as the provisions themselves are cognate, attinent, and germane to the subject-matter of the title, no violence is done to the Constitution. See, also, *Ex parte Yun Quong*, 159 Cal. 508, 114 P. 835, Ann.Cas.1912C, 969. Here the act in question is entitled "An act to regulate the sale, possession, distribution and use of habit forming, narcotic and other dangerous drugs and substances, and providing penalties for the violation thereof" (St.1929, p. 380), which, as will be seen, is broad enough in its scope to embrace every kind of regulation of traffic in narcotics and the imposition of various penalties for violations thereof, including the right of forfeiture under certain conditions of vehicles engaged in the transportation thereof. Manifestly there would be much force in respondent's contention if, as it argues, the

provisions of the section under attack, irrespective of their connection with the operation of the Narcotic Act, constituted a compulsory regulation affecting the validity of sales of automobiles and other vehicles generally under mortgage or other liens, or conditional sales contracts. But said provisions will not support such construction. They become operative only in cases of the enforcement of the state's power, conferred by said act, to seize and forfeit, under certain conditions, automobiles and other vehicles engaged in the unlawful practices prohibited by the act; and therefore, since the subject-matter thereof is cognate and attinent to the general subject embraced within the comprehensive title given to the act, namely, the regulation of all kinds of traffic in narcotics and the imposition of penalties for violations thereof, the title is legally sufficient, under the doctrine of the authorities cited, to conform to the constitutional requirement.

Moreover, the title thus given to the Narcotic Act is much broader in its terms than the title given to the State Poison Law (St.1907, p. 124), which read: "An act to regulate the sale of poisons in the State of California and providing a penalty for the violation thereof." And in passing upon the legal sufficiency of the latter it was held that the same was broad enough even to cover a provision contained in the act prescribing a method for the disposition of fines collected by inferior courts for a violation of the act's provisions. *People v. City of San Bernardino*, 47 Cal.App. 232, 190 P. 482.

[4] Respondent's second point, that section 15 (e) contains unreasonable requirements, is fully disposed of by the decision in the *Harley-Davidson Motorcycle Case*, *supra*, which holds in effect that before a claimant is entitled to the release of a vehicle seized for violation of the Narcotic Act he must prove compliance with the provisions thereof; and the point is answered also by that group of decisions of the United States Supreme Court which hold that no constitutional guaranties are invaded by a statute which provides for the forfeiture of automobiles or other vehicles used for the unlawful transportation of narcotics, and that it is well within the power of a state, if it chooses so to do, to forfeit entirely all interests in a vehicle actually used in such unlawful enterprises, despite the fact that the owner or owners of such interests may have no knowledge

of the unlawful purpose for which it is being used. *Dobbins' Distillery v. United States*, 96 U.S. 395, 24 L.Ed. 637; *Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 41 S.Ct. 189, 65 L.Ed. 376; *Van Oster v. Kansas*, 272 U.S. 465, 47 S.Ct. 133, 71 L.Ed. 354, 47 A.L.R. 1044; *Various Items of Personal Property v. United States*, 282 U.S. 577, 51 S.Ct. 282, 75 L.Ed. 558.

[5] Nor is there any merit in the suggestion that the use of the word "offender" in said section creates such an uncertainty in the meaning of its provisions as to render said section inoperative. Obviously the word "offender" was intended to designate the incumbrancer or conditional sales vendee, because in the final analysis it is his property which is offending against the law.

Therefore, inasmuch as the evidence shows as a matter of law that because of claimant's failure to comply with the provisions of said section it is not entitled to any relief afforded thereunder, the judgment is reversed.

We concur: TYLER, P. J.; CASHIN, J.



12 Cal.App.2d 588

**UNION LUMBER CO. v. INDUSTRIAL
ACCIDENT COMMISSION et al.**

Civ. 5566.

District Court of Appeal, Third District,
California.

March 21, 1936.

1. Master and servant §417(7)

In reviewing action of Industrial Accident Commission on certiorari, Court of Appeal has no authority to supply evidence, speculate as to facts not disclosed by record, weigh evidence adduced, or pass upon credibility of witnesses.

2. Master and servant §417(7)

Reviewing court should in support of award consider entire record in compensation case most favorably to claimant, together with every reasonable inference which may

be drawn from evidence adduced (St.1917, p. 877, § 69 (a)).

3. Master and servant §361

Injuries received by pupil in vocational high school while working for private company to learn trade as part of vocational training, where stipulated sum company contributed to school vocational fund was paid to pupil by school authorities, held compensable, on ground that company was "employer" and pupil was "employee" within Workmen's Compensation Act (Smith-Hughes Act, 20 U.S.C.A. § 11 et seq.; St.1917, p. 877, § 69 (a); St. 1929, p. 306, § 7; St.1933, p. 2613, § 8 (b)).

[Ed. Note.—For other definitions of "Employee" and "Employer," see Words & Phrases.]

4. Master and servant §361

Employment agreement whereby pupil in vocational high school worked for private company while learning trade as part of vocational training would not lack consideration because pupil was not actually paid any money for his services, since instructions received would be sufficient consideration (Smith-Hughes Act, 20 U.S.C.A. § 11 et seq.; St.1917, p. 877, § 69 (a); St.1929, p. 306, § 7; St.1933, p. 2613, § 8 (b)).

5. Master and servant §361

Wages need not be paid directly to employee in order to constitute relationship of master and servant or employer and employee.

Certiorari to Superior Court, Mendicino County.

Proceeding under the Workmen's Compensation Act by Alton Thornquist, a minor, by his guardian ad litem, Mrs. Helga Thornquist, claimant, opposed by the Union Lumber Company, employer. To review an award of the Industrial Accident Commission of the State of California, the employer brings certiorari.

Award affirmed.

Mannon & Brazier, of Ukiah, and Norman Johnson, of Fort Bragg, for petitioner.

E. J. Seawell and Everett A. Corten, both of San Francisco, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

This is a petition for a writ of certiorari. The Industrial Accident Commission adopted findings and rendered an award of \$1,950 against this petitioner in favor of Alton Thornquist, a minor, for the loss of portions of four fingers while he was operating a meat-cutting machine in a butcher shop maintained by the Union Lumber Company. The commission found that the accident occurred in the course of the employment of the minor. A petition for rehearing on the grounds of newly-discovered evidence and for a lack of evidence to support the finding that the claimant was employed by the lumber company was subsequently presented and denied. The problem to be determined is whether a pupil of a high school who is engaged with an industry in learning a trade as a part of his vocational training under an oral agreement for stated services in consideration for which he receives compensation from the school vocational fund to which the industry regularly contributes by agreement a stipulated sum for the pupil each semester constitutes an employment rendering the industry liable for injuries sustained under the provisions of the Workmen's Compensation Act.

February 23, 1917, a federal statute, called the Smith-Hughes Act, was adopted to promote vocational education in agriculture, trades, and industries, subject to co-operation of the various states. (U.S. Stats. 1917, c. 114, 20 U.S.C.A. § 11 et seq., p. 7 et seq.) The benefits of this act were accepted and adopted by the Legislature of California May 31, 1917. (St. 1917, p. 1387, c. 720.) Subject to this act the Fort Bragg high school instituted a vocational training course which was approved by the state department of education. Several pupils of that school took advantage of this privilege. They were credited in their general course for efficient work in the vocational department. A co-operative working agreement was adopted by the terms of which pupils were employed by several industries as apprentices to learn trades on consideration of the payment of specified sums to be contributed by the employers each semester to the pupils or to the vocational school fund for the pupils. By agreement the pupils were actually engaged for a portion of each school day in working for the respective industries under their direct supervision and management. The vocational teacher of the school had no authority to control the pupil in his occupation or the manner of

performing his duties while so employed, but adopted reports from the managers of the enterprises regarding the efficiency of the pupils, the industries which co-operated in the vocational training plan, by agreement, paid each semester the sum of \$25 either to or for each pupil. This sum of money was paid either directly or indirectly to the pupils, although it appears the school authorities had a discretion to determine what sum should be paid to the students. In the present case the entire sum was paid to the claimant.

The Union Lumber Company maintained a butcher shop at Fort Bragg in connection with its enterprise. The claimant, Alton Thornquist, a minor 16 years of age was attending the Fort Bragg high school as a pupil thereof. He had previously worked at the petitioner's butcher shop for small pay during vacation time. He learned of the co-operative vocational training plan of the school and inquired of the manager of the butcher shop as to whether he might be employed by the petitioner at that shop as a vocational pupil. The manager acquiesced and arranged with the supervising vocational teacher of the Fort Bragg high school to accept the boy for training in the shop as a vocational pupil four hours of each school day. In consideration for his services, the petitioner agreed to and did pay into the school vocational fund the sum of \$25 for each semester while the pupil was so employed. The petitioner also paid into that fund a similar sum for each of the other vocational pupils in its employ. The petitioner engaged five or six other pupils in the various branches of its industry under similar terms. This resulted in the payment of \$50 per year for each vocational pupil so employed. The petitioner contends that it did not pay nor agree to pay this sum of money to the pupils themselves, but, on the contrary, that the compensation was paid into the school vocational fund, and that the school authorities did not necessarily have to pay that money to the pupils, but that the school board's contribution to the vocational pupils was entirely discretionary on their part. The record does, however, show that the petitioner did agree to pay into that fund \$25 per semester for each pupil which it employed, and that this exact sum was paid from the school vocational fund to Thornquist. It appears that this claimant was also hired by the petitioner to work in its shop in the same capacity on Saturdays and holidays, for

which services he was paid by the petitioner the additional sum of 25 cents per hour. For several months he worked as a helper in the butcher shop under this vocational training agreement four hours each school day. His vocational training time and agreement may be segregated from the time and terms upon which he was employed in that shop on Saturdays and holidays. But we must assume from the record that he was always subject to the control and directions of the manager of the butcher shop in the duties and manner of performance of his services during the hours of his vocational training on school days, exactly as he was subject to his supervision on Saturdays and holidays. Mr. Burrows, the manager of the shop, testified in that regard: "He was instructed by me personally." We must assume that the supervising vocational teacher had no authority to direct the particular work or the manner in which the pupil should perform any service rendered in the butcher shop. While the agents of the petitioner did testify that they thought they had no authority to discharge Thornquist "directly" without first consulting the school authorities, in support of the award we may assume the record indicates that the petitioner had the absolute right to discharge the claimant at any time without consulting the school authorities. Although the terms of the agreement under which the vocational pupil was accepted by the petitioner are somewhat uncertain, it does appear that the supervisor of vocational training neither possessed nor exercised authority over the pupil or his work while he was actually employed in the shop. Mr. Burrows testified regarding his authority over the boy:

"Q. Did you make reports to the school from time to time? A. I did not. I did not have any report to make, but I met in person Mr. Good (the vocational instructor) and he asked how he was progressing."

It appears that the boy performed efficient service while he was thus engaged in the shop, for the manager testified that he believed he would be qualified as a full-fledged butcher within two years and that he would then be able to earn \$100 per month.

April 26, 1935, while Thornquist was engaged in operating a meat-cutting machine in the petitioner's shop, during the vocational hours of his employment, he

caught his right hand in the machine and lost portions of four fingers. Through his guardian a claim for compensation for injuries sustained was presented to the Industrial Accident Commission. Findings were adopted favorable to the claimant to the effect that the injuries were sustained in the course of his employment with the Union Lumber Company. An award was accordingly rendered in the claimant's favor for the sum of \$1,950. A petition for rehearing was denied. This petition for a writ of certiorari was then filed.

We are of the opinion the evidence sufficiently supports the findings of the commission to the effect that Alton Thornquist was employed by the petitioner as a helper in its butcher shop, although he was also then serving as a vocational pupil of the Fort Bragg high school, and that he was injured in the course of his employment so as to render the Union Lumber Company liable for compensation therefor under the provisions of the Workmen's Compensation Act. The fact that the boy was employed as a vocational pupil is not in conflict with the relationship of master and servant which apparently existed between the petitioner and the claimant whether or not he was working in the capacity of an apprentice who aspired to learn the butcher business. The record supports the theory that the petitioner was the employer and the vocational student was an employee who was working for compensation and not merely voluntarily contributing his services, notwithstanding the fact that at the same time he was a vocational pupil under the tutelage and apprenticeship of the Union Lumber Company. That renders the petitioner liable for the injuries sustained by the claimant in the course of his employment.

The chief problem to determine is whether under the provisions of the Workmen's Compensation Act a vocational pupil who is learning a trade under an independent industry as a part of his high school course may, at the same time, be employed by it so as to render the enterprise liable for injuries sustained by the pupil in the course of his employment. In considering this question, the act should receive a liberal construction with the object of extending its benefits if reasonably possible to the protection of persons who are injured in the course of their employment. Section 69 (a), Workmen's Compensation Act (St. 1917, p. 877). The so-

lution of this problem will depend on the particular facts of each case. The industry may be held liable only when there is a contract of employment of the pupil as distinguished from services voluntarily performed without consideration. The fact that a claimant is a vocational pupil does not necessarily preclude the existence of a relationship of master and servant or employer and employee. A student may render services in a dual capacity of pupil and servant. The consideration for the agreement of employment may be represented by money paid for services or it may consist of valuable instructions rendered to qualify the pupil as a skilled artisan or tradesman. In determining whether a contract of employment exists, it is important to ascertain whether the school authorities retain the right to direct and control the pupil in the performance of his vocational duties, or whether that authority vests in the manager of the enterprise accepting his services. It will also be important to determine whether the industry has the right to hire or discharge the pupil independently of the school authorities, and whether there is a valid consideration for the alleged agreement of employment.

[1,2] In determining these questions on certiorari, this court has no authority to supply evidence, speculate as to facts not disclosed by the record, weigh the evidence adduced or pass upon the credibility of witnesses. These are questions within the exclusive province of the Industrial Accident Commission. *Ledson v. Pacific Indemnity Co.*, 105 Cal. App. 328, 287 P. 566. But in support of the award, this court should consider the entire record most favorably to the claimant, together with every reasonable inference which may be drawn from the evidence adduced. Considering the record in that manner, we are of the opinion the commission had jurisdiction to make the award and that the findings are adequately supported by the evidence.

[3] It is immaterial that the compensation was paid to the boy indirectly through the school vocational fund. It does appear that \$25 per semester was paid by the petitioner "for each vocational pupil." That may reasonably be construed to mean that \$25 per semester was paid by the petitioner for this boy. He actually received that sum of money for his services. Moreover, while he was so employed in the shop

he was subject to the exclusive directions and control of the manager of the business. This supplies the elements necessary to constitute an employment and renders the petitioner liable for the injuries sustained. The term "employer" is defined in section 7 of the Workmen's Compensation Act (St. 1917, p. 835, as amended by St. 1929, p. 306) as one "who has any person in service under any appointment or contract of hire, or apprenticeship, express or implied, oral or written." Likewise, the term "employee" is defined in section 8 of that same act (St. 1917, p. 835, as amended by St. 1933, p. 2613) as "every person in the service of an employer * * * under any appointment or contract of hire or apprenticeship, express or implied, oral or written." Subdivision (b) of the last-mentioned section declares that "Any person rendering service for another, other than as an independent contractor, or as expressly excluded herein, is presumed to be an employee within the meaning of this act." The facts of the present case seem to fulfill the foregoing definitions of "employer" and "employee" as those terms are applied to the Workmen's Compensation Act.

[4] Nor does the agreement of employment lack consideration even though we assume for the purpose of the argument presented that the claimant was not actually paid any money for his services by the petitioner, since the stipulated sum for each vocational pupil was delivered to the school authorities and was paid by them to the pupil only in the discretion of the school board. It is not necessary that services rendered in an employment shall be compensated in money. It is said in that regard in the case of *Gabel v. Industrial Accident Commission*, 83 Cal.App. 122, 256 P. 564, 565: "A pecuniary consideration for services is not necessary. One may compensate for services by means of any property of value, or even by a return of services pursuant to agreement."

In the present case the services of the boy as a helper in the butcher shop may be deemed to have been compensated so as to furnish an adequate consideration for the contract by the instructions which he received from the petitioner in training him to become a skilled butcher. In the case of *Beatty v. San Diego Electric Railway Co.*, 5 Ind.Acc.Dec. 241, it was held that an apprentice motorman on an electric car who was serving without monetary

compensation was entitled to recover for injuries sustained while so employed. That case says: "Applicant sustained an injury in the course of his employment while acting as 'student' motorman on the defendant's street railway without pay, it being the expectation that by two days later he would have learned the routes and would be put on the pay roll as a regular motorman. The commission held that there existed a contract of hire entitling the applicant to compensation."

[5] Moreover, we are satisfied that the record in this case adequately shows that the compensation of \$25 per semester was paid by the petitioner to the school vocational fund for the claimant. It is not necessary that the compensation shall be paid directly to the employee in order to constitute a relationship of master and servant or employer and employee. *Claremont Country Club v. Industrial Accident Commission*, 174 Cal. 395, 163 P. 209, L.R.A. 1918F, 177; *Department of Natural Resources of State of California v. Industrial Accident Commission*, 216 Cal. 434, 14 P.(2d) 746; 71 C.J. 426, § 169.

The order denying the petition for a rehearing on the ground of newly discovered evidence was properly denied.

The order and the award are affirmed.

I concur: PULLEN, P. J.



12 Cal.App.2d 525

PEOPLE v. NOVO.*

Cr. 1484.

District Court of Appeal, Third District,
California.

March 18, 1936.

Rehearing Denied April 2, 1936.

Hearing Denied by Supreme Court
April 16, 1936.

1. Criminal law ☞878(4)

Verdict finding defendant guilty of assault was void as inconsistent with verdict of guilty of burglary of second degree, since by statute burglary accompanied by assault is burglary of first degree, and burglary verdict was, in effect, acquittal of first-degree

burglary and charge of assault included therein (Pen.Code, §§ 459, 460).

2. Criminal law ☞878(4)

Where defendant was convicted of second-degree burglary and simple assault, burglary conviction held valid, notwithstanding it was, in effect, acquittal of first-degree burglary, since conviction for second-degree burglary did not depend on whether defendant committed assault (Pen.Code, §§ 459, 460).

3. Indictment and information ☞192

Evidence which supports verdict of burglary of first degree is also adequate to support verdict of burglary of second degree (Pen.Code, §§ 459, 460).

4. Criminal law ☞1175

Defendant convicted of second-degree burglary could not complain of conviction, where evidence showed that he entered house with intent to commit rape and so was in effect guilty of first-degree burglary (Pen. Code, §§ 459, 460).

Appeal from Superior Court, Sonoma County; Donald Geary, Judge.

Albert Novo was convicted of burglary of the second degree and of a simple assault. He appeals from an order denying a motion for new trial and from the judgment and order of commitment to the county jail.

Reversed in part, and affirmed in part.

J. Harold McAlpine, of Santa Rosa, Alfred J. Hennessy, Virgil Garibaldi, and Carlton D. Dethlefsen, all of San Francisco, and A. E. Sheets, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for the People.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant was charged in two separate counts of an information, first, with burglary committed by entering a dwelling house in the nighttime with the intent to commit a felony, to wit, rape, and, second, with an assault upon a female person who was not his wife, by means of force, violence, and the use of a deadly weapon, to accomplish sexual intercourse with her. The jury returned a verdict on the first count of burglary of the second degree. On the second count the defendant was found guilty of a simple assault. The defendant's

motion for a new trial was denied. Upon application therefor he was granted probation for the period of five years on condition that he serve one year of imprisonment in the county jail. From the order denying a motion for new trial and from the judgment and order of commitment, the defendant has appealed.

The appellant contends that the two verdicts which were returned by the jury are in irreconcilable conflict requiring a reversal of the order and judgment for the reason that it is impossible to determine what offenses the jury deemed him to be guilty of. The sufficiency of the evidence is not challenged. There is ample evidence to support both verdicts.

[1] The appellant's assertion is irrefutable that the verdict on the second count finding him guilty of an assault is inconsistent with the verdict returned on the first count which found him guilty of burglary in the second degree for the reason that section 460 of the Penal Code specifically classifies burglary accompanied by *an assault on any person* as burglary of the first degree. That section reads in part:

"Every burglary of an inhabited dwelling-house * * * committed by a person armed with a deadly weapon, or who * * * while in the commission of such burglary *assaults any person*, is burglary of the first degree.

"2. All other kinds of burglary are of the second degree."

Having found that the defendant was guilty of burglary of the second degree, the necessary inference is that the jury must have assumed he made no assault. This verdict, in effect, constituted an acquittal of the first degree of burglary and the charge of an assault included therein. This determination that there was no actual assault is in irreconcilable conflict with the verdict on the second count, to the effect that he was guilty of an assault, for both counts of the information were based on the same transaction which occurred at the same time and place. Since both counts are based on the same transaction and the finding of the jury on the first count refutes the possibility of the commission of the offense by means of an assault, the verdict on the second count is void and should be set aside. *People v. Andursky*, 75 Cal.App. 16, 241 P. 591; 80 A.L.R. 171, note.

[2] The verdict finding the defendant guilty of burglary of the second degree is amply supported by the record and is valid in spite of the fact that the verdict on the second count is void because it conflicts with the finding of burglary of the second degree regarding the element of an assault. In the first count the defendant was merely charged with burglary. Section 459 of the Penal Code declares that: "Every person who enters any house * * * *with intent* to commit grand or petit larceny or any felony is guilty of burglary."

To constitute the crime of burglary, all that was necessary for the prosecution to prove was that the defendant entered the dwelling house with the intention of committing rape as charged. So far as the crime of burglary of the second degree is concerned, it is immaterial whether he actually committed an assault or not. *People v. Barry*, 94 Cal. 481, 29 P. 1026; 4 Cal. Jur. p. 719, § 4. If he actually entered the house with the intention of committing the felony with which he was charged, he is guilty of burglary even though he abandoned that unlawful purpose one moment after his entry and in spite of his failure to accomplish his object. Burglary of the second degree does not necessarily contain the element of an actual assault. The verdict of an assault which was rendered on the second count is therefore not inconsistent with the validity of the verdict of burglary of the second degree. So far as the verdict of burglary of the second degree is concerned, it does not matter whether the defendant actually committed an assault or not. The evidence is ample to prove that he entered the building for that purpose. The verdict of burglary of the second degree which was rendered on the first count is therefore valid and may not be disturbed on this appeal.

[3, 4] It is true that the evidence indicates that the defendant entered the bedroom of the prosecutrix in the nighttime armed with a revolver, a flashlight, and a bottle of chloroform to aid him in the commission of his crime. The record contains substantial evidence that he actually used force in attempting to perpetrate the offense of an assault and that he was thwarted in his purpose by the strenuous resistance of the two women who occupied the room. These facts indicate that he was really guilty of burglary of the first degree. Since the verdict on that issue is more fa-

avorable to the defendant than he is entitled to receive, he may not complain of the judgment on that account. *People v. Dong Pok Yip*, 164 Cal. 143, 127 P. 1031; 17 C. J. 361, § 3732. Evidence which supports a verdict of burglary of the first degree will also be deemed adequate to support a verdict of burglary of the second degree. *People v. Maroney*, 109 Cal. 277, 41 P. 1097; *People v. Latourell*, 118 Cal.App. 386, 5 P. (2d) 456; 4 Cal.Jur. 725, § 10.

The judgment and the order are reversed with respect to the second count, being those portions which apply to the conviction of an assault. In all other respects the judgment and the order are affirmed.

We concur: PULLEN, P. J.; TUTTLE, Justice pro tem.



12 Cal.App.2d 652

STEWART v. LEASURE et al.
Civ. 5452.

District Court of Appeal, Third District,
California.

March 24, 1936.

Hearing Denied by Supreme Court
May 21, 1936.

1. Landlord and tenant ⇨246(1)

Provision in lease of gas station that all improvements and equipment for operation of business shall be understood to be appurtenant to land and treated as affixed thereto, provided only that lessee may remove them at end of term upon performance of all obligations under lease, *held* to give lessor lien upon equipment installed by lessee, but not to vest absolute title thereto in lessor (Civ.Code, § 3440).

2. Abandonment ⇨4

To make out case of abandonment or waiver of legal right, there must be a clear, unequivocal, and decisive act of party showing such purpose or acts amounting to an estoppel on his part.

3. Landlord and tenant ⇨254(2)

Act of lessor in requesting lessee to sign chattel mortgage *held* insufficient to establish waiver by lessor of lien upon improvements created by clause in lease declaring that all improvements for operation of business upon

premises should be treated as affixed to land, provided only lessee might remove them at end of term upon performance of all obligations under lease.

4. Landlord and tenant ⇨157(4)

Under lease of gas station providing that all improvements for operation of business upon premises should be understood to be appurtenant to and treated as affixed to land, provided only lessee at end of term upon performance of all obligations under lease might remove them, lessor, at end of lease, *held* entitled to possession of improvements placed thereon by lessee, where lessee was in default in paying rent.

5. Chattel mortgages ⇨138(3)

Lien upon equipment, reserved to lessor under lease of gasoline station *held* inferior to lien of recorded chattel mortgage, where lease was not executed according to law governing chattel mortgages, was not recorded, and mortgagee had no actual notice of provision in lease (Civ.Code, § 3440).

6. Chattel mortgages ⇨90

Where chattel mortgage upon equipment installed upon premises occupied for gas station was given to secure a loan already made, mortgagor was not required to state in recorded notice of mortgage the amount of loan paid, notwithstanding provision of statute requiring that recorded notice state date when, and place where, purchase price or consideration is to be paid (Civ.Code, § 3440).

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by A. T. Stewart against Alva Leasure and others. Judgment for defendants, and plaintiff appeals.

Modified and, as modified, affirmed.

Stewart & Stewart, of Los Angeles, for appellant.

Harry K. Cohen, of Los Angeles (Irving Shore, of Los Angeles, of counsel), for respondents.

TUTTLE, Justice pro tem., delivered the opinion of the court.

By this action plaintiff seeks to have a chattel mortgage declared null and void, and to have it adjudged that defendants have no right, title, or interest in the personal property described therein. Plaintiff now appeals from a judgment in favor of defendants.

The complaint sets out a lease between plaintiff, as lessor, and defendant Alva Leasure, as lessee, covering certain real property in the county of Los Angeles, and alleges that during the term of the lease certain fixtures were placed upon the premises, and that under the terms of said lease said fixtures became part of the real property; that said fixtures could be removed by the lessee in the event that he complied with all the terms of the lease; that, at the date of the termination of the lease, there was due plaintiff the sum of \$650 as rental for said premises; that the fixtures are still upon the property; that thereafter, in fraud of plaintiff, and with intent to defraud plaintiff of said fixtures and improvements, defendants mentioned executed a chattel mortgage in favor of defendant Toney, covering said fixtures.

The clause in the lease which is at the bottom of the controversy reads as follows: "Any and all improvements and equipment for the operation of business to be conducted upon said premises shall be understood to be appurtenant to and treated as affixed to the land, and a part thereof, provided only that it is agreed that lessee may, at the end of the term hereof and performance by him of all things herein required to be performed by him, remove any and all said equipment except only cement and similar work and structures; and it is agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the lessors to re-enter said premises and remove all persons therefrom, and the said lessee agrees to quit and deliver up said premises to the lessors peaceably and quietly at the end of said term in as good order and condition as the same are now or may be put into."

The trial court found the lease was executed as alleged, and that at the termination thereof the sum of \$650 was due plaintiff as rental, and the further sum of \$51 was also due for taxes paid by plaintiff on said fixtures and improvements. The following findings were also made:

"IV. That the said lease was in writing and contained a forfeiture clause providing that the plaintiff could declare a forfeiture of all fixtures installed on the said premises in the event that any or all obligations of the lease should remain unperformed at the expiration of the period of said lease.

"V. That at the termination of the said lease, plaintiff (lessor) did not insist on the

forfeiture clause as provided for in the said lease, but instead allowed the defendant to make new arrangements with a new lessee, and claimed a mere right to the amount due at that time and nothing more."

The court also found that the said mortgage was executed in compliance with section 3440 of the Civil Code, and that there was no fraudulent intent on the part of any of the parties, and that the mortgage was made in good faith and for a valuable consideration. The judgment was that plaintiff take nothing by reason of his complaint. The only attack made upon the judgment is the insufficiency of the evidence to support the three findings last above mentioned.

The improvements mentioned were installed by the lessees in connection with their business of running a "gas station," and consisted of a small building, tanks, pumps, and similar equipment.

[1] Appellant contends that the legal effect of the clause quoted was to vest in him the absolute title to the property, subject to the right of the lessee to redeem upon payment of the rent reserved, prior to or at the time the lease expired. It has been held that, where a lease provides that the landlord shall be the owner of all crops until the rent has been paid, such agreement must be construed as intending to give security to the landlord for the rental, and to create a lien upon the crops. *Ferguson v. Murphy*, 117 Cal. 134, 48 P. 1018. The court there held that it was an attempt to obtain the advantages of a chattel mortgage without complying with the provisions of the statute upon the subject. In our opinion, the instant lease should be subject to the same rule of construction, and that plaintiff had a lien upon the property, but was not the absolute owner of the same, and could not become so until he had taken the necessary steps to foreclose such lien.

[2, 3] The finding that plaintiff had lost his right to enforce his lien is not supported by the evidence. The court merely finds that plaintiff did not "insist upon a forfeiture" at the termination of the lease. As we view it, the remedy of plaintiff was not the insisting upon a forfeiture, but the foreclosure of his lien, a step which he could take at any time prior to the expiration of the statute of limitations. The "arrangements for a new lease" referred to in the findings arose out of negotiations with Richfield Oil Company for a lease on the premises. These lasted several months, and the intent was to settle the controversy. It was

there suggested by plaintiff that defendant lessee give him a chattel mortgage for the accrued rental. Plaintiff called upon the lessee several times and presented a note and mortgage for signature. The last time he called the lessee told him he had executed a chattel mortgage upon the property to defendant Toney for \$750. None of this was paid upon the rental due. The only evidence in the record from which the court could have found that plaintiff waived his right to his lien was the request that the lessee sign a chattel mortgage. On the other hand, there is the testimony of plaintiff "that Leasure owed money to him, and that the fixtures and improvements secured it." It must be remembered, however, that the court made no findings of such a waiver, or of sufficient facts which would constitute a waiver. In the case of *First National Bank v. Maxwell*, 123 Cal. 360, 55 P. 980, 982, 69 Am.St.Rep. 64, it was held that where a creditor, with knowledge of a prior fraudulent conveyance of the debtor, accepted from the latter a mortgage upon other property covering the amount of the indebtedness, such conduct on the part of the creditor will not amount to a waiver of his right to attack such conveyance. The court states the rule as follows: "To make out a case of abandonment or waiver of a legal right, there must be a clear, unequivocal, and decisive act of the party showing such a purpose, or acts amounting to an estoppel on his part." We therefore hold that, assuming the finding can be construed as a waiver of plaintiff's right to a lien, the evidence is clearly insufficient to support such finding.

[4] While the court found that none of the parties was guilty of fraud, the conduct of the lessee is far from commendable. When plaintiff requested him to sign the chattel mortgage covering the property, the lessee replied that he could not because the Richfield Oil Company would not allow him to do so. After plaintiff had induced the oil company to release a chattel mortgage which the lessee had given them, plaintiff again called upon the lessee, and the latter informed him that he had given a chattel mortgage to defendant Toney. Though the lease stated in effect that the property belonged to plaintiff, the lessee walked out owing the sum of \$700 to plaintiff, and proceeded to execute a chattel mortgage to a third party, whereby he procured the sum of \$750, no part of which was paid to plaintiff. This is an equitable proceeding, and it may be observed that the record shows

that every equity is upon the side of plaintiff as against the defendant lessee. The lease gives plaintiff the right to take possession of the property in the event the rent was not paid, and, as it is admitted, and the court found, that the rental and taxes advanced had not been paid when the lease expired, it follows that the lessor is entitled to possession of the property, as such instrument was, between the parties, in the nature of a chattel mortgage, and the mortgagor had defaulted. In the case of *Wixom v. Davis*, 57 Cal.App. 620, 207 P. 694, it was held that, after the debt, secured by a chattel mortgage, has become due, the mortgagee is entitled to the possession of the mortgaged property, although there was no express provision in the mortgage giving the mortgagee such right. It follows as a conclusion of law that plaintiff is entitled to such possession.

[5] As to the finding respecting the chattel mortgage, it is supported by the evidence. The mortgagee was acting in good faith, and there was a valuable consideration. "Reserving a lien for rent on chattels located on leased premises will give the landlord a prior claim thereto, unless at the time the property is brought on the premises it is subject to a valid mortgage, but such reservation in favor of the landlord is in effect a mortgage and must be recorded to be effectual against a subsequent mortgage in ordinary form, unless the subsequent mortgage has notice of the reservation in the unrecorded lease." 11 C.J., p. 656, par. 404. This rule assumes, of course, that the lease must be executed according to the law governing chattel mortgages when it is so recorded. In the instant case, the lease was not so executed, nor was it recorded, nor was it contended that the mortgagee had actual notice of the provision in the lease.

[6] It is contended that the mortgage was not valid, for the reason that it was not executed according to section 3440 of the Civil Code. Appellant points out that the amount of the loan was paid over before the notice required by law was recorded. The position of appellant is that this section requires that the "consideration" be actually paid on the date given in the notice, as it is provided that the notice state "the date when and the place where the purchase price or consideration, if any there be, is to be paid." No authorities are cited by appellant. We are of the opinion that, where such a mortgage is given to secure a loan

already made, the portion of the section quoted is not applicable. The point is without merit. It follows that the finding and judgment in favor of defendant Toney cannot be disturbed.

As to the other defendants, it is ordered that the findings be modified by striking out the paragraphs numbered V and VI.

It is further ordered that the conclusions of law, as to paragraph I thereof, be modified to read as follows: "That plaintiff has a valid lien upon the fixtures and improvements described in the complaint, and is entitled to the possession of said property, subject, however, to the lien of the chattel mortgage executed in favor of defendant, Mrs. J. R. Toney, and said mortgage is hereby declared to be valid." And paragraph 11 is modified to read as follows: "Defendants are entitled to their costs of suit."

The judgment is modified as follows: In lieu of the second paragraph thereof, commencing with the word "Wherefore," insert the following: "Wherefore, by reason of the law and the findings of fact aforesaid, it is ordered, adjudged and decreed that plaintiff has a valid lien upon the fixtures and improvements described in the complaint, and is entitled to the possession thereof, but that such lien is subject to the lien of the chattel mortgage executed in favor of defendant, Mrs. J. R. Toney, and said mortgage is declared to be valid, and that judgment be entered against plaintiff for the costs of suit in the sum of \$22.38."

As so modified, the findings, conclusions of law, and judgment are affirmed, each party to pay his own costs on this appeal.

We concur: PULLEN, P. J.; THOMPSON, J.



12 Cal.App.2d 659

WILLS v. POLICY HOLDERS LIFE INS.

ASS'N.

Civ. 5454.

District Court of Appeal, Third District,
California.

March 24, 1936.

1. Insurance ⇨646(3)

To avoid life policy for misrepresentation of insured in application, insurer had

burden to prove that statements in application were not only untrue but that insured knew, or had reasonable cause to believe, they were false.

2. Insurance ⇨291(3)

Under life policy providing that false statement, misrepresentation, or concealment of material facts in application would avoid policy, statement in application by insured that she was in good health, and, so far as she knew, had no disease, while in fact she was then suffering with heart disease, held not to avoid policy, in absence of evidence that insured knew of heart disease at time of application.

3. Insurance ⇨291(5)

Assured is in "good health" within life policy unless affected with substantial attack of illness threatening life or with malady which has some bearing on general health, but term does not mean perfect health, but, if applicant is free from apparent sensible disease, and unconscious of derangement of important organic functions, he is in good health, although he may have some slight or temporary indisposition.

[Ed. Note.—For other definitions of "Good Health," see Words & Phrases.]

4. Insurance ⇨291(3)

Where insured's representations regarding health in application for life policy are honestly made and justified by his then knowledge of his physical condition, that representations were proved to be unfounded by subsequent events will not avoid policy in absence of fraud.

Appeal from Superior Court, Los Angeles County; Harry F. Sewell, Judge.

Action by Alberta L. Wills against the Policy Holders Life Insurance Association. Judgment for defendant, and plaintiff appeals.

Reversed, with directions.

Sefman & Bernard, of Los Angeles (Ernest M. Torchia, of Los Angeles, of counsel), for appellant.

Charles D. Warner and Thomas W. Hughes, both of Angeles, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiff, who is named as beneficiary in a life insurance policy, has appealed from a judgment which was rendered against her on the ground that the contract was void because of false statements made by the insured in her application therefor.

July 16, 1931, Ruby Broadwater, a widow 48 years of age, signed a written application for membership in the Policy Holders Life Insurance Association, a mutual benefit association of California, organized under the provisions of division 1, part 4, title 2, chapter 4, of the Civil Code. That application contains the following affirmative statements:

"(Q) Are you now in good health? (A) Yes. * * * (Q) Have you knowledge that any physical or mental disease exists in your system? (A) No. * * * I am in good health and so far as I know have no disease or other conditions which would prevent me from obtaining life insurance. I agree to the terms, conditions and provisions of the certificate of membership that this application become a part of such certificate and that any false statement, misrepresentation or concealment of any material fact on my part shall make void my membership."

In consideration of the payment of \$5 per annum, this application was accepted, and a policy of \$1,500 was issued by the company July 16, 1930, on her life. Alberta L. Wills was named as beneficiary in the policy. It provided that "a false statement, misrepresentation or concealment of any material fact in the Application for Membership shall make void this Certificate and shall bar the right of any beneficiary to collect any sum hereunder." November 2, 1931, the insured died as a result of sclerosis with occlusion of the left coronary artery of the heart. The company refused to pay the insurance. This suit on the policy was then commenced. The cause was tried by the court sitting without a jury. The court adopted findings to the effect that it was not true that the insured was "now in good health" when her application for insurance was made, and upon the contrary determined that she "had then existing in her system and was at that time afflicted with chronic interstitial nephritis, hypertension and myocarditis." But the court failed to find either that the insured knew that she was then afflicted with heart disease or any other ailment or that the policy was procured by fraud. Upon the findings adopted the court

rendered judgment against the plaintiff. From that judgment she has appealed.

[1, 2] There is no substantial evidence to support the judgment which was rendered against the plaintiff in the present case. The burden was on the defendant to prove as a matter of defense that the statements of the insured which are contained in her application were not only untrue but that she knew they were false, or at least that she had reasonable cause to believe they were false. The written application for insurance is specifically made a part of the policy. It does not constitute a warranty that the applicant was in "good health." The language of that application refutes the assumption that she was guaranteeing that her health was good. After asking her if she was in good health, the very next question was, "Have you knowledge that any physical * * * disease exists in your system?" The following statement is, "So far as I know I have no disease." Moreover, the court carefully refrained from finding that she then knew of the heart disease of which she subsequently died. Since the court merely found that it was not true that she was in "good health" at the time of her application, but upon the contrary that she was then afflicted with heart trouble, and failed to also find that she knew of that chronic ailment, we must assume the court misapprehended the law and concluded that the defendant was entitled to a judgment in its favor merely because the statement that the applicant was then in good health was not true. There is no evidence in the record to the effect that the insured did then know she was afflicted with heart disease or that she had symptoms which should have warned her of that fact. The evidence is just the contrary.

The plaintiff testified: "I last saw the deceased alive a few days prior to her death: * * * Between the years 1928 and November 2, 1931, the date of the death of said Ruby Broadwater, I lived, off and on, with the deceased, and during that period of time, the deceased did not complain of any illness or sickness, nor, during said period of time, was she confined to her bed on account of illness or sickness, and that during said period of time deceased was constantly able to work, and appeared to be in good health."

It also appears from her application that she had not consulted a physician for any illness or ailment for more than three years prior thereto. It does appear she was confined to a hospital for a few days in 1924,

seven years before this policy was issued. It does not appear what ailment then required her to go to a hospital. It also appears she had no family physician. And it is true that she carried other insurance when this policy was issued and that she had never been rejected in any previous application for insurance. These facts are not controverted.

After the death of Ruby Broadwater, Dr. Wagner performed an autopsy on her body and discovered that she died from "sclerosis with occlusion of the left coronary artery of the heart." He said that the heart was enlarged, the arteries of the kidneys were somewhat hardened, and that no other organic disease appeared. He testified that this heart disease had probably been progressing for two, three, or four years. He said that it was his opinion she was not in good health in July, 1931, when the application for insurance was made. The doctor makes it clear that the deceased may not have had symptoms which would warn her of the ailment. He testified that this heart disease was not necessarily accompanied by acute pains or repeated attacks; that the fatal shock may have been the first attack. But he did say the disease would "probably give certain ill-defined symptoms of just not being very strong or not very good health." Dr. Pollia testified to substantially the same symptoms and results of heart disease. He also said that the patient might not suffer from previous sharp pains in the heart or chest, but he did add that the condition described by Dr. Wagner was very likely chronic and of long duration. He described the symptoms of the disease as follows: "In the beginning the patient might notice frequency of urination at night, a shortness of breath, easily fatigued, increase of blood pressure; and then as the condition became more advanced, these symptoms would increase, and there would be enlargement of the heart, swelling of the body and extremities; perhaps pain in the region of the heart itself; certain chemical findings in the urine. * * * Some of those symptoms are always present; perhaps not all of them in every case."

Dr. Blank, who for nine years had charge of a Los Angeles hospital and was a physician of wide experience, testified that, if the deceased had suffered a mere partial obliteration of the coronary vessel, she "might get along all right and carry on the different ordinary requirements of life, and not complain of any symptoms at all. In that

condition a patient very often might go on although they will feel a little tired, but never complain of anything like pain, and all of a sudden they will die." In other words, the doctor testified that the condition of the heart of the deceased as disclosed by the autopsy might not be preceded by sharp pains in the region of the heart, nor by any other symptoms which a non-expert would recognize as a heart affliction or other serious ailment, and that, when a total obliteration of the coronary vessel suddenly occurred, the patient would die instantly without previous warning. There is no evidence in this record to the contrary.

In spite of the fact that the autopsy disclosed a chronic heart disease which must have been developing for some time, there is not a syllable of evidence to indicate that the insured possessed knowledge of that fact. Nor is there any evidence that symptoms of the disease existed which should have warned a reasonable person of its presence. Nor are there any facts from which we may presume that the deceased knew of the existence of that disease. In truth, the affirmative evidence is just the contrary. She carried other insurance. She consulted no physician. She worked constantly for several years past. She appeared well, and she never complained of illness or ailment, even to her friend and the beneficiary named by her in the policy. We are persuaded the insured did not know of the existence of any serious physical ailment when she applied for the policy. Certainly the defendant failed to prove that she had any such knowledge. The judgment is therefore not supported by the evidence.

[3] The mere fact that the insured first said that she was "in good health," in the absence of evidence that she knew or believed that she was not in good health, is not such misstatement of fact or fraud as will render an insurance policy void. *Burr v. Policy Holders' Life Insurance Association*, 128 Cal.App. 563, 17 P.(2d) 1014, 1015, 4 Cooley's Briefs on Insurance (2d Ed.) p. 3296, § 17, subd. (i). In the *Burr* Case above cited it is said in that regard: "The term 'Good Health' in the life insurance policy or application is comparative, and an assured is in good health unless affected with a substantial attack of illness threatening his life or with a malady which has some bearing on the general health. It does not mean perfect health; nor would it depend upon ailments slight and not serious in their natural consequences."

And in 2 Cooley's Briefs on Insurance, at page 3296, it is said with respect to the use of the term "good health": "If the applicant is free from apparent sensible disease, and unconscious of any derangement of important organic functions, he may truthfully say that he is in good health, although he may have some slight or temporary indisposition."

The preceding definitions of the term "good health" are peculiarly applicable to the facts of this case, for the very next statement of the applicant is that "so far as I know have no disease." That statement regarding the general state of the applicant's health upon which the respondent relies does not constitute fraud nor furnish grounds upon which the obligation of the insurance company may be repudiated. In the absence of evidence to the contrary, we must assume the insured believed she was in good health at the time she signed her application for a policy.

[4] In the case of Chase v. Sunset Mutual Life Association, 101 Cal.App. 625, 281 P. 1054, the syllabus correctly states the principle of law therein determined with respect to the effect upon a life insurance policy of erroneous statements innocently made by an assured in his application for a policy with respect to his condition of health. It is there said: "Where insured's representations regarding his health in application for life insurance were honestly made, and were justified by his then knowledge of his physical condition, mere fact that representations of insured were proved to be unfounded by subsequent events, in absence of fraud or deceit, did not avoid policy."

In the present action the burden was on the defendant to prove, not only that the insured was afflicted with serious heart disease of the time she signed her application for membership, but also that she then knew she had that ailment. Weiss v. Policy Holders' Life Insurance Association, 132 Cal. App. 532, 536, 23 P.(2d) 38; Chase v. Sunset Mutual Life Association, supra. The defendant failed to sustain this burden. The judgment is not supported by the evidence.

The judgment is reversed, and the court is directed to render judgment for the plaintiff as prayed for in her complaint.

We concur: PULLEN, P. J.; TUTTLE, Justice pro tem.

12 Cal.App.2d 644
PEOPLE v. SHEPHERD et al.
Cr. 2734.

District Court of Appeal, Second District,
Division 1, California.

March 24, 1936.

1. Criminal law ☞1081

Notice of application for appeal filed before judgment *held* to sufficiently comply with statute to perfect appeal from order denying accused's motion for new trial, where notice included among various grounds relied on that court erred in overruling motion for new trial (Pen.Code, §§ 1191, 1202, 1237, 1239; Rule 2, § 7 of the Rules of the Judicial Council for the Supreme and District Courts of Appeal).

2. Criminal law ☞1068½

Appeal before judgment from order denying accused a new trial should be perfected in same manner as an appeal from judgment or any order after judgment (Pen.Code, §§ 1191, 1202, 1237, 1239).

3. Criminal law ☞1086(14)

Purported appeal from order denying motions for new trial *held* dismissible, where record contained nothing showing that trial court denied such motions.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Willis W. Shepherd, Howard J. Streich, and W. F. Wigginton were convicted of assault by means of force likely to produce great bodily injury, and the two last-named defendants appeal. On motion to dismiss the appeal.

Motion denied.

Entenza & Gramer, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

YORK, Justice.

The people moved to dismiss the appeal of defendants on the grounds hereinafter set forth in detail.

The defendants were convicted of assault by means of force likely to produce great bodily injury. Verdict of guilty was returned February 25, 1935, as to all three defendants, and on February 28th appellants moved for new trial, which motions

were denied on March 11th. Appellants, on said latter date, made oral applications for probation and March 27th was set for hearing on said applications. No written applications for probation were ever made by appellants, but on March 27th,—the day set for hearing—counsel for appellants told the court he would file the applications that day, and the matter was continued to April 3d. On April 3d, counsel for appellants appeared and objected to a further continuance on the ground that an appeal from the orders denying motions for new trial had been taken on March 13th, and that the court had no jurisdiction to proceed. However, the court continued the matter of hearing on application for probation to April 10th, at which time the appellants moved for a new trial under section 1202 of the Penal Code, on the ground the court had no jurisdiction to pass sentence, or to grant probation, since the time for passing sentence or granting probation had expired, and on the ground particularly that the defendants had not consented to any continuance of the matter to said April 10th. At this hearing the court granted probation to the appellants for a term of one year, six months thereof to be spent in the county jail.

Appellants on March 13, 1935, filed a notice of application for appeal, pursuant to section 7, rule II, of the Rules of Judicial Council for the Supreme and District Courts of Appeal; on April 12, 1935, they caused to be filed a notice of appeal from the orders of March 11th, denying motions for new trial and from the alleged order of April 10th, denying motions for new trial under sections 1191 and 1202 of the Penal Code, and on the same day filed a second notice of application for appeal pursuant to section 7, rule II, of the Rules of the Judicial Council for the Supreme and District Courts of Appeal.

This matter is now before this court on a motion of respondent to dismiss appeal on the grounds: (1) That no proper appeal has been taken; (2) that no notice of appeal was made or filed as to the orders of the trial court of March 11, 1935, denying defendants and appellants' motions for a new trial; (3) that the appeal of appellants was not taken within the time required by the provisions of section 1239 of the Penal Code; (4) that the purported order of the trial court of April 10, 1935, denying appellants' motion for a new trial was never made by said court; and (5) that the record affirmatively shows that no judgment was ever imposed upon defendants and appellants.

[1,2] Section 1239 of the Penal Code provides: "An appeal from a judgment may be taken by the defendant by announcing personally or through his attorney in open court at the time the judgment is rendered that he appeals from the same or by filing a written notice of appeal within two days after the rendition of judgment with the clerk of the court wherein judgment was rendered; and from any order made after judgment, by announcing in open court at the time the same is made that he appeals from the same."

The notice of application for appeal, which was filed two days after the denial of motions for new trial, was as follows: "Comes now the defendants Howard J. Streich and W. J. Wigginton, in compliance with section 7 of Rule II, of the rules of the Judicial Council for the Supreme and District Courts of Appeal, and file with the clerk and present to the trial court their respective applications for appeal to the District Court of Appeal, Second Appellate District, State of California, and state in general terms the grounds of appeal and the points upon which the defendants respectively rely as follows, to-wit: * * *" and then proceeds to enumerate the various points, including one "That the Court erred in overruling defendants' Motion for New Trial."

The decisive question before this tribunal upon the motion to dismiss appeal is whether the above-quoted notice of application for appeal is a sufficient compliance with the terms of section 1239 of the Penal Code, above set forth.

While the right of appeal from an order denying a motion for a new trial is expressly given to a defendant by section 1237 of the Penal Code, the statute prescribes no form of notice of appeal, and while section 1239, *supra*, provides the method of taking an appeal from a judgment at the time it is rendered and from any order made after judgment, to hold that a defendant cannot appeal from an order denying a new trial until after rendition of judgment would be, in effect, to deprive him of any remedy during the time the imposition of sentence may be suspended. In such case the appeal should be perfected in the same manner as an appeal from the judgment or any order after judgment, without regard to the fact that no mention of the order is made in said section 1239. 8 Cal.Jur., p. 518, § 529; *People v. Hartman*, 23 Cal.App. 72, 137 P. 611, 612. The cited case holds that the language of section 1247 of the Penal Code (repealed in 1927 [St.1927, p. 1048]),

providing for the making of the record upon appeal from any judgment or order in a criminal proceeding, is not restricted to an order made after judgment, but "is broad enough to include" an order denying motion for new trial made before judgment, "notwithstanding the provisions of the preceding section 1239 allowing an appeal from 'any order made after judgment,' especially in view of section 1237 expressly giving the right of appeal from an order denying a motion for a new trial." See, also, *Smith v. McCallum*, 36 Cal.App. 143, 172 P. 408. It should be noted that the notice of application for appeal in the case at bar was drawn in strict compliance with the provisions of section 1247 of the Penal Code, referred to in the cited case, and which was repealed by the Legislature in 1927.

We are of the opinion that the language used in said notice admits of the construction that "defendants hereby appeal" from the orders of March 11, 1935, denying their motions for new trial, especially in view of the fact that said notice includes among the various grounds relied upon "That the Court erred in overruling defendants' motion for new trial."

[3] While the record shows that defendants made motions for new trial on April 10, there is nothing in the record to show that the trial court denied such motions, and therefore the purported appeal from such order or orders is dismissed.

The motion to dismiss appeal from the orders of March 11, 1935, denying motions for new trial is denied.

We concur: HOUSER, P. J.; WHITE, Justice pro tem.



12 Cal.App.2d 622

PEOPLE v. ONE LINCOLN EIGHT,
ENGINE NO. 31,382.

Civ. 9892.

District Court of Appeal, First District,
Division 1, California.

March 24, 1936.

Rehearing Denied April 23, 1936.

Hearing Denied by Supreme Court
May 21, 1936.

I. Forfeitures ☞5

Evidence held insufficient to sustain judgment denying forfeiture of automobile on ground that it had not been used in un-

lawful transportation of narcotics (St.1933, p. 788, § 15).

2. Forfeitures ☞5

Investigation by conditional sellers of automobile used in illegal transportation of narcotics as to financial standing of buyer held insufficient investigation of responsibility, character, and reputation required by statute to preclude forfeiture of sellers' rights in automobile (St.1933, p. 788, § 15).

Appeal from Superior Court, City and County of San Francisco; Edmund P. Morgan, Judge.

Forfeiture proceeding by the People of the State of California against One Lincoln Eight, Engine No. 31382, to which Taggart & Dolan filed a claim. Judgment for claimants, and the People appeal.

Judgment reversed, and the trial court directed to enter its judgment in favor of the state.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

John H. Corning and D. J. O'Brien, Jr., both of San Francisco, for respondents.

KNIGHT, Justice.

The state appeals from an adverse judgment entered in the present proceeding which the state instituted under the State Narcotic Act (St.1929, p. 380, as amended) for the forfeiture of the automobile above described.

The act provides, among other things, that "any automobile or other vehicle used to convey, carry or transport any of the drugs mentioned in section 1 of this act * * * shall be forfeited to the State of California as in this section provided"; also that, in a proceeding instituted for the forfeiture of a vehicle so used, the claimant of any right, title, or interest therein may file an answer and prove his lien, mortgage, or conditional sales contract to be bona fide, and that such right, title, or interest was created after reasonable investigation of the responsibility, character, and reputation of the offender, and without any knowledge that the vehicle was being or was to be used for the illegal transportation of drugs, in which event he shall be entitled to the release of said automobile, provided the amount due him is equal to or in excess of the value of the automobile. Section 15, State Narcotic Act (St.

1929, p. 388), as amended in 1933, St.1933, pp. 781, 788.

The automobile in question was seized by state officers on a street in San Francisco while it was being driven by Henry Uhrig, the conditional sales vendee thereof. He failed to appear in the proceeding, but the conditional sales vendors, Taggart & Dolan, filed an answer setting forth their interest in said vehicle, and alleging, among other things, that they "made investigation as to the responsibility, character and reputation" of Uhrig, and that they had no knowledge that said automobile was being or was to be used for the illegal transportation of drugs.

The trial court found, first, that said automobile was not used in the unlawful transportation of narcotics; and, secondly, that the claimants had complied with the statutory requirements above mentioned in making reasonable investigation of the responsibility, character, and reputation of Uhrig. Judgment was entered accordingly, releasing the automobile to them. As ground for reversal the state contends that said findings are wholly contrary to the admitted facts of the case. In our opinion, the state's contention must be sustained.

[1] With respect to the issue of transportation, the evidence shows that riding with Uhrig at the time of the seizure of the car were two other persons; namely, James Quinn and a Chinaman named Quong. All three were ordered out of the car and searched. Uhrig and Quong offered no objection, and nothing illegal was found in their possession, nor were any drugs found concealed in the car itself. Quinn, however, resisted, and, after considerable difficulty, the officers found four bindles of morphine on his person. The theory upon which the claimants endeavor to uphold the trial court's finding on this issue is based on the proposition that Quinn was a mere passenger in the automobile, and that, since the narcotics were found in his possession and not concealed in the car itself nor on Uhrig, the vendee and driver thereof, it cannot be held that the car was being used unlawfully for the transportation of drugs in violation of the provisions of the section above quoted. Such theory is totally destroyed, however, by an overwhelming amount of additional uncontradicted evidence establishing beyond doubt that at the time of the seizure of said car, and for several months prior thereto, Uhrig and Quinn had been actively

engaged in the joint criminal enterprise of selling, transporting, and delivering narcotics in violation of said act, and that, when they were overtaken by state officers on the present occasion, they were actually using the automobile in carrying on such joint criminal enterprise. All of these facts were established by the uncontradicted testimony of three state officers; neither Uhrig nor Quinn being called as a witness to refute said testimony.

In this regard the evidence shows that the living quarters occupied by them were operated as a so-called narcotic "joint" which was frequented by drug addicts and peddlers; that they took orders over the phone for delivery of drugs, and afterwards made such deliveries by automobile; that they covered a regular route daily in San Francisco, selling and making deliveries to addicts and peddlers at certain hotels, rooming houses, garages, and other places; that Uhrig drove the car while Quinn carried and delivered the drugs; and that on this particular day they had just left their living quarters together in said automobile and were starting out on one of their daily deliveries when overhauled by the state officers and their automobile seized. Furthermore, the evidence shows without contradiction that immediately following the seizure the state officers searched the living quarters in the presence of Uhrig and there found secreted in various places large quantities of narcotics. It was concealed in a coffee can, a razor box, a box of "wheaties," and a large quantity was found under the doorstep. The officers also unearthed various kinds of narcotic paraphernalia including "hypo" needles, and the paper which had been used to wrap the bindles of narcotics found in Quinn's possession; and Uhrig admitted having purchased the paper. The evidence further shows that, while the officers were searching the premises, several phone calls came from persons ordering drugs. One of the officers answered the phone, and, pretending that he was Uhrig, received the orders and ascertained the names and addresses of those calling. He informed them that deliveries would be made at once. One of the persons so calling identified himself as "Tommie," and soon afterwards he phoned a second time, stating that "something must have happened to Quinn"—that he had not yet "showed up with the stuff," and requested Uhrig to bring it over at once, that he was sick. It was also established that

previously Uhrig had been convicted and imprisoned for unlawfully peddling narcotics.

At the conclusion of the foregoing evidence the court remarked: "The question arises whether the association of Uhrig and Quinn on that day [of the seizure] and on former occasions justifies the deduction that they were engaged in transporting these narcotics, that they were jointly engaged in that enterprise, and so forth. There is sufficient evidence to justify that deduction." But in its written decision filed subsequently the court found specifically that on the day in question said automobile was not being used in the unlawful transportation of narcotics contrary to the force and effect of said State Narcotic Act. Manifestly, the undisputed facts above narrated prove to the contrary.

None of the federal cases cited and relied on by claimants in support of their theory are in point, nor is the law declared therein controlling here, for the reason that those cases involved the construction of federal revenue laws, the provisions of which are essentially different from the broad terms of the transportation clause of the State Narcotic Act.

[2] With respect to the second issue, Miss Dolan, who consummated the sale with Uhrig, frankly admitted that no effort whatever was made to investigate Uhrig's character or reputation; that she was interested only in the question of his financial responsibility to pay for the car; and that she made but three such inquiries, one from Uhrig's bank prior to the consummation of the sale and delivery of the car, and two afterwards in checking references previously given her by Uhrig; that she was informed by one of said references that Uhrig was "a good old soak" and that the other told her he was "a very fine gentleman." Such was the extent and the result of her investigation. When the state's attorney proceeded to interrogate her as to what effort, if any, she made to investigate Uhrig's character or reputation, the trial court said: "I wonder if that makes any difference, counsel. The lady says all she investigated was his financial standing, and she knew nothing about him, whether he was an ex-convict or a thousand things. She knew nothing about that and didn't inquire about it. Why not let it stand at that particular point, that she made no inquiry regarding his character at all, but only his financial standing." Under

the ruling in the recent case of *People v. One Harley-Davidson Motorcycle* (Cal. Sup.) 53 P.(2d) 970, such an investigation is legally insufficient to conform to the statutory requirements of section 15 of said act.

For the reasons stated, the judgment is reversed; and, exercising the power conferred by section 956a of the Code of Civil Procedure (a jury trial herein having been waived), this court finds from the undisputed facts disclosed by the record that at the time of the seizure of the automobile in question it was being used unlawfully for the transportation of narcotics in violation of the State Narcotic Act; also that, prior to the creation of the rights of the claimants under the conditional sales contract pursuant to which the automobile was sold, no reasonable investigation was made by the claimants of the character and reputation of the conditional sales vendee. Therefore the trial court is directed to enter its judgment accordingly, in favor of the state, for the forfeiture of said automobile.

We concur: TYLER, P. J.; CASHIN, J.



12 Cal.App.2d 478

ABBOTT v. INDUSTRIAL ACCIDENT COMMISSION et al.
Civ. 5567.

District Court of Appeal, Third District,
California.

March 16, 1936.

1. Master and servant ⇨419

Insane person's guardian, filing petition to reopen Industrial Accident Commission's award of compensation for injuries to ward and award him additional compensation for further disability from insanity 3 years, 2 months, and 20 days after qualifying as guardian, held barred by lack of diligence from maintaining such proceeding.

2. Insane persons ⇨100

Insanity of party appearing before judicial tribunal without counsel or guardian is ground for vacating or reopening judgment or decree improvidently rendered against him on that account.

3. Insane persons ☞100

Application to vacate or reopen judgment or decree against insane person, appearing before judicial tribunal without counsel or guardian, must be made with due diligence and within reasonable time after his restoration to competency or appointment of guardian to represent him.

4. Master and servant ☞419

Workmen's Compensation Act does not entitle injured employee to file petition with Industrial Accident Commission to reopen award of compensation and award him additional compensation for further disability because of insanity at any time within 245 weeks after appointment of guardian of his estate (St.1931, p. 2372, § 11 (c, d).

Proceeding by William Abbott, an insane person, by Walter B. Abbott, as guardian of his estate, for a writ of certiorari to review an order of the Industrial Accident Commission denying the guardian's application to reopen an award of compensation to the ward for injuries received in the course of his employment by the Southern Pacific Company.

Order affirmed.

Warren H. Atherton, of Stockton, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

This is a petition for a writ of certiorari to review an order of the Industrial Accident Commission refusing to reopen an award of compensation for injuries received in the course of employment. The application to reconsider the award was made on the ground of new and further disability resulting in the permanent insanity of the employee. The application was denied on the ground of laches, more than three years having elapsed after the appointment of a guardian before the rehearing was sought.

William Abbott was employed by the Southern Pacific Company at Sacramento. February 23, 1929, he received slight head and chest injuries in the course of his employment while handling a sheet of steel plate. The company was self-insured. Upon application therefor the commission

adopted findings and made an award in favor of the claimant December 30, 1929, for "temporary partial disability" of \$5.93 per week while the disability lasted. A petition for rehearing was denied February 28, 1930. On petition therefor and after formal hearing the commission made an order terminating the liability of the company from and after December 24, 1930. Pursuant to a petition therefor the commission subsequently approved an agreement between the parties to compromise the claim for liability in consideration of the payment of a further sum of \$725. April 10, 1931, the claimant received the last-mentioned sum of money and executed a release from all further liability of the company on account of the injuries sustained. March 24, 1932, he was adjudged to be insane and committed to the state hospital for the insane at Stockton, where he still remains. Upon proceedings therefor this petitioner, Walter B. Abbott, was appointed and qualified July 15, 1932, as guardian of the estate of the claimant, William Abbott, an insane person. October 5, 1935, the guardian first petitioned the commission to reopen the proceedings and award the claimant additional compensation for new and permanent disability, to wit, insanity, which resulted about February 23, 1929, from the injuries sustained. It was alleged the former proceedings were void on account of the incompetency of the claimant, who was not represented therein either by counsel or by a guardian. This application was denied by the commission October 10, 1935. A petition for rehearing of the last-mentioned application was also subsequently denied. The present petition for a writ of review was then filed in this court.

[1] The only question which is involved in this proceeding is whether the petitioner was barred from maintaining his application to reopen the award of the Industrial Accident Commission for compensation in his behalf for new and further disability on the ground of the alleged insanity of the claimant by failing to file the petition therefor within statutory or a reasonable time after the appointment of his guardian; 3 years, 2 months, and 20 days elapsed from the qualification of the guardian of the claimant before the petition to reopen the proceedings before the commission was filed. We are of the opinion this lapse of time constitutes a lack of diligence and that the petitioner is therefore barred from

maintaining the proceeding to reopen the award of the commission.

[2, 3] The legal disability of a claimant caused by insanity who appears before a judicial tribunal without counsel or a guardian and against whom a judgment or decree is improvidently rendered on that account is a ground for vacating or reopening the judgment or decree. *Western Pipe & Steel Co. of California v. Industrial Accident Commission*, 79 Cal.App. 215, 249 P. 34. That application, however, must be made with due diligence and within a reasonable time after the petitioner is restored to competency or after a guardian is appointed to represent him.

[4] The petitioner contends that section 11, subdivisions (c) and (d), of the Workmen's Compensation, Insurance and Safety Act of California (St.1917, p. 831, 841, and amendments thereto [St.1931, p. 2372]), entitled him to file his petition for new and further disability at any time within 245 weeks from the time of the appointment of the guardian. We believe the statute does not bear that construction. These subdivisions of section 11, upon which the petitioner relies, read in part:

"(c) The payment of compensation, or any part thereof, or agreement therefor, shall have the effect of extending the period within which proceedings for its collection may be commenced, six months from the date of the agreement or last payment of such compensation, or any part thereof, or the expiration of the period covered by any such payment; provided, however, that nothing contained in this section shall be construed to bar the right of any injured employee to institute proceedings for the collection of compensation within two hundred forty-five weeks after the date of the injury upon the grounds that the original injury has caused new and further disability; and the jurisdiction of the commission, in such cases, shall be a continuing jurisdiction at all times within such period.

"(d) If an injured employee, or in the case of his death, one or more of his dependents, *shall be* under twenty-one years of age or *incompetent at any time when any right or privilege accrues* to such person under the provisions of this act, a *general guardian*, appointed by the court, or a guardian ad litem or trustee appointed by the commission or a commissioner *may*, on behalf of any such person, *claim and exercise any such right or privilege* with the

same force and effect as if no such disability existed; *and no limitation of time provided by this act shall run against any such person* under twenty-one years of age or *incompetent unless and until such guardian or trustee is appointed.*"

It will be observed from that portion of the preceding subdivision which we have emphasized by italicizing the language that the 245 weeks which are allowed for presenting to the commission a claim for "new and further disability" does not begin to run from the time of the appointment of his guardian. The act provides that "no limitation of time * * * *shall run* against any such person * * * unless and until such guardian or trustee is appointed." This language means that the limitation of time within which the claim may be made shall not "run out" or expire until after the guardian has been appointed. If the Legislature had intended to provide that in the event of incompetency the claimant shall be entitled to 245 weeks after the appointment of a guardian within which to file his claim, it could have very easily and definitely so declared by saying that "no *limitation of time* * * * *shall begin to run*" until after the appointment of the guardian. The very use of the term "*limitation of time*" which appears in the preceding statute implies that the expiration of the period of time for filing the claim was not to run or terminate until the guardian was appointed, after which a reasonable time would be allowed in which to make his application. It would seem to be unreasonable to hold that an employee would be entitled to 245 weeks, or 4 years, 9 months and 1 week, in which to file his claim for new and further disability after the appointment of a guardian, regardless of when his incompetency developed. The facts of the present case illustrate the unreasonableness of such construction. The claimant was not adjudged incompetent until 3 years after his accident occurred. In the meantime he was repeatedly examined and he was allowed compensation. His disability was determined to have terminated. A subsequent payment of \$725 was approved, and he signed a receipt therefor and a complete release and satisfaction of all claims on account of his injuries. His guardian was then appointed, after which 3 years and 3 months elapsed before the present claim was filed. In other words, 6 years and 7 months passed after the accident occurred before the claim for compensation for fur-

ther disability was made. The 245 weeks "after the date of the injury" expired October 28, 1933. To hold that the employee was entitled to 245 weeks in addition thereto would certainly discourage the exercise of diligence and render it very difficult to secure legitimate evidence to rebut a claim on account of the possible death or absence of material witnesses. In view of the language employed in the statute, we are satisfied the Legislature did not intend to confer such an unreasonable time in which to file the claim.

The respondent asserts that the reasonable time within which such a claim may be filed for compensation for further disability in the event of the incompetency of the employee is fixed by statute at 6 months after the appointment of the guardian. There may be some uncertainty regarding the application of that statute, and it is unnecessary for this court to determine that question. We are satisfied that under the circumstances of this case the lapse of 3 years and 3 months after the appointment of the guardian before the claim for further disability was filed is not reasonable, and that his claim was barred and the petition was therefore properly denied.

In the case of *Gouanillou v. Industrial Accident Commission*, 184 Cal. 418, 193 P. 937, 938, the claimant, who was a minor, was not represented by a guardian in the proceeding to secure compensation for injuries sustained by her in the course of her employment. She petitioned for a rehearing thereof, which was denied; 2 days after the hearing was terminated she reached the age of 21. Within 6 months thereafter her petition for a rehearing was filed. The court there held that: "The right of a minor to disaffirm an adjudication of his rights by a judicial tribunal obtained in a proceeding in which he has not been duly represented as provided by law continues *until barred by laches* after the minor has attained the age of majority. * * * Therefore, if the employee was a minor, under the terms of the Workmen's Compensation Act, at the time of the first application and hearing, since she was not represented therein by a guardian, she had the right, incident to minority, of disaffirming the award of the commission rendered in such proceeding *within a reasonable time after reaching the age of majority.*"

This rule was also announced in the case of *Fogarty v. Department of Industrial Relations*, 206 Cal. 102, 273 P. 791. The

rule with respect to the limitation of time within which a minor may apply to the commission for compensation for further disability is also made applicable to incompetent persons under the provisions of section 11, subdivision (d), of the Workmen's Compensation Act.

The case of *Western Pipe & Steel Co. of California v. Industrial Accident Commission*, 79 Cal.App. 215, 249 P. 34, 36, upon which the petitioner relies in support of his contention that he is entitled to 245 weeks from the time of the appointment of the guardian in which to present his claim, may be readily reconciled with the preceding authorities and the construction which we have heretofore placed upon the statute. In that case Fitzgerald was injured in the course of his employment. On August 31, 1922, his application for compensation was filed with the commission. October 27, 1922, an award was made in his behalf. Subsequently he became incompetent. August 19, 1924, a guardian of his estate was duly appointed. January 10, 1925, his guardian applied to the commission to reopen the proceedings to secure additional compensation for "new and permanent disability." That petition was granted, and he was awarded additional compensation. Upon application for a writ of certiorari, that award was affirmed. The court said that it was a question as to whether the petitioner had exercised diligence in seeking to reopen the proceedings. In determining that the petitioner had acted with due diligence, the court merely said: "In the instant case the question of diligence is covered by the provisions of the statute." The court then quoted subdivision (d) of section 11 of the Workmen's Compensation Act, and does say: "The time within which he must act is by the terms of the statute limited only as from the date of the guardian's appointment." But it will be observed the court does not say what that limitation of time consists of. The opinion does not state that the claimant is entitled to 245 weeks after the appointment of the guardian within which to petition for a rehearing. It will be observed that the petition was filed in that case in just 4 months and 21 days after the appointment of the guardian. Unquestionably that was an exercise of due diligence, whether the correct construction of the statute of limitations under such circumstances limits the time to 6 months from the appointment of the guardian or allows merely a reasonable time thereafter to

be determined by the circumstances of each particular case.

For the reason that the petition to reopen the proceedings before the commission in the present case was not filed until more than 3 years had elapsed after the appointment of the guardian, we are of the opinion the remedy was barred for lack of diligence, and the petition was therefore properly denied.

The order is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.



12 Cal.App.2d 403

KEEFER v. PORTERFIELD.

Civ. 9620.

District Court of Appeal, Second District,
Division 1, California.

March 12, 1936.

1. Appeal and error ⇨1010(1)

Evidence *held* not to justify reversing judgment on note on ground that wife received no consideration for note executed by husband and wife for price of ranch.

2. Stipulation ⇨18(7)

Recovery on note *held* not precluded on ground of lack of evidence that plaintiff was owner, in view of stipulation that note had been transferred to plaintiff after maturity subject to defenses against transferor, which was made without reservation.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by Jerome Keefer against Margaret S. Porterfield. From a judgment for plaintiff, defendant appeals.

Affirmed.

John J. Selover and Frank McNulty, both of Long Beach, for appellant.

Denio, Hart, Taubman & Simpson, of Long Beach, for respondent.

WHITE, Justice pro tem.

Defendant has appealed from a judgment rendered against her for \$21,022.96 and

costs in an action upon a promissory note executed by defendant Margaret S. Porterfield and her husband, W. L. Porterfield, in favor of Harry A. Reidy, dated July 8, 1929, for \$16,500, due one year after date, and assigned by Reidy to plaintiff Jerome Keefer. The action was dismissed as to the defendant W. L. Porterfield because he was out of the state and it was impossible to obtain personal service of process upon him.

At the trial it was stipulated that the promissory note which was the subject of this action had been transferred to plaintiff Keefer after maturity, subject to any defenses good against the original payee, Harry Reidy.

On the appeal now before us appellant contends that there has been a total failure of consideration, and that appellant Margaret S. Porterfield received nothing whatever in consideration for the making and execution of the promissory note in question; that the findings and judgment lack support in the evidence; and that the evidence is insufficient to show that plaintiff is the owner of the note.

[1] For a consideration of the grounds upon which the judgment is assailed, a statement of the facts, as disclosed by the evidence, becomes necessary. In 1926, Harry A. Reidy (now deceased) owned a ranch at Hemet. A short time before October 8, 1926, Reidy entered into negotiations with W. L. Porterfield (husband of appellant here) for the sale of the Hemet ranch. However, the negotiations finally terminated in a deal whereby Reidy deeded the Hemet ranch to Porterfield and Porterfield delivered to Reidy a \$25,000 promissory note, executed by himself and wife (the appellant herein). Reidy also gave to Porterfield the sum of \$12,500, and the latter delivered to Reidy a \$12,500 note and mortgage, dated October 8, 1926, also executed by himself and wife, upon the Hemet ranch.

With the ranch in his possession, and Reidy holding the unsecured note for \$25,000 and the secured note for \$12,500, Porterfield then turned the ranch over to the Prudential Mortgage Company, subject not only to the aforesaid \$12,500 note, but also to a second mortgage, the nature and amount of which is not disclosed by the evidence. Then, about June, 1928, Porterfield contacted Reidy, advising the latter that he had tried to foreclose the second mortgage on the ranch as against the mortgage company (to whom he had deeded the ranch),

but that the mortgage company was defending against such foreclosure. Porterfield asked Reidy to foreclose the \$12,500 first mortgage, so as to eliminate the mortgage company, as well as the second mortgage, thereby putting Porterfield back where he was before he had put on the second mortgage and sold the property. Porterfield offered to pay the costs of these foreclosure proceedings and to give a new note, signed by himself and wife (the appellant herein), for \$12,500, in lieu of the original \$12,500 note, which of necessity must be delivered into court for cancellation when the first mortgage was foreclosed. About this time Reidy assigned the original \$12,500 note and mortgage to one Comfort (his son-in-law), and the latter, in September, 1928, started an action to foreclose the original \$12,500 mortgage. A judgment was rendered foreclosing the mortgage, and pursuant thereto the foreclosure sale was held June 15, 1929. On July 17, 1929, Porterfield wrote to Comfort, agreeing to pay in full the \$25,000 note originally executed in favor of Reidy, and also to pay in full the \$12,500 mortgage against the ranch, plus expenses incurred in the foreclosure proceedings, upon the understanding that when such payments were made the ranch would be deeded to Porterfield free and clear of incumbrances, except taxes and current bills; and further promised in his letter to "expedite the payments as far as possible." It further appears that payments were made on the principal of the \$25,000 note which reduced it to \$16,500. On July 8, 1929, a new note for the remaining unpaid balance of \$16,500 was executed by Porterfield and appellant herein. The Porterfields made two payments of interest on the \$16,500 renewal note, doing this as late as October, 1929. Reidy obtained the final commissioner's deed on foreclosure June 17, 1930, there having been no redemption. The evidence indicates that the agreement between the parties was that if the Porterfields paid both the renewal note for \$16,500 and the new note for \$12,500 at the end of the period of redemption, Reidy was to deed the property back to the Porterfields. However, the Porterfields did not make such payments, and finally Reidy deeded the ranch to his wife. Later, Mrs. Reidy quieted the title to the ranch as against the Porterfields through a stipulated judgment in the superior court. The present suit is

to recover on the renewal note of \$16,500, and does not involve the \$12,500 note. From the evidence, therefore, we find that the Porterfields in 1926 obtained clear title to the ranch from Reidy. They then borrowed \$12,500 in cash and gave a mortgage on the ranch to secure it. Porterfield then sold the ranch. He then asked Reidy to foreclose the \$12,500 mortgage and buy the ranch in, thus wiping out the one to whom Porterfield had sold the ranch. The Porterfields then gave a renewal note for the balance of \$16,500 on the original purchase price note of \$25,000, and also executed a \$12,500 note to hold in lieu of the one being foreclosed, agreeing that he (Porterfield) would pay them both when the time for redemption was up. However, he paid nothing whatever, and we find Reidy has the ranch back, with no part of his \$12,500 mortgage paid, and only a comparatively small part of the original \$25,000 mortgage paid.

In the face of these facts it seems to us that it would tax one's credulity and do violence to reason to declare that there was either a failure or a want of consideration, in so far as this appellant is concerned.

A mere recital of the aforementioned evidence is a complete answer to appellant's contention that the findings are not supported by the evidence, for the findings are predicated upon the evidence herein set forth, and a comparison of the evidence with the findings made conclusively shows that the latter finds abundant support in the former.

[2] Appellant's final claim, that there is no evidence to show that plaintiff is the owner of the note, falls before a recital of the stipulation entered into between the parties at the trial: That the promissory note in question had been transferred to plaintiff, Jerome Keefer, after the maturity thereof, subject to any defenses good against Harry Reidy. This stipulation, made without reservation, relieved the plaintiff from the necessity of introducing further evidence as to plaintiff's ownership of the note.

For the foregoing reasons, the judgment is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.

12 Cal.App.2d 543

TATONE v. CHIN BING et al.

Civ. 1315.

District Court of Appeal, Fourth District,
California.

March 19, 1936.

1. Damages ☞105

Proper measure of damages for destruction of personalty is reasonable market value of property destroyed.

2. Damages ☞174(1)

In action for destruction of truckload of produce, evidence of price paid for produce at wholesale market on day of its destruction *held* admissible on question of damages.

3. Damages ☞139

Evidence that truckload of produce had been purchased for \$150 at wholesale market shortly before its destruction *held* to support judgment for \$150 for its loss.

Appeal from Superior Court, Fresno County; Arthur Allyn, Judge.

Action by Frank Tatone against Chin Bing and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Wakefield & Hansen, of Fresno, for appellants.

Lucius Powers, Jr., and Barbour, Kellas & Backlund, all of Fresno, for respondent.

MARKS, Justice.

This is an appeal from a judgment awarding plaintiff damages for injury to personal property. An automobile of defendant Bing struck a truck of plaintiff loaded with fruit and vegetables which were destroyed in the accident. The trial court allowed plaintiff damages in the sum of \$150 for the loss of the fruit and vegetables. The correctness of the award of this item of damage is the sole question presented on this appeal.

The agent of plaintiff had purchased the fruit and vegetables at a cost of \$150, at a wholesale market in Fresno early on the morning of the accident. He was proceeding to his markets in the west part of Fresno county when the accident occurred. Over the objection of defendants, plaintiff and his agents were permitted to testify as

to the cost of the fruit and vegetables. Defendants maintain that their objections to this evidence should have been sustained and that there is no proper evidence in the record as to the plaintiff's damage caused by the destruction of the personal property in question here.

[1] There can be no question but that the proper measure of damage in a case of this kind is the reasonable market value of the personal property destroyed. *Murray v. Southern Pacific Company*, 112 Cal.App. 150, 296 P. 667. In an action for breach of contract to deliver personal property, it has been held that evidence of the price paid in the open market for like property to supply deficiencies in the delivery was not material to plaintiff's case in proving damage. *Fairchild, etc., Co. v. Southern Refining Co.*, 158 Cal. 264, 110 P. 951. See, also, *Mattern v. Alderson*, 18 Cal.App. 590, 123 P. 972. In *Sanders v. Austin*, 180 Cal. 664, 182 P. 449, it was held that, while the evidence of the cost price of an automobile in use by the owner for several months may not be admissible, still if such evidence be admitted without objection it furnished some evidence of value.

The case of *Angell v. Hopkins*, 79 Cal. 181, 21 P. 729, 730, was an action for the recovery of personal property, or its value, in case delivery could not be had. The court there said: "It is contended that there was error in admitting evidence as to what the property cost the plaintiff. It is quite true that the measure of damages is the value of the property at the time of the conversion, with certain additions in certain cases. Civil Code, § 3336. But in arriving at such value it was proper to take into consideration what the property cost as a circumstance to aid at arriving at its value at the time in question. *Luse v. Jones*, 39 N.J.Law [707] 708; *Jones v. Morgan*, 90 N.Y. [4] 10 [43 Am.Rep. 131]; *Norton v. Willis*, 73 Me. 580; *Small v. Pool*, 8 Ired. [30 N.C.] 47; *Boggan v. Horne*, 97 N.C. 268, 2 S.E. 224; *Rawson v. Prior*, 57 Vt. [612] 615; *Ford v. Smith*, 27 Wis. [261] 267; *Roberts v. Dunn*, 71 Ill. [46] 50." See, also, *Greenebaum v. Taylor*, 102 Cal. 624, 36 P. 957.

It has also been held that the price at which a thing can be sold at public sale, or in the open market, is some evidence of its market value. *Yukon, etc., Co. v. Gratto*, 136 Cal. 538, 69 P. 252; *Meyer v. McAllister*, 24 Cal.App. 16, 140 P. 42; *Moore*

v. Maryland Casualty Co., 100 Cal.App. 658, 280 P. 1008.

In *San Diego Water Co. v. San Diego*, 118 Cal. 556, at page 568, 50 P. 633, 38 L.R. A. 460, 62 Am.St.Rep. 261, the rule is announced that the judicial test of market value depends upon the fact that the property in question is marketable at a given price, which in turn depends upon the fact that sales of similar property have been, and are being, made at ascertainable prices.

In *Quint v. Dimond*, 147 Cal. 707, 82 P. 310, it was held competent to prove market value in the nearest market.

[2,3] In the instant case the fruit and vegetables were purchased in the public wholesale market nearest the place of destruction a short time before the accident. The price paid was the wholesale price of the articles asked in this market. No contrary evidence was introduced by defendants. Under these circumstances, the evidence bore upon the reasonable market value of the fruit and vegetables, and sustains the judgment.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.



12 Cal.App.2d 634

MacDOWELL v. CITY OF LONG BEACH.
Civ. 9685.

District Court of Appeal, Second District,
Division 1, California.

March 24, 1936.

Hearing Denied by Supreme Court
May 21, 1936.

1. Licenses ⇐39

Statute providing that any person might furnish building plans for others after informing them that he was not a certified architect *held* not to authorize nonresident architect, who had informed his employer that he held no architect's certificate, to prepare plans and data for building to be erected in state (St.1901, p. 644, § 5).

2. Licenses ⇐39

Statute prohibiting practice of architecture without a certificate but permitting any person to furnish building plans who gave

notice of lack of certificate *held* not to prohibit nonresident architect who gave such notice from supervising construction of building, since statutory term "practice of architecture" is synonymous with "furnishing plans or other data for buildings" (St.1901, p. 644, § 5).

"Architect" is one who makes plans and specifications for a building, and superintends its construction.

[Ed. Note.—For other definitions of "Architect" and "Practice of Architecture," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by J. Harold MacDowell against the City of Long Beach, wherein defendant filed a cross-complaint. Judgment for plaintiff, and defendant appeals.

Affirmed.

Nowland M. Reid, City Atty., and Edmund J. Callaway, Deputy City Atty., both of Long Beach, for appellant.

Ivan L. Hiler, Herman Tepp, and Jay J. Stein, all of Hollywood, for respondent.

SHINN, Justice pro tem.

Appeal by defendant from a judgment in favor of plaintiff, in an action to recover fees for architectural services.

Plaintiff, a nonresident architect, was employed by the city of Long Beach, under written contract, to prepare plans and specifications for, and to supervise the construction of, a municipal auditorium. His compensation was fixed at \$84,000, of which \$12,932.34 sued for herein, remains unpaid. The city, by answer and cross-complaint, alleged negligence in the preparation of the plans and specifications, and sought recovery of \$30,621.27, as damages. Plaintiff's claim was allowed; the city was awarded an offset of \$7,832.50 as damages, and plaintiff was given judgment for the difference in the sum of \$5,108.77.

Plaintiff held no certificate from the state board of architectural examiners. The court found that some two weeks prior to the date of the contract, plaintiff informed the city manager of defendant that he held no such certificate.

The statute regulating the practice of architecture, at the time of the contract

(Stats.1901, p. 641, as amended by Stats. 1903, p. 522 [adding section 7 to act]), read as follows: "Sec. 5. After the expiration of six months from the passage of this act, it shall be unlawful, and it shall be a misdemeanor, punishable by fine of not less than fifty dollars nor more than five hundred dollars, for any person to practice architecture without a certificate in this state, or to advertise, or put out any sign or card, or other device which might indicate to the public that he was an architect; provided, that nothing in this act shall prevent any person from making plans for his own buildings, nor furnishing plans or other data for buildings for other persons, provided the person so furnishing such plans or data shall fully inform the person for whom such plans or data are furnished, that he, the person furnishing such plans, is not a certificated architect; provided, that nothing in this act shall prevent the employment of an architect residing out of the State of California, to prepare plans and specifications for buildings or other structures within the state, conditioned, he shall present satisfactory evidence to the board of the district in which the structure is to be erected, that he is a competent architect, when such board shall issue to such architect a temporary certificate for such employment, upon the payment of a fee of five dollars." St.1901, p. 644, § 5. See Gen.Laws 1931, Act 486.

As one of its defenses, the city relied upon its claim that the contract was illegal because plaintiff was unlicensed. This is the sole point urged upon appeal.

The questions are the following: First, under the statute was it unlawful for a non-resident architect to prepare plans and data for a building to be erected in this state, when he had no full or temporary certificate issued in this state but informed the person employing him, of that fact before accepting the employment or commencing the work? Second, was it unlawful for an architect under such circumstances to supervise the construction of the building and do other work incidental thereto?

[1] The city contends that while a resident, not an architect, could lawfully prepare plans and other data for others after informing them that he held no certificate, yet a nonresident architect could not do so. The argument is based upon the provision of the statute allowing a nonresident architect, upon proof of his qualifications, to obtain a temporary certificate; it is said that

this provision is the only one applying to nonresident architects; that they are therefore placed in a class by themselves and have not the rights given to others who are not architects. Under this construction, it would be possible for either a resident or nonresident, who was not an architect, to lawfully practice architecture if he first informed his clients that he was unlicensed, but this privilege would be denied a non-resident architect. We are unable to give the statute this construction. A nonresident architect is given the temporary privilege to practice architecture as a certified architect, but this fact does not exclude him from the class of unlicensed persons who may lawfully prepare plans and data after first making known the fact that they have not been certified as competent architects. The statute plainly says that any person may do so, and it cannot be so construed as to exclude nonresidents. There could be no good reason why this right should be limited to residents of the state and to non-residents who are not architects, and there is ample reason for believing that no such unreasonable and unsupportable discrimination was intended. The act was construed in *Ex parte McManus*, 151 Cal. 331, 90 P. 702, as applying to all unlicensed persons.

[2] Under the next point it is claimed by the city that even though plaintiff could lawfully prepare plans and data he could not perform the other services contracted for unless he held either a full or temporary certificate. It was provided in the contract that the architect should draft all forms of proposals and contracts, issue certificates of payment, keep accounts and have general administration of the business and supervision of the work, and all architectural and engineering services performed under the contract, and he was to completely inspect the work in order to guard the owner against defects and deficiencies in the work of the contractor.

Appellant's contention is that an unlicensed person may do nothing more than prepare plans and data, and that as plaintiff performed other services which, it is claimed, constituted the practice of architecture, and as the contract was entire and called for services he could not legally perform, that it was void. The argument assumes that supervision of construction of a building is the practice of architecture regulated by the statute. While architects, as a common practice, supervise construction, which work they may undertake, as plain-

tiff did, in connection with the furnishing of plans and specifications, it does not result that such supervision is the practice of architecture. Not every one who supervises construction is an architect, nor is he thereby practicing architecture. "One who makes plans and specifications for a building, and superintends its construction, is an 'architect.' In fact, the rule most commonly applied does not embrace the duty of supervision." *Payne v. De Vaughn*, 77 Cal. App. 399, 246 P. 1069, 1071. When the statute refers to the "practice of architecture" and to "furnishing plans or other data for buildings," the former expression is not used in any broader sense than the latter; in other words, the preparation of plans and data is used as synonymous with "practice of architecture." In allowing an unlicensed person under certain conditions to prepare plans and data, the statute does not expressly grant him the right to supervise construction, but neither does it withhold that right, nor could it be arbitrarily withheld from him while all others were allowed to exercise it.

Under the facts established, plaintiff's services in preparing plans and data were expressly authorized by the law; his services, consisting of supervision of construction, were not prohibited.

The judgment is affirmed.

We concur: HOUSER, P. J.; DORAN, J.



12 Cal.App.2d 533

CRAWFORD v. SUMMERS.

CRAWFORD v. CRAWFORD.

Civ. 5451.

District Court of Appeal, Third District,
California.

March 19, 1936.

I. Marriage Ⓒ60(7)

Evidence held to justify decree ordering reconveyance of property acquired through marriage on ground that husband was induced to marry through wife's fraudulent representation that she was divorced from former husband.

2. Cancellation of Instruments Ⓒ24(1)

In action to cancel conveyance acquired through fraud of grantee, no offer to restore is necessary where nothing of value has been received by grantor.

3. Marriage Ⓒ63

Where husband in equitable proceeding secured reconveyance of wife's interest in property acquired in name of husband and wife as joint tenants, in reliance on wife's representation that she was unmarried at time of supposed marriage to husband, husband held not required to make restoration to wife, who had not obtained divorce from former husband, since wife parted with nothing of value.

Appeal from Superior Court, Los Angeles County; Bertin A. Weyl, Judge.

Action by James L. Crawford against Hazel K. Summers, also known as Katherine H. Summers, and sometimes called Hazel K. Crawford, wherein the defendant filed a cross-complaint, and action by Hazel K. Crawford, also known as Hazel K. Summers, against James L. Crawford. From adverse judgments, Hazel K. Summers appeals.

Judgments affirmed.

Crail, Shutt & Crail, of Los Angeles, for appellant.

Samuel H. French and Hyams & Himrod, all of Los Angeles, for respondent.

PER CURIAM.

These causes are consolidated on this appeal.

The first is an appeal by the defendant from a decree ordering a reconveyance of property fraudulently acquired by her through marriage under false representations that she had been divorced from a former husband.

The second is an appeal from a judgment refusing to grant partition of real and personal property.

Owing to the fact that the cross-complaint in the first cause seeks the same relief involved in the second, all questions are presented in the cause first appealed. The matter has been briefed upon this theory, and this opinion will follow the same course.

The parties to the actions went through the legal form of a marriage ceremony in

August, 1930. Prior to the ceremony, defendant told plaintiff that she had been married to one Summers, but had obtained a divorce from him in Chicago. About one month prior to the filing of this action plaintiff discovered that an interlocutory decree of divorce from Charles Summers had been granted defendant in Los Angeles county, and that no final decree of divorce had ever been entered in said action. When defendant appeared at the office of the county clerk of Orange county, in connection with the application for a marriage license, she stated that she had previously been married to one Charles M. Summers, but had been divorced. Plaintiff testified that shortly before their marriage ceremony was performed defendant told him she was divorced.

During the time they were living together, after said ceremony, plaintiff caused to be purchased certain parcels of real property, shares of corporate stock, and an automobile. The consideration for these purchases was furnished entirely by plaintiff. Title was taken in the names of plaintiff and defendant as joint tenants. Plaintiff also loaned defendant \$1,200, and took her note for that amount. This note was destroyed by plaintiff before the parties separated.

Several causes of action were set forth in the complaint, though they were not separately stated. The trial court found for plaintiff on only one cause of action—that which charged defendant with falsely and fraudulently representing and stating to plaintiff that she had been divorced. The court found that "she (defendant) made such representations as to her having been divorced from said Summers by positive assertion, in a manner not warranted by her information, and that the same was not true." It is further found that plaintiff believed such representations and consented to marry on the strength thereof; that the transfer of said property to defendant was made on the belief that she was his lawful wife. A decree was entered declaring the marriage null and void; that defendant held said property in trust for plaintiff, and directing her to reconvey the same to plaintiff. The decree also reinstated the \$1,200 note which plaintiff had destroyed, and gave him judgment for the amount of the same. Relief was denied defendant on her cross-complaint for partition. In the second cause brought by the wife for par-

tition, the judgment was that plaintiff take nothing.

[1] The only contention made by appellant which has any semblance of merit is the failure of the evidence to sustain the findings. An examination of the record discloses that the trial court had ample justification in the evidence for its finding that plaintiff was induced to marry defendant through her fraudulent representation that she was divorced. She told plaintiff that she was divorced in Chicago, whereas she was granted an interlocutory decree in Los Angeles county. In making the application for marriage, she stated to the county clerk in the presence of plaintiff, that she had been divorced. In her verified answer she set up the defense that the marriage "was entered into in good faith and relying upon the belief that her previous marriage had been dissolved by a final decree of divorce, and that she was within her legal rights in entering into a subsequent marriage." At the trial it was stipulated that, if her former attorney in the divorce action against Summers were called as a witness, he would testify as follows: "That after he had secured the interlocutory decree he told Mrs. Summers (defendant herein) that he would not enter the final decree or cause it to be entered until instructed to do so by her; that she told him she had no intention of remarrying and when she wanted the final decree entered she would notify him, and that he had never heard from her since." Confronted with this testimony, defendant took the position that she was under the impression "that after the year had passed, it (the final decree, presumably) was automatically entered." In addition to evidence of this character, the trial court had an opportunity to observe the conduct and demeanor of defendant while on the witness stand, and we are not at liberty to disturb this finding of fact under such circumstances.

[2,3] It is contended that the court did not place the wife in "status quo," this being an equitable proceeding. It is not contended that the wife, when she received the property, parted with anything of value. No suggestion is made as to what should be restored. Plaintiff had the right to assume that he was receiving the love and affection of a lawful wife. This he did not receive. In an action to cancel a transfer of property acquired through the fraud of the grantee, no offer to restore is necessary

where nothing of value has been received by the grantor. *Abney v. Belmont Country Club Properties*, 100 Cal.App. 12, 16, 279 P. 829. This is a familiar rule which requires no further authorities. The point is without merit.

Several other contentions are made as grounds for reversal. We have carefully examined them, and find that they lack any substantial merit.

The judgment in each cause is affirmed.



12 Cal.App.2d 468

GIBB v. CLEAVE et al.

Civ. 9980.

District Court of Appeal, First District,
Division 2, California.

March 16, 1936.

Hearing Denied by Supreme Court
May 14, 1936.

1. Automobiles ⇨244(50)

Testimony of pedestrian, struck by automobile as he was crossing arterial highway, that he had drunk but a glass and a half of wine before accident, *held* not evidence of nonintoxication and not to overcome positive evidence of three disinterested witnesses who had full opportunity to examine his condition.

2. Automobiles ⇨217(5)

Pedestrian about to place himself in midst of on-coming traffic upon a public highway has duty to look in directions of anticipated danger and to continue to be alert to safeguard himself against injury.

3. Negligence ⇨136(8)

Where there is no conflict on facts and reasonable men can draw but the one inference of contributory negligence, plaintiff cannot recover as matter of law.

4. Automobiles ⇨226(1)

Pedestrian who, while intoxicated, on a dark, wet night, completely covered with dark clothing, entered arterial boulevard without looking other than to take one look before entering boulevard, *held* contributorily negligent, precluding recovery against motorist who struck him when he was about 20 feet from curb.

Appeal from Superior Court, Alameda County; Leon Gray, Judge.

Action by Charles L. Gibb against Earl Minor Cleave and others. Judgment for plaintiff, and defendants appeal.

Reversed.

Decoto & St. Sure, of Oakland, for appellants.

Frank M. Carr and W. W. Laidley, both of Oakland, for respondent.

NOURSE, Presiding Justice.

In a trial before a jury the plaintiff had a verdict for injuries caused when struck by defendants' motor vehicle, and the defendants have raised three points in their appeal from the judgment; that plaintiff was guilty of contributory negligence, that he failed to prove any negligence on defendants' part, and that the damages were excessive. We limit our discussion to the first point.

The plaintiff attempted to cross the intersection of Broadway and Forty-First streets in the city of Oakland at about 8:15 p. m. of December 13, 1934. The street was wet from recent rains, the night was dark and the visibility poor because of the glare of street lights upon the wet pavement. Broadway at that point is an arterial boulevard appropriately marked with "stop signs" at the intersection with Forty-First. The plaintiff saw the car approaching from his left while he was on the sidewalk. When he reached the curb he took one look and saw the car 150 feet to his left. He wore a dark hat and a dark overcoat; he turned the collar of the coat completely over his face, and walked into the street with his eyes "on the buttons," and without looking in either direction for approaching cars. The buttons referred to marked a safety zone for northbound street car passengers. Broadway from curb to curb is 70 feet wide. The distance from the outer rail of the street car tracks to the easterly curb is 26 feet, 7 inches. The safety zone is about 4 feet wide. The distance from the outer rail to the first button of the safety zone is about 2 feet, and the distance from the outer button to the easterly curb is 20 feet, 1 inch. The plaintiff testified that as he left the easterly curb he saw the car running astride the easterly street car track. He could not judge its speed, but other evidence fixed a speed of 20 or 25 miles. Plaintiff was struck at a point near the most easterly button of the

safety zone marking its northerly boundary. The car was stopped within 2 feet of the point of impact, and plaintiff was taken immediately to the emergency hospital for treatment. The attending physician and two nurses found him to be intoxicated, and so testified.

[1] The foregoing statement is without substantial conflict. The defendant, who was operating the car, and his companion both testified that they were not running on the street car track, and the plaintiff testified that he had drunk but a glass and a half of wine before the accident. Neither is important so far as the issue is concerned. If the car was on the street car rail, as plaintiff testified, and continued on that course, the two would have met at approximately the same point, and an accident would have been unavoidable unless one of the two came to a stop. The lights of the car would have then appeared in front of plaintiff and inside of the safety zone. But he was struck from the rear and outside of the safety zone. Hence, if his story be true, a single glance to the front or to the left would have shown that the car had left the rails and was trying to pass behind him. His testimony as to the amount of wine he had taken is not evidence of nonintoxication and does not contradict the positive evidence of three disinterested witnesses who had a full opportunity to examine his condition. These witnesses all testified that plaintiff was distinctly intoxicated when he was brought to the hospital, and there was no evidence that he had had any liquor to drink after the accident.

When the plaintiff was taken to the hospital he talked freely to the physician in charge, the nurses, the defendant who operated the car, and his companion. He absolved the operator from all blame and assumed full responsibility for the accident. All the evidence confirms this conclusion. The only rational analysis of the circumstances is that plaintiff became confused because of his intoxication and walked directly into a path of danger without taking any precautions for his own safety. He attempted to cross a busy arterial boulevard on a dark night at a point where no pedestrian crossing was laid out. He was struck at a point outside of the safety zone and outside of the territory where a pedestrian crossing would have been placed. His dark coat and hat made him an object of danger to himself and to others using the highway.

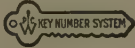
[2] The whole issue is one which has been decided again and again; that a pedestrian does not exercise reasonable care by taking just one look before placing himself in the midst of on-coming traffic upon a public highway. In *Moss v. Boynton Co.*, 44 Cal. App. 474, 476, 186 P. 631, 632, we said: "It was a duty devolving upon plaintiff, as the act of an ordinary prudent man, immediately before placing himself in a position of danger, to look in the direction from which danger was to be anticipated. This was a continuing duty, and was not met by looking once and then looking away." The statement was based on the holding in *Sheldon v. James*, 175 Cal. 474, 479, 166 P. 8, 2 A.L.R. 1493, and has been followed without disagreement in the subsequent cases. *Wright v. Foreman*, 86 Cal.App. 595, 604, 261 P. 481; *Bullock v. Western Wholesale Drug Co.*, 91 Cal.App. 369, 372, 266 P. 978; *Wing v. Kishi*, 92 Cal.App. 495, 499, 268 P. 483; *Chase v. Thomas*, 7 Cal. App.(2d) 440, 444, 46 P.(2d) 200; *Deike v. East Bay Street Railways, Ltd.*, 7 Cal. App.(2d) 544, 550, 46 P.(2d) 812; *Finkle v. Tait*, 55 Cal.App. 425, 432, 203 P. 1031; *Horton v. Stoll*, 3 Cal.App.(2d) 687, 690, 40 P.(2d) 603; *Koeppl v. Daluiso*, 118 Cal. App. 442, 448, 5 P.(2d) 457. The rule of these cases has often been misunderstood and misquoted. In the last case we have found on the subject, it is correctly said that it "does not mean that it is a duty to look one way and continue to so look, but rather to look in the direction or directions of anticipated danger, and to continue to be alert to safeguard against injury." *Lavin v. Fereria* (Cal.App.) 52 P.(2d) 518.

[3, 4] The rule is equally well settled that, where there is no conflict on the facts and reasonable men can draw but the one inference of contributory negligence, then the law steps in and denies plaintiff a recovery. *Zibbell v. Southern Pac. Co.*, 160 Cal. 237, 240, 116 P. 513; *Gore v. Market Street Railway Co.* (Cal.Sup.) 48 P.(2d) 2; *Anderson v. Market Street Railway Co.*, 116 Cal.App. 282, 285, 2 P.(2d) 529. This is such a case, as the only inference that reasonable men could draw from the evidence is that plaintiff, while intoxicated, placed himself in a position of danger without taking any precautions for his own safety. Reasonable men could draw but one conclusion; that when plaintiff entered this arterial boulevard on a dark wet night, and covered himself completely with dark clothing he created an extra hazard to himself

and to all others using the highway. It is not a case of having looked to his left and then miscalculated the speed of defendants' car. He testified that he made no calculations. If he merely assumed that when he got into the traffic it would stop for him, then he was negligent in making himself practically invisible until it was too late to avoid injury.

The judgment is reversed.

We concur: STURTEVANT, J.;
SPENCE, J.



12 Cal.App.2d 603

GRACE et al. v. CRONINGER et al. (two cases).

Civ. 9607.

District Court of Appeal, First District,
Division 2, California.

March 23, 1936.

Rehearing Denied April 22, 1936.

Hearing Denied by Supreme Court
May 21, 1936.

1. Guaranty ⇨50

Liability of guarantor for rents under lease of premises for business of a saloon and cigar store but also permitting subletting for bootblack and/or cigar store purposes held not terminated by enactment of wartime prohibition act, where lessee continued in possession and used premises for legitimate purposes authorized by lease (War-time Prohibition Act, 40 Stat. 1046).

2. Landlord and tenant ⇨134(2)

Lease of premises for the "business of a saloon" contemplates sale of nonintoxicating beverages as well as of intoxicating liquors.

[Ed. Note.—For other definitions of "Saloon," see Words & Phrases.]

3. Landlord and tenant ⇨199½

Where lease does not restrict use of premises solely to liquor business, passage of law making liquor business illegal does not terminate lease.

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Action by Theodosia Cook Grace and another against Hermann Croninger and oth-

ers. From the judgment, plaintiffs and defendant Mary L. Frederick appeal.

Reversed, with directions.

Keyes & Erskine, of San Francisco (J. Benton Tulley, of San Francisco, of counsel), for Mary L. Frederick.

Hugh Goodfellow and Thomas Ashby, both of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for Theodosia Cook Grace and Hugh Goodfellow, executor of Frank J. Grace.

SPENCE, Justice.

This is an action by a lessor based upon a written guaranty of the covenants of a lease. Some of the facts are set forth in the opinion in *Grace v. Croninger*, 56 Cal. App. 659, 206 P. 130, which litigation involved a claim for rent accruing prior to the time that this action was commenced. The complaint herein was filed in June, 1919, at which time the other litigation was still pending. The lessor sought by the original complaint in this action to recover additional rent which had become due upon the premises up to and including the month of June, 1919, together with attorney's fees. After the decision in the previous litigation had become final, the rent demanded in the original complaint herein was paid. A supplemental complaint had been filed in October, 1919, seeking to recover rent for the remaining months of the lease, to wit, July, August, September, and October, 1919, at the rate of \$650 per month, together with interest and attorney's fees.

There have been substitutions of parties herein, but it is sufficient for our purposes to refer to the parties as the lessor, the lessee, and the guarantor. The lessor proceeded to trial against the guarantor alone and the cause was tried by the court sitting without a jury upon the supplemental complaint and the answer thereto. The trial court entered judgment denying to the lessor any recovery against the guarantor for rent due from the lessee, but awarded to the lessor the sum of \$299 as attorney's fees. The lessor has appealed from said judgment and the guarantor has appealed from that portion thereof awarding attorney's fees.

Certain facts should be stated in addition to those set forth in *Grace v. Croninger*, supra. The so-called War-Time Prohibition Act (40 Stat. 1046) became effective on July 1, 1919, and remained in effect until

after the termination of the lease on October 31, 1919. Said act made it unlawful to sell intoxicating liquor for beverage purposes. The lease herein provided that the premises were let "for the purpose of therein carrying on the business of a saloon and cigar store, and for no other purpose or purposes whatsoever." It was further provided that "said lessee will not underlet the whole or any part of said demised premises except for bootblack and, or cigar store purposes." After the effective date of the act above mentioned, the lessee and his subtenants continued in possession of the premises until the lease terminated. Said lessee continued to operate the saloon portion of the premises for the sale of nonintoxicating beverages. No part of the rental for said four months was paid.

[1,2] The main question presented by these appeals is whether the liability of the guarantor for the subsequently accruing rents ceased upon the enactment of the War-Time Prohibition Act under the facts presented by the record. The lessor contends that such liability did not cease and in our opinion this contention must be sustained. The guarantor claims that the case of *Industrial Development & Land Co. v. Goldschmidt*, 56 Cal.App. 507, 206 P. 134, 136, is decisive in favor of the position taken by the guarantor, but we do not so read that decision. The lease in that case restricted the use to "a general winery and/or wholesale and/or retail liquor business." Obviously said lease restricted the premises to a use relating solely to intoxicating liquors which use thereafter became wholly illegal by the passage of the so-called National Prohibition Law in 1920 (27 U.S.C.A.). In the present case, the lease in one place restricted the use of the premises to "the business of a saloon and cigar store," but in another place permitted subletting "for bootblack and, or cigar store purposes." In other words, said lease did not restrict the use of the premises to the sale of intoxicating liquors. Two of the uses which the premises were restricted, to wit, bootblack and cigar store purposes remained wholly legal after the enactment of the War-Time Prohibition Act and the third use, "the business of a saloon," remained legal in part as "the business of a saloon" contemplates the sale of nonintoxicating beverages as well as the sale of intoxicating liquors. *O'Byrne v. Henley*, 161 Ala. 620, 50 So. 83, 23 L.R.A.(N.S.) 496; *Hecht v. Acme Coal Co.*, 19 Wyo. 18, 113 P. 788, 117 P. 132,

34 L.R.A.(N.S.) 773, 777, Ann.Cas.1913E, 258; *In re Bradley* (D.C.) 225 F. 307; *Downes v. McClellan*, 72 Colo. 204, 210 P. 397; *Brewer & Hofmann Brewing Co. v. Boddie*, 181 Ill. 622, 55 N.E. 49; *Springfield v. State* (Tex.App.) 13 S.W. 752; *Kitson v. Mayor, etc.*, 26 Mich. 325; *Snow v. State*, 50 Ark. 557, 9 S.W. 306. But furthermore, the decision in *Industrial Development & Land Co. v. Goldschmidt*, supra, must be read in the light of the opinion of the Supreme Court in denying hearing. It is there pointed out "that when such law took effect the defendants, because of the effect of such law, vacated the premises, surrendered them to the plaintiff, and never afterwards occupied or used the same." After approving the judgment denying recovery of "the rent accruing after the vacation and surrender of the premises to the landlord," the Supreme Court said: "The opinion might be understood to hold that the lessee, in such a case, could continue to hold possession of the premises after the prescribed business became unlawful, and escape payment of the rent on the ground of such illegality, without surrendering to the lessor. We do not think this is the law, and the opinion must not be so understood." We believe said opinion implies that even where the sole business to which premises are restricted by the terms of a lease becomes unlawful, the lease is not terminated merely by the enactment of the law declaring such business unlawful, but liability under the lease continues as long as the lessee continues in possession. In the present case, the lessee did continue in possession for the remaining four months of the term of the lease and, as indicated above, it appears that the lessee continued to use the premises for purposes which were neither prohibited by law nor by the restrictive provisions of the lease.

[3] There is ample authority sustaining the view that where the lease does not restrict the use of the premises *solely* to the liquor business, the passage of a law making such business illegal does not terminate the lease. Many of the authorities are collected in 22 A.L.R. at page 821, where the author of the annotation says: "The cases upon this question fall into two main classes, depending upon whether or not the lease is solely for the transaction of the liquor business. If it is not, the courts are practically unanimous in holding that the prevention of such business by law does not affect the tenant's liability for rent." Again, on page

822 of 22 A.L.R., it is said: "If the conducting of a liquor business is not the sole and exclusive purpose of the lease, so that the tenant may have some beneficial enjoyment of the property notwithstanding the liquor business becomes unlawful, the tenant is not entitled to relief from payment of rent." The author of the annotation in 7 A.L.R. 836, likewise states: "The decided weight of authority is to the effect that where the contract does not restrict the use of the leased premises to a single purpose, it is not invalidated by a subsequent enactment prohibiting the use for less than all of the several purposes specified." See *Burke v. San Francisco Breweries*, 21 Cal.App. 198, 131 P. 83; *Home Brewing Co. v. Kaufman*, 78 Ind.App. 462, 133 N.E. 842; *Proprietors' Realty Co. v. Wohltmann*, 95 N.J.Law, 303, 112 A. 410; *Conklin v. Silver*, 187 Iowa, 819, 174 N.W. 573, 7 A.L.R. 832; *Standard Brewing Co. v. Weil*, 129 Md. 487, 99 A. 661, L.R.A.1917C, 929, Ann.Cas.1918D, 1143; *Teller v. Boyle*, 132 Pa. 56, 18 A. 1069; *Christopher v. Charles Blum Co.*, 78 Fla. 240, 82 So. 765. If the lease is not invalidated by the subsequent enactment of a law declaring unlawful one of the uses to which the premises are restricted by the terms of the lease, then it follows that the lease remains in force and the liability of the guarantor is not affected by the enactment of such law. Judgment should therefore have been entered herein in favor of the lessor for the rent due under the lease for the period covered by the supplemental complaint and for interest and attorney's fees.

In view of the conclusions which we have reached, we deem it unnecessary to discuss certain other points raised by the lessor. And as it is conceded by the guarantor that an award of attorney's fees is proper under the terms of the lease in the event that the lessor prevails in this action, we need not discuss the appeal by the guarantor from that portion of the judgment entered herein awarding attorney's fees.

The judgment is reversed, with directions to the trial court to enter judgment in favor of plaintiffs in accordance with the view expressed herein.

We concur: NOURSE, P. J.; STURTEVANT, J.

12 Cal.App.2d Supp. 759
PEOPLE v. MATIASEVICH.

Cr. A. 1315.

Appellate Department, Superior Court,
 Los Angeles County, California.

March 16, 1936.

1. Criminal law ⇨1024(2)

Under statute allowing people right to appeal from order or judgment terminating prosecution "without a trial," prosecution has not been terminated "without a trial" if trial has been entered upon and defendant has been placed in jeopardy (Pen.Code, § 1466).

[Ed. Note.—For other definitions of "Trial," see Words & Phrases.]

2. Criminal law ⇨165

To constitute once in "jeopardy," party must be placed on trial for a prescribed public offense on valid indictment before competent court with competent jury duly impaneled and sworn and charged with the case, or, if the trial is by the court, it must be entered upon.

[Ed. Note.—For other definitions of "Jeopardy," see Words & Phrases.]

3. Criminal law ⇨163

Plea of once in jeopardy applies to misdemeanors as well as felonies.

4. Criminal law ⇨1024(2)

People held not entitled to appeal from order dismissing prosecution after state's evidence was received, since defendant was placed in "jeopardy" and prosecution was not terminated "without a trial," within statute allowing appeal by people from order or judgment terminating a prosecution "without a trial," when trial was entered upon (Pen.Code, § 1466).

Appeal from Municipal Court of Los Angeles; A. A. Scott, Judge.

Proceeding by the People of the State of California against L. C. Matiasovich, charging violation of section 1011 of the Agricultural Code (St.1933, p. 229, as amended by St.1935, p. 871). From a judgment dismissing the action the people appeal.

Appeal dismissed.

Ray L. Chesebro, City Atty., Newton J. Kendall, Asst. City Atty., and John L.

Bland, Deputy City Atty., all of Los Angeles, for the People.

Leo R. Kasviner, of Los Angeles, for respondent.

SCHAUER, Judge.

This case comes to us upon a purported appeal by the people "from the order and judgment * * * dismissing and otherwise terminating the said action without a trial thereof."

It appears from the record that a jury was waived, the trial entered upon, evidence introduced, the plaintiff rested, defendant moved for a dismissal upon the grounds that the prosecution had failed to prove facts constituting a public offense and that the statute alleged to have been violated was unconstitutional. It also appears that the court "granted the motion of defendant for dismissal." Defendant (respondent) asserts that the judgment or order attempted to be appealed from is nonappealable and asks that the proceeding here be dismissed.

Section 1466, Pen.Code, allows the people an appeal from an order or judgment dismissing or otherwise terminating the action without a trial. The appellant would have us give to the word "trial," as used in that section, an extended minimal inclusive meaning somewhat analogous to that ascribed to it in certain civil cases, such as *San Joaquin, etc., Irr. Co. v. Stevinson*, 30 Cal. App. 405, 414, 158 P. 768, and thus construe such section as allowing the people an appeal in cases where the defendant had been in jeopardy but where there had not been a "complete trial" to the extent of the enlarged minimum. To adopt such construction would but perpetrate legal absurdity. The lower court, even if a new trial were granted by this court, could not lawfully try the defendant again (at least, in the absence of his consent thereto and his resistance to this appeal negatives such consent). *People v. Superior Court*, 214 Cal. 513, 515, 6 P.(2d) 955; *Ex parte Hayter*, 16 Cal.App. 211, 224, 225, 116 P. 370.

[1] In *People v. Webb*, 38 Cal. 467, 479, the Supreme Court quoted from 1 Bishop, Cr.L. § 665, as follows: "'A legislative provision for the rehearing of a criminal cause cannot be interpreted to violate the constitutional rule under consideration, whatever be the words in which the provision is expressed. When, therefore, the defendant has been once in jeopardy, the

jeopardy cannot be repeated without his consent, whatever statute may exist on the subject. And so the writ of error, or the like allowed to the State, can authorize the State to procure the reversal of erroneous proceedings, and proceed anew only in those cases in which the first proceeding did not create a legal jeopardy'" and the court held (38 Cal. 467, at page 480): "The correct interpretation of our statute giving to the prosecutor a right to his bill of exceptions and appeal, when construed with reference to this provision of the Constitution, must be understood to have reference to such errors only as may occur in the proceedings before the legal jeopardy attaches. With these views, it follows that a reversal of the judgment in the present case would be vain and useless, as we are not authorized to direct or order a retrial." Concerning a similar situation the same court in *People v. Roberts*, 114 Cal. 67, 69, 45 P. 1016, 1017, said: "The defendant could not be again tried upon the charge here involved, and hence a reversal could avail nothing in the interests of justice." See, also, *People v. Hill*, 146 Cal. 145, 146, 79 P. 845; *People v. Knowles*, 27 Cal.App. 498, 506, 155 P. 137; *People v. Garcia*, 120 Cal.App.(Supp.) 767, 769, 7 P.(2d) 401. We think it cannot be said that the action has been terminated "without a trial" if the trial has been entered upon, i. e., if the defendant has been placed in jeopardy. Once jeopardy has attached, there has been a trial, irrespective of the scope or manner of resolution of the issues.

[2, 3] "To constitute once in jeopardy the party must be placed on trial for a prescribed public offense, on a valid indictment, before a competent court, with a competent jury, duly impaneled and sworn and charged with the case [citations], or, if the trial is by the court, it must be entered upon. [Citations.] * * * The plea of once in jeopardy * * * applies to misdemeanors as well as felonies." In *re Harron*, 191 Cal. 457, 466, 467, 217 P. 728, 731. See, also, *People v. Superior Court*, 214 Cal. 513, 6 P.(2d) 955; *People v. Young*, 100 Cal.App. 18, 279 P. 824; In *re Berman*, 104 Cal.App. 259, 286 P. 1043; *People v. Garcia*, 120 Cal.App.(Supp.) 767, 769, 7 P.(2d) 401.

In *People v. Hawkins*, 127 Cal. 372, 59 P. 697, the parties announced themselves ready for trial and a jury was impaneled and sworn. Thereupon, before the taking of any evidence, the defendant moved to dis-

miss the action upon the ground that he had not been brought to trial within sixty days after the information was filed and it was held that his right under section 1382, Pen. Code, had been waived by entering upon the trial without previous objection. The Supreme Court said: "It is well settled that the impaneling of the jury is part of a trial. *Silcox v. Lang*, 78 Cal. 118, 20 P. 297. The legal jeopardy of the defendant has attached when a jury has been 'charged with his deliverance,' and the jury stands thus charged when its members have been impaneled and sworn. *Cooley*, Const.Lim. (6th Ed.) p. 399. When, therefore, the defendant here moved for dismissal, he had been 'brought to trial,' and was upon trial, without previous objection that the limit of 60 days had expired." That jeopardy is incurred when a jury has been impaneled and sworn is also declared in *People v. Young*, 100 Cal. App. 18, 23, 279 P. 824.

[4] It is apparent from the foregoing quotations and cited cases that the defendant herein upon the record before us was clearly placed in jeopardy by the proceedings in the court below. He came into jeopardy when the trial was "entered upon," whether evidence was actually received or not, and the receipt of evidence is significant merely as a nonexclusive means of establishing in the record the fact that it had been so "entered upon." The fact, therefore, that evidence on the part of the prosecution only, and none in behalf of defendant, was received, and that the cause was not submitted for decision upon issues of fact, is immaterial.

The appeal herein is dismissed.

SHAW, P. J., and BISHOP, J., concur.

5 Cal.2d 712

SHUEY v. ASBURY.

L. A. 15494.

Supreme Court of California.

March 25, 1936.

1. Appeal and error ⇐1064(1)

Judgment will not be reversed for erroneous instructions unless, upon consideration of entire case, it appears that such error caused miscarriage of justice.

2. Appeal and error ⇐1064(1)

Judgment will not be reversed for erroneous instructions unless evidence indicates that without such error verdict probably would have been different.

3. Appeal and error ⇐1064(1)

Judgment for plaintiff in automobile collision case would not be reversed for erroneous instruction that defendant was negligent as matter of law in violating speed law, where evidence that defendant was driving 30 or 40 miles per hour in heavy traffic without having automobile under sufficient control to avoid colliding with plaintiff's automobile, justified finding that defendant was negligent (St.1931, p. 2120, § 113 (d)).

In Bank.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Olga Shuey against Ruth Asbury, sometimes known as Ruth Eyraud, Jr. From a judgment for plaintiff, defendant appeals.

Affirmed.

For prior opinion, see 46 P.(2d) 977.

Joe Crider, Jr., and Clarence B. Runkle, both of Los Angeles, for appellant.

Paul Blackwood and Bingham Gray, both of Los Angeles, for respondent.

CONREY, Justice.

Action to recover damages for personal injury. Verdict and judgment for plaintiff. The defendant appeals.

The court instructed the jury that if the defendant, at the designated time and place, and in violation of section 113 of the California Vehicle Act (St.1923, p. 553, as amended by St.1931, p. 2120), drove her automobile at a speed exceeding 20 miles per hour, this act in itself was negligence as a matter of law. This instruction was erroneous, because subdivision (d) of said section 113 provides that where such violation of the speed limit has occurred, the driver "shall not be deemed to have been negligent by reason thereof as a matter of law but in all such actions the burden shall be upon the opposing party to establish that the operation of such vehicle at such speed constituted negligence."

[1-3] The sole question presented by this appeal arises out of appellant's contention that because of the stated error, the judgment should be reversed. It is now settled law that a judgment will not be reversed by reason of an erroneous instruction, unless upon a consideration of the entire case, including the evidence, it shall appear that such error has resulted in a miscarriage of justice. The usual consequence is that there will be no cause for reversal unless the evidence indicates that without such error in the instructions the verdict probably would have been different from the verdict actually returned by the jury. In this case a reading of the defendant's testimony as set forth in her own brief is alone sufficient to justify the jury in finding that she was negligent in the driving of her automobile. The admissions by her are such that taken together with the other uncontradicted evidence, the fact of her negligence, and of its resulting effect in causing the injury, is so strongly proved that the jury could not reasonably have found otherwise. In a twenty-mile zone, at a time when there was a heavy movement of traffic, appellant was driving at a speed which she admits was as much as thirty or forty miles per hour; and she did not keep her car under sufficient control to enable her to avoid collision with the plaintiff's car. The evidence shows that the plaintiff's car

was in a position where the collision could easily have been avoided had the plaintiff's car been under proper control.

For the reasons hereinabove stated, the judgment is affirmed.

We concur: WASTE, C. J.; THOMPSON, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.



5 Cal.2d 649

PEOPLE v. COLTRIN.
Cr. 3926.

Supreme Court of California.

March 18, 1936.

Rehearing Denied April 16, 1936.

1. Abortion ⇨11
Homicide ⇨254

Evidence held to sustain conviction of murder in the second degree and abortion.

2. Abortion ⇨9
Homicide ⇨145

In prosecution for murder and abortion, prosecution had burden of proving that certain acts had been done resulting in abortion, and that these acts were performed with intention of causing abortion.

3. Criminal law ⇨371(1)

Where offense is of such nature that proof of act with which defendant is charged is not in itself proof of the required criminal intent, evidence of other offenses of similar nature committed by defendant is admissible for purpose of proving intent.

4. Criminal law ⇨1186(4)

Instruction regarding purpose of testimony of commission of abortions by defendant other than that of which he was charged, stating that such testimony was introduced to corroborate evidence tending to support alleged offense for which defendant was on trial by showing defendant's intent and motive held not reversible error (Const. art. 6, § 4½).

5. Criminal law ⇨406(1)

In prosecution for murder and abortion, admission of evidence that defendant on being asked to come to district attorney's office in regard to abortion inquired "Which one?" held not reversible error, since statement was in nature of admission.

6. Criminal law ⇨404(1)

In prosecution for murder and abortion, admission of uterus of deceased *held* admissible to prove absence of laceration thereon which defendant had testified was present at time of his examination.

7. Abortion ⇨10**Homicide** ⇨203(5)

In prosecution for murder and abortion, statement made by deceased shortly before death *held* not admissible as dying declaration where deceased at time stated that she thought she was going to get well.

8. Abortion ⇨9**Homicide** ⇨171(4)

In prosecution for murder and abortion, statement made by deceased before her death that she had taken medicine more than week before visiting defendant *held* not admissible as showing that deceased was not pregnant at time of visit.

9. Criminal law ⇨863(1)

In prosecution for murder and abortion, where jury returned to courtroom after case had been submitted to them and juror inquired as to relationship between counts, statement of court that if jury believed evidence introduced by people to moral certainty and beyond reasonable doubt, that evidence would support indictments on both counts *held* not reversible error, notwithstanding constitutional provision that judges should not charge jury with respect to matters of fact (Const. art. 6, § 19).

10. Criminal law ⇨200(1)

In prosecution for murder and abortion, where judgment of guilty was first pronounced on abortion charge and then on murder charge, order in which verdicts were read *held* immaterial in determining whether defendant was twice placed in jeopardy by imposing two punishments for one act (Pen. Code, § 654; Const. art. 1, § 13).

11. Criminal law ⇨202(1)

Where victim dies following conviction on abortion charge, subsequent prosecution for murder is not barred (Pen. Code, § 654; Const. art. 1, § 13).

12. Criminal law ⇨1209

Where act involved in one charge is necessarily involved in another and is merely incidental to that charge, but one offense is committed and it cannot be carved into two

offenses in order to inflict double punishment (Pen. Code, § 654; Const. art. 1, § 13).

13. Criminal law ⇨195(1)

Where two offenses are entirely separate and distinct, and one is not necessarily included in other, prosecution for one is no bar to prosecution for other, even though same testimony may be applicable to both (Pen. Code, § 654; Const. art. 1, § 13).

14. Criminal law ⇨371(1)

In prosecution for murder and abortion, admission of testimony that defendant physician had performed other abortions *held* not prejudicial error, where evidence was sufficient to show commission of act, since testimony was relevant on question of intent.

15. Criminal law ⇨200(1)

Conviction of defendant of both abortion and second-degree murder *held* not invalid on ground of double jeopardy, since offenses were distinct and neither was included within the other (Pen. Code, §§ 194, 274, 654, 799, 800, 1023; Const. art. 1, § 13).

In Bank.

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Francis D. Coltrin was convicted of abortion and of murder in the second degree, and he appeals.

Affirmed.

For prior opinion, see 48 P.(2d) 973.

Sharpless Walker and Otto A. Jacobs, both of Santa Ana, for appellant.

U. S. Webb, Atty. Gen., and John O. Palestine, Deputy Atty. Gen., for the People.

SEAWELL, Justice.

Further examination of the questions of law raised by petitioner, appellant herein, in his petition which caused this court to grant a hearing, has satisfied us that the reasoning and the conclusion reached by the District Court of Appeal, Fourth District, opinion by Barnard, P. J., are sound, and that the questions presented on appeal were correctly decided.

We herewith adopt the opinion and decision of that court as and for the decision of this court. The opinion follows:

The defendant was charged with the crime of abortion and, in a second count,

with the crime of murder. He was convicted of abortion on the first count and of murder in the second degree on the second count and sentenced on both, the sentences to run concurrently. This appeal is from the judgments and from orders denying motions for a new trial.

It is contended that the evidence is not sufficient to sustain the verdict. The appellant is a physician seventy-seven years of age, and the two charges arose out of his treatment of a girl sixteen years old and her subsequent death. The defense was that the appellant merely made an examination of the girl to determine whether or not she was pregnant; that he found she had previously aborted; and that all he did was to clean up and treat the condition he found.

Another doctor testified that the girl came to him on January 19, 1935; that he made a complete examination of her, with a Friedman test, and found that she was a perfectly healthy girl who was six weeks pregnant; that he saw her again on January 20 and January 24; that she admitted to him that she had taken some medicine and drugs, but that on these three occasions there was no evidence of any interference, either medical or surgical, which would cause a miscarriage; that he himself used no medicine and no instruments but merely determined her condition; and that, in his opinion, an abortion was not necessary to save her life. The mother of the girl testified that on January 30, 1935, she went with the girl to the office of the defendant; that she told him the girl was in trouble and wanted to have something done; that the defendant replied he thought he could do something; that she asked what he charged for an operation like that to which he replied \$50; that after some talk he agreed to do it for \$35 and told them to come back on February 4, 1935, at 8:30 a. m.; that they returned at that time and she told the appellant she only had \$20; that the appellant accepted this amount with the girl's watch; that when they went there the girl was suffering no pain and was not flowing; that the appellant administered a hypodermic and took her daughter to another room; that about an hour later she went into this room and her daughter was on an operating table; that the girl was then removed to a bed to remain until she became conscious; that fifteen or twenty minutes later the appellant administered another hypodermic;

that the girl was bleeding and a napkin was placed upon her; that she was taken home about 1 o'clock; that the girl was suffering pain in the abdomen from the time she was brought home; and that the next morning another doctor was called.

The girl was taken to the hospital on February 9 and died on February 14, 1935.

A doctor who performed an autopsy testified that he found a piece of placental tissue, a tissue which results from conception, in the uterus; that death came from peritonitis; that this girl had been "operatively manipulated" causing this infection; and that, in his opinion, as a result of the examination, an instrument had been used and peritonitis was caused by "instrumentation." Another doctor, who treated the girl from February 9 until her death and who assisted in the autopsy, testified that the cervical canal was unduly enlarged, congested, red, and gave the appearance of trauma, a bruising of the tissues in that area. He expressed an opinion that an instrument had been inserted, basing the same upon the fact that the living tissues of the cervix were traumatized. Both of these doctors expressed the opinion that an abortion was not necessary to save the girl's life.

The defendant testified that on January 30, the girl and her mother came to his office; that the mother told him she had just discovered that the girl was in a delicate way and wanted to know if there was anything he could do or would do that could be safely done to help her out of it; that he told her to bring the girl in on February 4 and he would make an examination and see whether or not she was pregnant, and if she was what might be the best thing to do about it; that he told her the charge would be \$35; that this charge was for an examination to ascertain whether or not she was pregnant; that the mother told him she knew her daughter was pregnant but that this did not mean anything to him, as she might be mistaken; that on February 4 the mother gave him \$20 and a watch that belonged to the girl; that he gave the girl a hypodermic injection and then an anaesthetic; and that he then made an examination to find out whether or not she was pregnant. He then testified that in making the examination some blood and a blood clot came out on his hand so he inserted a speculum to enable him to look at the cervix; that he found a tear or laceration in the uterus

about an inch long and knew at once that "there had been some meddling there"; that he decided to explore the uterus to see if she had aborted and if it was a complete abortion; that he did not find any part of the fetus; and that he then "gave it up" and merely irrigated the parts and did what he could to prevent a possible infection. While at the trial the appellant denied he had intended to perform an abortion in case he found the girl pregnant, his testimony before the grand jury was admitted in which he frankly stated that he intended to do so and that he told them to come on February 4 for that purpose.

The appellant's nurse testified that she was present when the appellant examined the deceased; that the appellant "inserted his two fingers and his hand was full of blood"; that the appellant then put the girl under an anaesthetic and inserted a speculum and opened it up and called her attention to a laceration which she says she observed; that the appellant then took a little instrument and took out some blood clots and did nothing more except to wash the patient and put some medicine in her. The two doctors who performed the autopsy testified that at that time they found no such laceration as that described by the appellant and produced the uterus which had been taken from the girl, which showed no such laceration. There was evidence that such a laceration as that described by the appellant if it had existed on February 4 would have been visible on February 14, and that the uterus when introduced in evidence was in the same condition as when taken from the body except that it had been cut open to permit inspection and except for the action of the preservative in which it was kept, and that neither of these would have affected the laceration in question. The defendant himself admitted before the grand jury that the laceration he observed on February 4, 1935, would not have healed before the death of the patient on February 14 and would still have been noticeable at that time.

[1] While the appellant insists that there is no evidence to show that the girl was pregnant on the morning of February 4, or that he did anything other than make an examination and treat the condition he found, this contention rests upon a conflict in the evidence at best, and the brief summary of the evidence above set forth, with the reasonable inferences therefrom, is sufficient to support the verdict. *People v.*

Knowles (Cal.App.) 46 P.(2d) 788; *People v. De Vaughn*, 2 Cal.App.(2d) 447, 38 P.(2d) 192.

It is next urged that the court committed prejudicial error in admitting the testimony of two witnesses who testified to the effect that the appellant had performed abortions upon them, respectively, on September 7, 1934, and on December 20, 1934. It is further urged that the district attorney should have stated the purpose for which this evidence was offered, that the trial court should have admonished the jury at the time that it was admitted for a special purpose, that the argument relating thereto should have been limited to this special purpose, and that the court at the close of the case should again have instructed the jury that it was admitted only for a special purpose. It is further argued that this evidence was not admissible on the question of intent because the appellant freely admitted that he had intended to perform such an operation had he found it necessary and that, in any event, it would only become admissible as rebuttal after evidence for the appellant was introduced.

[2,3] While the appellant admitted before the grand jury that he intended to commit an abortion on this occasion, he refused to admit this at the trial and stated that he had only performed certain acts for another purpose. His intention in performing these acts was directly in issue. It was incumbent upon the prosecution not only to prove that certain acts had been done which resulted in an abortion, but also that these acts were performed not for a lawful purpose but with the intention of causing an abortion. *People v. Josselyn*, 39 Cal. 393; *People v. Richardson*, 161 Cal. 552, 120 P. 20; *People v. Lee*, 81 Cal.App. 49, 252 P. 763; *People v. Browning*, 132 Cal.App. 136, 22 P.(2d) 784. It is well settled that where an offense is of such a nature that proof of the act with which the defendant is charged is not in itself proof of the required criminal intent and where additional proof of such intent is necessary to prove the crime charged, evidence of other offenses of a similar nature committed by the defendant is admissible for the purpose of proving intent. *People v. Morani*, 196 Cal. 154, 236 P. 135; *People v. Northcott*, 45 Cal.App. 706, 189 P. 704; *People v. Hickok*, 56 Cal.App. 13, 204 P. 555; *People v. Judson*, 128 Cal.App. 768, 18 P.(2d) 379. Since it was incumbent upon the prosecution to prove the intent with

which the act was done, and especially since the order of proof is largely in the discretion of the trial court, it was not prejudicial error to receive this evidence during the main case for the prosecution. *People v. Northcott*, supra; *People v. Sindici*, 54 Cal.App. 193, 201 P. 975. The appellant did not ask the court to admonish the jury at the time this evidence was received that it was received for a special purpose but, at the close of the case, the court instructed the jury to that effect.

[4] The appellant complains of the following instruction given by the court, "Testimony has been introduced by the prosecution in this action tending to prove other alleged acts of abortion by the defendant. This testimony was admissible only when the defendant claimed he had not performed the operation following an agreement to do so with the mother of Charlotte Valentine, for the reason that the said Charlotte Valentine had a miscarriage before she came to his office on February 4th, 1935. To rebut this contention of defendant, such testimony was admitted. This testimony was not introduced to prove distinct offenses, but was introduced to corroborate the evidence tending to sup-

port the one specified alleged offense for which the defendant is now on trial herein, as a felonious intent is an essential ingredient of the crime of abortion as charged, and said testimony was introduced for the purpose to show intent and motive on the part of said defendant," and the refusal of the court to give this instruction, "You are instructed that in this case the defendant cannot be convicted of any other offense than the offenses upon the person of Charlotte Valentine, as charged in the indictment herein, or offenses against said person included in said charges."

While the first of these instructions is far from a model, we think it sufficiently informed the jury that the evidence of two other offenses of a similar nature, which was received, was to be considered only on the question of the intent of the appellant and that he was not to be convicted on account of other offenses, but that the offense with which he is here charged was alone to be considered by them. This is especially true when the instruction complained of is considered with several instructions which both preceded and followed it, in which the court definitely limited the matter to the offense charged in the indictment. In our opinion, any tech-

nical error in connection with this instruction may not be held sufficient to justify a reversal in view of article 6, § 41½, of the Constitution.

[5] Error is assigned in the admission of the testimony of another witness, a deputy sheriff, who testified that on February 11, 1935, he went to the appellant's office and asked him to accompany him to the district attorney's office, that the appellant inquired as to why he was wanted, and that when told it was in regard to an abortion, he replied, "Which one?" This statement by the appellant was in the nature of an admission and tended to indicate a consciousness of guilt. We see no reversible error in its admission.

[6] It is next urged that the court erred in admitting in evidence the uterus of the deceased, it being urged that its only purpose was to prejudice the jury. It had another purpose since the appellant and his nurse testified that they observed a laceration thereon which did not there appear at the time of the autopsy or at the time of the trial. The defendant's rights were amply protected in connection with any changes that had occurred in the condition of the exhibit.

[7,8] It is strenuously urged that the court erred in refusing, prior to the trial, to require the district attorney to furnish to the appellant a statement made by the girl in question shortly before she died, and again in refusing a request of the appellant during the trial to have this statement admitted in evidence. The statement was taken on February 11, 1935, at the hospital and was taken down in shorthand. The appellant contends that it was in the nature of a dying declaration and also that it was admissible as showing the condition of the girl at the time she came to him on February 4. The statement was not admissible as a dying declaration since the girl at that time stated she thought she was going to get well. The appellant's contention that this statement was admissible as showing the condition of the girl at the time she came to him on February 4 is based upon a portion thereof in which the girl admitted that she had taken some capsules and some medicine. It appears from the statement that these were taken by her more than a week before February 4 and nothing in the statement would even indicate that she was not pregnant on the last-named date. It further appears that appellant's contention in this matter is

purely a technical one since the statement in its entirety, if admitted in evidence, instead of being helpful to him would necessarily have had a quite contrary effect.

[9] It is contended that the court was guilty of prejudicial error in commenting on the evidence after the case had been submitted to the jury. The jury returned to the courtroom and asked that certain instructions be reread, which was done. Thereafter one of the jurors asked, "Could you tell us the relationship between the first count and the second?" The court reread both counts of the indictment and certain instructions with reference to each count and then said: "It might be possible that some of the jurors are confused by the fact that there are two counts, one charging murder and one abortion. I will say that under our code not only murder is a felony, of course, but abortion is a separate and distinct offense; it also is a felony, and under the indictment in this case if the jury believes the evidence introduced by the people to a moral certainty and beyond a reasonable doubt, that evidence will support the indictments on both counts." This statement was in answer to the juror's question and amounts to a statement that the evidence on behalf of the prosecution, if believed by the jury to a moral certainty and beyond a reasonable doubt, was legally sufficient to support the conviction on both counts. No attempt was made to comment on the weight of the evidence or express any view that might be held by the court. Whether or not the statement was proper, under the recent amendment to the Constitution (art. 6 § 19), we are unable to regard it as reversible error under the circumstances of this case.

After reading the entire record, we cannot see how the jury could have come to any other conclusion with respect to the guilt of the appellant, and, with that in mind, we are unable to say that any error or irregularity appearing is sufficient to have resulted in a miscarriage of justice.

[10] The final contention is that in pronouncing sentence upon both counts the court violated section 13 of article 1 of the Constitution and section 654 of the Penal Code relative to placing a person twice in jeopardy and imposing two punishments for one act. In this connection it is also argued that since judgment was first pronounced on the abortion charge the court was without power to pronounce any judgment on the murder charge. Irrespective

of the merits of the first of these contentions we think the order in which the verdicts were read, and in which the judgments were pronounced, is not material (*People v. Deggen*, 70 Cal.App. 567, 234 P. 129) and that, in any event, the sentence on the more serious charge may be sustained under the authorities which will be hereafter cited.

[11] In most cases where an abortion has been committed and where the victim has died, the prosecution and conviction have been upon the greater charge alone. It seems clear under the authorities that where a defendant was convicted on an abortion charge and where the victim thereafter died, the first conviction would not be a bar to a subsequent prosecution for murder. *People v. Wilson*, 193 Cal. 512, 226 P. 5; *People v. McKee*, 80 Cal. App. 200, 251 P. 675. While a prosecution on both of these charges in one action after the death of the person involved is unusual, we think the same principles are applicable and that a prosecution for the one is not a bar to a prosecution for the other.

[12, 13] The constitutional provision referred to relates to a second jeopardy for the same offense. Section 654 of the Penal Code does not apply to statutes which do not make an act or omission punishable in different ways, but which name different acts and different offenses, and punishes each act separately. *People v. Mehra*, 73 Cal.App. 162, 238 P. 802. If the act involved in one charge is necessarily involved in the other and is merely incidental to that charge, but one offense is committed, and it cannot be carved into two offenses in order to inflict a double punishment. *People v. Mazzola*, 99 Cal.App. 682, 279 P. 211. But where the two offenses are entirely separate and distinct and the one is not necessarily included in the other, a prosecution for the one is no bar to a prosecution for the other even though the same testimony may be applicable to both. In *re O'Connor*, 80 Cal.App. 647, 252 P. 730, 732. In that case, the court said: "While a single act may be an offense against two statutes, and thus constitute two crimes, if each statute requires proof of a fact additional to those involved in the other, an acquittal or conviction of either does not result in the defendant having been in jeopardy for the other." In *People v. Kerrick*, 144 Cal. 46, 77 P. 711, 712, the court said: "To be 'necessarily included' in the offense

charged, the lesser offense must not only be part of the greater in fact, but it must be embraced within the legal definition of the greater as a part thereof. "To entitle a defendant to the plea of autrefois convict or acquit, it is necessary that the offense charged be the same in law and fact." *People v. Helbing*, 61 Cal. 620." In *People v. Day*, 199 Cal. 78, 248 P. 250, 252, the court said: "It may be conceded that, if the two counts stated precisely the same offense, an acquittal upon one count would operate as an acquittal upon the other count. * * * It is not the great similarity in most of the facts constituting separate offenses, but the presence of a fact necessary in one offense and absent in another, that determines whether offenses are separate." Among other cases throwing some light on the matter before us may be cited the following: *People v. Brain*, 75 Cal.App. 109, 241 P. 913; *People v. Johnson*, 82 Cal.App. 411, 256 P. 273; *People v. McFarlan*, 126 Cal.App. 777, 14 P.(2d) 1066.

The act of committing an abortion and the act of killing a person while attempting to do this are not merely the same act made punishable in different ways. Not only are these two offenses separate and distinct in a legal sense and each dependent upon evidence not required in the other, but as a practical matter it cannot be said that the two charges involve but one act. The act of committing an abortion may be done without causing the death of the party operated upon. The act which causes the death of the same person is usually another act, careless or otherwise, which, while it may be committed in connection with the first and about the same time, involves a further and additional element. The precise question here raised seems not to have been decided in this state, but an application of the above-mentioned rules to the facts of this case leads us to the conclusion that in pronouncing sentence on both of these counts the court did not violate either the constitutional provision or the statute relied upon.

The above opinion quite fully considers each question raised by appellant. However, because of the insistence of appellant, first, that prejudicial error was committed by the trial court in admitting evidence of other abortions alleged to have been committed by appellant, and, second, that a judgment of conviction for the crime of abortion and for murder, in cases where the latter offense is the direct result

of the former, violates the double jeopardy clause of the state Constitution (article 1, § 13), which provides that, "No person shall be twice put in jeopardy for the same offense," we have deemed it proper to add a few observations to those made by the District Court of Appeal on those specific subjects.

[14] Appellant undertakes to distinguish the applicability of the rule as to the admissibility of evidence tending to prove other offenses of abortion committed by the defendant in cases where the accused is an experienced physician and surgeon from cases in which the accused is not a physician or surgeon. He asserts that in the case of an experienced physician or surgeon, as appellant was shown to be, his "professional acts characterize his intent," and therefore proof of other acts of a criminal character are inadmissible against him, while acts committed by a person not a physician or surgeon would be admissible to show that the operation by the layman was not innocently or ignorantly done, but was performed with the specific intent to commit an abortion. We are unable to follow this reasoning. A physician charged with the crime of abortion may claim that the fetus was removed in order to save life and thereby refute the charge that it was done with a criminal intent. On this controverted question, evidence that he has committed other abortions is admissible as throwing some light upon the question of intent, that is to say, whether the fetus was removed with a criminal intent or whether it was a lawful operation. No logical distinction may be drawn as to the rule being applicable to a layman and not to a physician. Neither are we able to see any merit in the contention of defendant that, because he boldly admitted in his testimony before the grand jury that the young girl came to his office upon appointment, with the understanding that he was to commit an abortion, and that he would have committed it had he not found that the condition of pregnancy which he had diagnosed a few days prior thereto had disappeared and there was then no fetus to remove, and that because, forsooth, having admitted his intention as to what he would have done if pregnancy had still continued, it thereby became unnecessary to call witnesses as to other abortions and that the only object in so doing was to prejudice him in the eyes of the jury. While appellant denied that he committed any act that would produce an abortion, with instruments or otherwise,

the evidence was sufficient to show a removal of the fetus by him, and therefore, acts tending to prove the commission of other abortions were germane to the intent with which he had committed an act which he denied. The admission that he came prepared to commit an abortion, but found the pregnancy removed, was the same kind of prejudice that proof of the commission of other abortions would have engendered. If the immateriality of the evidence as to other abortions be conceded, appellant, by reason of his avowed intent, suffered no prejudice that would justify a reversal.

[15] We have given attention to the double jeopardy argument and are brought to the same conclusion as above announced in the adopted opinion of the District Court of Appeal. Murder and abortion are not the same offenses. Therefore, the Constitution is not violated.

We now turn to the statute. Section 1023, Penal Code, provides: "When the defendant is convicted or acquitted, or has been once placed in jeopardy upon an indictment or information, the conviction, acquittal, or jeopardy is a bar to another indictment or information for the offense charged in the former, or for an attempt to commit the same, or for an offense necessarily included therein, of which he might have been convicted under that indictment or information."

Certainly murder does not include abortion. Neither is the converse true. Death is by no means a necessary ingredient of abortion. There are classes of crime which have the same basic elements and a conviction or acquittal of one is a bar to a prosecution of the other. Assaults are of this class and a conviction of an assault with a deadly weapon with intent to commit murder, made upon the same person and consisting of one act, bars a prosecution for an assault with a deadly weapon or assault. Other illustrations could be drawn.

Abortion is a distinct crime from murder. There is no limitation of time within which a prosecution for murder must be commenced. Prosecution may be commenced at any time after the death of the

person killed. Section 799, Pen.Code. In a case of abortion, an indictment must be found or an information filed within three years after its commission. Section 800, Pen.Code. "To make the killing either murder or manslaughter it is required that the party die within a year and a day after * * * the cause of death administered." Section 194, Pen.Code.

In case of judgment pronounced on conviction of abortion, prosecution for murder would not abate, provided the party upon whom the abortion was committed died within one year and a day after its commission. Nor would the judgment of conviction obtained many months prior thereto be nullified by reason of the conviction of the murder charge resulting from said criminal operation.

Section 654, Penal Code, which provides that an act which is made punishable in different ways by different provisions of the Penal Code, cannot be punished under more than one of such provisions, has no relevancy whatever to the proposition before us. It is not sought in this proceeding to punish abortion in any different way than the sole manner provided by section 274, Penal Code, in which the crime is defined as the employment of certain means or methods or the use of instruments, with intent thereby to procure the miscarriage of a woman, unless the same is necessary to preserve her life, the punishment being not less than two or *more than five* years. Murder and abortion are two distinct crimes and are not the same offenses, and there is no common basis upon which they may rest as the same offense.

The state constitutional provision is sufficient of itself to sustain an affirmance of the proposition that no double jeopardy exists by reason of the two judgments pronounced against appellant.

All other questions raised on appeal have been fully considered.

The judgments and orders appealed from are affirmed.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; SHENK, J.; THOMPSON, J.

5 Cal.2d 673

GLOBE DISCOUNT CO. v. OSTERGARD

et al.

L. A. 15640.

Supreme Court of California.

March 24, 1936.

1. Appeal and error ☞1135

Judgment for plaintiff in action to foreclose street improvement bond would be affirmed, where neither pleadings, findings, nor judgment showed that appellant or estate which he represented had any interest in subject of action, or in result of appeal.

2. Appeal and error ☞1135

Appellant was bound by denials of his answer, as respects whether judgment would be affirmed on ground that no substantial question was presented by appeal.

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by the Globe Discount Company against Mrs. C. L. Ostergard, Okey Meadows, as administrator of the estate of August Joerimann, deceased, and others. From a judgment, second named defendant appeals, and plaintiff moves to dismiss the appeal, or affirm the judgment.

Judgment affirmed.

Carl B. Sturzenacker and James R. Jaffray, both of Los Angeles, for appellant.

Henry J. Merdink, of Los Angeles, for respondent.

PER CURIAM.

Motion to dismiss appeal or affirm judgment upon the ground that the appeal was taken for delay only, and that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

[1,2] The action is one to foreclose a street improvement bond. Judgment was for the plaintiff. Defendant has appealed. The appeal is on the judgment roll. Neither the pleadings in the action, the findings, or the judgment showed that the appellant, nor the estate which he represents, has any interest in the subject of the action or in the result of this appeal. The complaint alleged that the appellant claims that said estate has a lien against

or is the owner of some interest in the property. Even this allegation is denied by the appellant in his answer. Appellant is bound by the denials of his answer. The appellant is, therefore, in no position to question the validity of the judgment. Should the judgment be reversed it would avail the appellant nothing.

The judgment should be affirmed on the ground that no substantial question is presented by the appeal, and it is so ordered.



5 Cal.2d 640

MURPHY v. MURPHY et ux.

Sac. 4953.

Supreme Court of California.

March 17, 1936.

Rehearing Denied April 16, 1936.

Dismissal and nonsuit ☞60(1)

Action which was not brought to trial within 5 years after filing thereof was properly dismissed under amended statute so requiring, notwithstanding that such statute was so amended after action was commenced, where plaintiff had 71 days from date of amendment to bring action to trial, and motion to dismiss was not made until over a year after amendment was passed (Code Civ. Proc. § 583, as amended by St.1933, p. 853).

In Bank.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Lulu Mignon Murphy against S. S. Murphy and Alice K. Murphy, his wife. From an order dismissing the action, the plaintiff appeals.

Order affirmed.

Prior opinion, 54 P.(2d) 459.

Lulu Mignon Murphy, in pro. per.

John R. Cronin, of Stockton, for respondents.

PER CURIAM.

This is an appeal by plaintiff from an order of the superior court dismissing an action under section 583 of the Code of Civil Procedure because not brought to trial within 5 years after filing thereof. The action

was filed October 31, 1928. The notice of motion to dismiss was given December 27, 1934, and the order of dismissal entered January 3, 1935. Plaintiff contends that the amendment of August, 1933, to section 583 (St.1933, p. 853), making the 5-year period run from the filing of the action instead of from the filing of the answer, is invalid where retroactively applied to her action. This matter has been fully considered by this court in other decisions. The record shows that plaintiff had a period of 71 days from the date of the amendment to bring the action to trial, and the motion to dismiss was not made until over a year after the amendment was passed. In view of these facts, we think the trial court did not err in applying the amended statute to her suit. See *Rosefield Packing Co. v. Superior Court* (Cal.Sup.) 47 P.(2d) 716.

The order is affirmed.



5 Cal.2d 694

**LANKTON v. SUPERIOR COURT IN AND
FOR LOS ANGELES COUNTY et al.**

L. A. 15563.

Supreme Court of California.

March 25, 1936.

1. Certiorari ☞ 16

Where no order was made modifying judgment after time for appeal or motion for new trial had lapsed, but trial court indicated its intention of modifying judgment when certain computations had been made, certiorari would not lie.

2. Prohibition ☞ 10(2)

Prohibition held to lie to restrain trial court from modifying judgment after time for appeal and motion for new trial had lapsed, where trial court indicated such intention under belief that it had no authority to enter judgment in excess of a certain amount, since judgment as to amount due plaintiff was the decision of a judicial question and any error therein was a "judicial" and not "clerical" error that could be corrected only by appeal or new trial (Code Civ.Proc. § 473).

A "clerical error" in judgment that can be corrected by trial court in proceeding other than by a new trial is not commit-

ted where trial court misconstrues the evidence before it, misapplies law to the facts, or is misled by counsel.

[Ed. Note.—For other definitions of "Clerical Error" and "Judicial Errors," see Words & Phrases.]

In Bank.

Original proceeding by Corinne Arbuckle Lankton for writs of certiorari and prohibition directed to the Superior Court of the State of California in and for the County of Los Angeles and the Honorable Ben B. Lindsey, judge thereof.

Petition for writ of certiorari dismissed. Writ of prohibition issued.

Wm. Ellis Lady, of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and F. M. Cross, Deputy Co. Counsel, both of Los Angeles, for respondents.

CURTIS, Justice.

Proceeding to review order of trial court or prohibit said court from modifying judgment after the time for appeal from said judgment and for motion for new trial has elapsed. No showing was attempted to be made that the judgment had been rendered through the mistake, inadvertence, surprise, or excusable neglect of the defendant. Therefore, the court was without authority to modify the judgment upon any of those grounds under the provisions of section 473 of the Code of Civil Procedure. The modification which the court in its memorandum opinion indicated it proposed to make in the judgment was to reduce the amount thereof from \$3,970 to \$2,295, not on the ground of any clerical error of the court in the rendition of the judgment, but because the court upon the argument of the motion to modify the judgment came to the conclusion that it was without authority to enter a judgment for an amount exceeding the sum of \$2,295. The decision of the court at the time of its rendition of the judgment that the plaintiff was entitled to a judgment against the defendant in the sum of \$3,970 was the decision of a judicial question, and if any error was made by the court in such decision, it was a judicial error which could only be corrected by the court upon a motion for a new trial, or by an appellate court upon an appeal.

[1] The judgment in this case was the identical judgment which the trial court in-

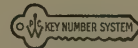
tended to render. There was no mistake in its entry, and it expressed in apt and definite terms the conclusion at which the trial court arrived during the trial of the action. If the court misconstrued the evidence before it, or misapplied the law applicable to the facts disclosed by the evidence, or was even misled by counsel, such an error was in no sense a clerical error which could thereafter be corrected by the court upon its own motion or in any proceeding except on motion for a new trial. *O'Brien v. O'Brien*, 124 Cal. 422, 426, 57 P. 225, 226; *First National Bank of Fresno v. Dusy*, 110 Cal. 69, 42 P. 476; *Bryne v. Hoag*, 116 Cal. 1, 47 P. 775. In the *O'Brien Case*, 124 Cal. 422, on page 426, 57 P. 225, 226, the court makes the following statement of the law, "We think, from the evidence upon which the order here in question was made, it clearly appears that the decree entered July 25th, as signed by the judge, was his last direction to the clerk, and was the decision in the case, and there was no mistake or misprision of the clerk. If error was committed in rendering the judgment, it was a judicial error, which could be remedied only by appeal or motion for a new trial."

[2] It is further contended by the respondent court that petitioner has an adequate remedy at law by appeal from the order of modification when made, and therefore a writ of prohibition would not issue to restrain the trial court from proceeding to modify the judgment in the manner indicated in its memorandum opinion. The same question was raised in the case of *Stanton v. Superior Court*, 202 Cal. 478, 261 P. 1001, in which the petitioner applied for a writ of certiorari to annul an order of the trial court purporting to vacate and annul the judgment of the court. It was contended that the error of the court in the premises could be reached by an appeal from said order and that the petitioner was relegated for relief to an appeal. In response to this contention, the court held, 202 Cal. 478, at page 490, 261 P. 1001, 1005: "To require review to be by appeal of every unauthorized order or judgment attacking the proceedings by which the regular judgment was given and made would seriously embarrass, if not destroy, the efficiency of our whole legal system."

In this proceeding, the record before us shows that no order was actually made by

the trial court modifying the judgment, but that the court signified in its memorandum opinion that it intended to make such modification when certain computations had been furnished. As no order for the modification of the judgment has been made, the writ of certiorari will not lie, and the petition, therefore, in so far as it asks for a writ of review, is dismissed. Petitioner's remedy is by prohibition to restrain the trial court from signing said order of modification or from taking any action to modify, change, or vacate said judgment. As we have stated above, the petition is for either a writ of review or a writ of prohibition. Let the writ of prohibition issue as prayed for. Motion to dismiss is denied.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; THOMPSON, J.; SEAWELL, J.



5 Cal.2d 635

In re SWAN'S ESTATE.

SWAN et al. v. BLOOM et al.

L. A. 14883.

Supreme Court of California.

March 17, 1936.

Rehearing Denied April 16, 1936.

1. Wills ⚡435

In case of ambiguity in terms of will, its meaning may be ascertained by considering particular terms of will and terms of instrument as a whole, and circumstances which testator reasonably may be supposed to have had in mind, but court is not authorized to create a bequest not contained in will.

2. Wills ⚡687(4)

Will creating trust for benefit of sister-in-law and nephews of testatrix until nephews reached specified age when corpus was to be distributed between sister-in-law and children of nephews, with provision for reverter if no children of nephews survived, held to vest in nephews no interest in corpus of trust on termination of trust, but to provide for reversion to residuary estate where nephews had no surviving children at time of termination of trust.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Proceeding in the matter of the estate of Frances B. Swan, deceased, by Frederick Howard Swan and others, as executors of the last will and testament of Frances B. Swan, deceased, and Frederick Howard Swan, in his individual capacity, against Burton Fontaine Bloom and another. From an adverse judgment, the plaintiffs appeal.

Reversed, with instructions.

Prior opinion, 48 P.(2d) 77.

Wilton W. Webster, of Pasadena, for appellants.

I. R. Rubin and Norman W. Neukom, both of Los Angeles (Neice & Packard, of Los Angeles, of counsel), for respondents.

CONREY, Justice.

Frances B. Swan, a resident of Los Angeles county, died on the 31st day of January, 1933, leaving an estate of large value, and a will bearing date of February 20, 1923, in which provision was made for numerous legacies, including some trusts. The residuary legatee is her son, Frederick Howard Swan. The fourth paragraph of the will reads as follows: "Fourth: I hereby bequeath to my brother, George C. Bloom, if he be living, at the time of my decease, the sum of Fifteen thousand dollars, (\$15,000.00) outright, but if said brother be not living at the time of my decease, then, in that case only, I give to the Pacific Southwest Trust and Savings Bank of Los Angeles, and its successors, the sum of Fifteen thousand dollars (\$15,000.00) in Trust, however, for the following purpose, and for no other, viz: To invest and keep invested, said Trust Fund, in first mortgage, or other equally as safe securities, at the best interest safely obtainable, as long as this Trust continues, and to pay the net income received therefrom, with any accrued interest thereon, as long as this Trust shall continue, in semi-annual payments, and in equal proportion, to Minnie Perkins Bloom (wife of George C. Bloom) and to their two sons, George Thompson Bloom and Burton Fontaine Bloom, until said Burton Fontaine Bloom, shall arrive at the age of forty years (40) and if he shall not live so long, then until George Thompson Bloom shall arrive at the age of forty-five years, and if he shall

not live so long, then upon the death of said George Thompson Bloom, said Trust shall terminate, and said Trustee shall pay over to said Minnie Perkins Bloom, if she shall then be living, one third of the entire Trust Fund, of Fifteen thousand dollars (\$15,000.00), and the remaining two thirds of said Trust Fund, namely, Ten thousand dollars (\$10,000.00) shall be equally divided, between the children of said George Thompson Bloom, and of Burton Fontaine Bloom, if any children survive them, but if no children shall survive said George Thompson Bloom or Burton Fontaine Bloom, then such an one's portion shall revert to my residuary estate."

Said will having been admitted to probate, the executors on February 19, 1934, filed their first account current, report, and petition for partial distribution. Among other things they requested that the court construe and interpret paragraph four of the will. Minnie Perkins Bloom and Burton Fontaine Bloom appeared, and also asked for an interpretation of said paragraph four of the will. Respondent George Thompson Bloom filed no answer. He later appeared in the proceeding, but not until after the trial. After hearing upon the issues presented for decision, the trial court made its findings of fact and conclusions of law, followed by a decree of settlement of the account and partial distribution of the estate. Pursuant to stipulation of the parties agreeing to payment of the sum of \$5,000 to Minnie Perkins Bloom as the sum to which she was entitled under the provisions of said fourth paragraph of the will, payment of that sum was directed to be made to her. The court by its decision with reference to the right to the remaining \$10,000 mentioned in said fourth paragraph, awarded said sum to respondents Burton Fontaine Bloom and George Thompson Bloom. It is from that provision of the decree that the executors and the residuary legatee, Frederick Howard Swan, appeal.

It was stipulated that George C. Bloom, brother of Frances B. Swan, died before the death of said decedent. He was husband of Minnie Perkins Bloom, and respondents are their two sons. Burton was over 40 years of age, and George was over 45, at the time of the death of decedent. Neither one of respondents has ever had any children. There was at all times a strong bond of affection between decedent and her brother George and the members

of his family. The opening brief for appellant states the question on appeal as follows: "By the fourth paragraph of the will of the deceased, she attempted to establish a trust fund of fifteen thousand dollars (\$15,000.00) provided that upon the determination of the trust ten thousand dollars (\$10,000.00) thereof should be equally divided between the children of her two nephews, if there were any children of said nephews then surviving, and in the absence of such surviving children the amount to revert to her residuary estate. The question involved in this appeal is: Whether or not in the absence of such surviving children a gift by implication of said amount would result in favor of the nephews themselves."

In the first place it will be observed that the provisions of the will as found in said fourth paragraph contain no direct gift of the trust fund under any circumstances to respondents Bloom. A condition of the creation of the trust was that decedent's brother George be not living at the time of her death. The gift is to a trustee for the purpose of investment and for payment of the net income in equal portions to Minnie Perkins Bloom and to the two sons George and Burton, "until said Burton Fontaine Bloom, shall arrive at the age of forty years (40) and if he shall not live so long, then until George Thompson Bloom shall arrive at the age of forty-five years, and if he shall not live so long, then upon the death of said George Thompson Bloom, said trust shall terminate * * * and the remaining two-thirds of said Trust Fund, namely, Ten thousand dollars (\$10,000.00) shall be equally divided, between the children of said George Thompson Bloom, and of Burton Fontaine Bloom, if any children survive them, but if no children shall survive said George Thompson Bloom or Burton Fontaine Bloom, then such an one's portion shall revert to my residuary estate."

It is manifest that if respondents at the time of the determination of this cause in the trial court had had children, this fund would have belonged to them upon termination of the trust; but it is admitted that neither of them have or ever have had any children. Not only does the will fail to say that in the absence of such existing children said \$10,000 should go to respondents, but it goes further and specially provides that under those conditions the portion which would have been the portion of such

children "shall revert to my residuary estate."

[1,2] It being admitted that there was no direct gift of such money to respondents, their claim, if it is to be sustained at all, must rest upon the doctrine of bequest by implication. It may be conceded that in case of ambiguity or other uncertainty in the terms of a will, its meaning may be ascertained and interpreted by considering the particular terms of the will and the terms of the instrument as a whole, and the various circumstances which the testator reasonably may be supposed to have had in mind at the time of execution of the will; but this means of ascertaining the intention of the testator is limited to the field of interpretation of the language of the instrument, and does not authorize a court to create a bequest not contained in the will. As was said by this court in the case entitled Estate of Reinhardt, 74 Cal. 365, 369, 16 P. 13, 15: "The implication must arise from and stand on something expressed in the will. It must be deduced from something said in the will." Again in Re Estate of Franck, 190 Cal. 28, 31, 32, 210 P. 417, 418, this court said: "It is equally well settled that a devise or bequest may arise by implication. To warrant the court in so declaring there must be something more than conjecture. The probability of an intention to make the gift implied must appear to be so strong that an intention contrary to that imputed to the testator cannot be supposed to have existed in his mind."

Respondents in their brief refer to the rule that a court in its consideration of a question of construction and interpretation of a testamentary instrument will endeavor to ascertain the actual intention of the testator by reference to the entire will in the light of surrounding circumstances. In this connection they call attention to the fact that in another paragraph of this will there is an outright bequest of \$2,000 each to the two respondents. It is further suggested that this fact lends weight to their contention that respondents should also have the benefit of a bequest by implication under the paragraph which is the subject of this present controversy. But this is mere conjecture. It might equally well be inferred that having given to each of these two nephews a direct bequest of \$2,000, and in said fourth paragraph having given them the income of \$10,000 for a limited period of time, the testatrix considered that, un-

der the conditions now existing, the principal sum at the termination of the trust should revert to her own estate. This inference is supported by the provision at the end of the paragraph that under the circumstances now existing the said principal sum "shall revert to my residuary estate."

That part of the decree directing payment to each of the respondents of the sum of \$5,000 (subject to reductions for inheritance tax, etc.), is reversed, with instructions to the trial court to dispose of said moneys in accordance with this decision.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.; SHENK, J.



5 Cal.2d 617

MATHER v. MATHER et al.

L. A. 15233.

Supreme Court of California.

March 17, 1936.

Appeal and error ⇨80(6)

Where complaint for return of property recited three alleged causes of action, judgment dismissing third cause of action before disposing of first and second causes *held* not appealable as "final judgment" (Code Civ. Proc. § 963).

[Ed. Note.—For other definitions of "Final Decree or Judgment," see Words & Phrases.]

In Bank.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Suit by A. W. Mather against Anna Inez Mather and another. From a judgment for defendants, plaintiff appeals. On defendants' motion to dismiss appeal.

Appeal dismissed.

Lorrin Andrews and Sidney Snyder, both of Los Angeles, for appellant.

Don Lake and James R. Jaffray, both of Los Angeles, for respondents.

WASTE, Chief Justice.

This is a motion to dismiss an appeal from a purported judgment.

While domiciled in the territory of Hawaii, plaintiff Mather transferred to his wife, the respondent Anna Inez Mather, real and personal property of considerable value situated in the state of California. Plaintiff sued for a return of the property. The complaint recited three alleged causes of action. The third cause of action with which we are here concerned gave the pleader considerable difficulty, and he made four attempts to state it, the attempts finally culminating in the filing, on December 10, 1934, of a pleading entitled "Third Amended Third Cause of Action." The pleading incorporated by reference certain sections of the original complaint, and, in so far as we are advised, sought the same general relief as that prayed for in the first and second causes, the relief consisting of a restoration and redelivery of money and securities, the cancellation of an assignment, the cancellation of a waiver, a money judgment, general relief, and costs.

Defendants Anna Inez Mather and Leslie G. Williams, her mother, interposed a demurrer, both general and special, to the third cause of action. The trial court sustained the demurrer without leave to amend, the ground of such decision being unstated. Subsequently, on January 4, 1935, a formal judgment was entered to the effect that plaintiff take nothing by the third amended cause of action. Plaintiff appealed from this judgment by notice filed February 7, 1935. The respondents move to dismiss.

After the judgment of January 4, 1935, was entered, the cause proceeded to trial, and on March 14, 1935, a further judgment was entered which, according to the clerk's certificate filed as a part of the supporting papers on this motion, adjudged "that plaintiff take nothing by his complaint, or by first and second counts thereof." The quoted extract is the only evidence before the court as to the final disposition of the action.

It is evident that the cause was attempted to be disposed of piecemeal—that a single object, although stated in several counts, was sought to be attained by the action, and that this single and unseverable object was arbitrarily attempted to be split up as the basis for two distinct judgments. It is at once apparent that no final judgment was entered in the action until March 14, 1935.

The judgment of January 4, 1935, was not a final judgment and is not appealable under the terms of section 963 of the Code of Civil Procedure, or otherwise. Our conclusion is fully supported by the leading case of *Gunder v. Gunder*, 208 Cal. 559, 282 P. 794, and the many cases which follow it, notably *De Vally v. Kendall de Vally, etc., Co.*, 220 Cal. 742, 32 P.(2d) 638; *Middleton v. Finney*, 214 Cal. 523, 6 P.(2d) 938, and *Potvin v. Pacific Greyhound Lines*, 130 Cal. App. 510, 20 P.(2d) 129.

The motion is granted, and the purported appeal is dismissed.

We concur: SHENK, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.



5 Cal.2d 669

FOSTER v. FOSTER.

L. A. 15528.

Supreme Court of California.

March 24, 1936.

1. Divorce ☞312

Perfected appeal in action for custody of child automatically constitutes stay of proceedings and precludes trial court from interfering with custody as it existed at time of appeal (Code Civ.Proc. § 949).

2. Divorce ☞312

Fact that, at date of judgment, plaintiff was legally entitled to custody of minor under order granting her temporary custody, and fact that stay of proceedings pending appeal kept matter in condition existing when stay of proceedings was granted, entitled plaintiff to retain custody of minor until final determination of appeal from judgment granting defendant custody (Code Civ.Proc. § 949).

3. Divorce ☞312

In absence of attempt by trial court to issue writ to aid in enforcement of judgment granting defendant custody of minor, writ of supersedeas would not lie to stay enforcement of judgment pending determination of appeal therefrom (Code Civ.Proc. § 949).

In Bank.

Action by Iva Gilbertson Foster against John Morrell Foster, wherein defendant

filed cross-complaint. From a judgment, plaintiff appealed, and filed petition for writ of supersedeas.

Petition denied, and alternative writ discharged.

Walter F. Haas, of Los Angeles, for appellant.

Gurney E. Newlin and Michael G. Lud- dy, both of Los Angeles, for respondent.

CURTIS, Justice.

Petitioner seeks a writ of supersedeas to stay the enforcement of a judgment of the superior court of Los Angeles county. The facts out of which this proceeding arose are as follows: Iva Gilbertson Foster, petitioner herein, and John Morrell Foster were divorced in March, 1933, by the court of Minnehaha county, S. D., and the custody of their adopted son, Whitney Foster, was awarded to each of them with the provision that he should remain with his father nine months of each year from September 10th to June 10th and with his mother for three months from June 10th to September 10th. While in the custody of Mrs. Foster, the child, who is now nine years of age, was brought with the consent of the South Dakota court to California, where his mother has established her residence at Beverly Hills. The father has maintained his residence in South Dakota. On August 24, 1934, while the child was lawfully in petitioner's custody, she instituted proceedings in the superior court of Los Angeles county whereby she sought the exclusive custody of the child upon the ground that he was not strong physically and that to permit him to live for nine months of each year in the rigorous climate of South Dakota would undermine his health. Foster resisted the claims and demands of petitioner, and by cross-complaint sought the sole custody of the boy. During the pendency of the action an order granting the temporary custody of the child to the mother was made by the court. On December 12, 1934, the trial judge filed a memorandum opinion. He stated that comity required him to give full faith and credit to the South Dakota decree, subject to the exception that the welfare of the child was the first consideration; that, however, petitioner had failed to sustain the burden upon her of proving changed conditions or that the health of the child necessitated the overruling of said decree. The court, therefore, ordered that the child remain in the custody of John Mor-

rell Foster for nine months each year and in the custody of the mother three months each year in accordance with said South Dakota decree. On December 14th the trial court granted a ten-day stay of execution on the judgment and ordered that the child remain in the temporary custody of the mother during that period. Foster then moved the trial court for an order granting him custody of the child to become effective December 27, 1934. The motion was argued December 20th, at which time the trial judge expressed the view that he should grant the motion. Nevertheless, the judge continued argument on the motion to December 28, 1934. On December 21, 1934, Foster served notice that on December 28, 1934, he would move the court to set aside all previous orders as to custody and to have the custody of the child awarded to him. On December 23, 1934, petitioner sought a writ of prohibition in the District Court of Appeal, Second Appellate District, Division Two, seeking to retain custody of the minor pending determination of her appeal from said judgment upon the ground that if Foster obtained custody of the child, he could remove him to South Dakota, in which event petitioner's appeal from the judgment would be ineffective. The District Court of Appeal refused to grant said writ upon the ground that said court would not entertain a petition for a writ affecting a pending proceeding which was appealable directly to the Supreme Court. *Foster v. Superior Court*, 4 Cal.App.(2d) 466, 41 P.(2d) 187. Thereupon application for said writ was made to the Supreme Court, and on July 30, 1935, a writ of prohibition was issued out of this court restraining the superior court of Los Angeles county and the judge thereof from making or ordering the execution of any judgment or decree "which shall have the effect of placing said infant, Whitney Foster, beyond the operation of process of the court prior to the final determination of the action." *Foster v. Superior Court* in and for Los Angeles County (Cal.Sup.) 47 P.(2d) 701, 702. No further order respecting the temporary custody of the minor was made, but judgment was rendered on September 5, 1935, in which judgment the court ordered that petitioner be required "to forthwith deliver to defendant and cross-complainant the minor child, Whitney Foster, and that the defendant have the custody, control and possession of said minor child, Whitney Foster, in accordance with the terms and conditions of the decree of the circuit court in and for the

county of Minnehaha, in the Second Judicial Circuit, State of South Dakota." The judgment further provided that "Nothing herein contained shall have the effect of placing, or shall place, Whitney Foster beyond the operation of the process of the courts of the State of California prior to the final determination of this action." From this judgment petitioner appealed.

[1,2] On September 16, 1935, application was made to this court for a writ of supersedeas to stay the enforcement of said judgment. We are of the opinion that no necessity exists for the issuance of said writ, and for this reason, the application therefor should be denied. Both in the return of respondent to the alternative writ of supersedeas and upon oral argument, respondent argued that no writ should issue for the reason that a perfected appeal in an action for the custody of a child automatically constitutes a stay of proceedings and precludes a trial court from interfering with custody as it existed at the time of appeal. Section 949, Code Civ.Proc.; *Ex parte Rose Queirolo*, 119 Cal. 635, 51 P. 956; *Vosburg v. Vosburg*, 137 Cal. 493, 70 P. 473; *Browning v. Browning*, 208 Cal. 518, 527, 282 P. 503. With this argument we agree. The authorities so hold. It necessarily follows, we think, from the fact that at the date of the entry of the judgment, the petitioner was legally entitled to the custody of said minor under the order granting her temporary custody, and the fact that the stay of proceedings pending appeal has the legitimate effect of keeping the subject thereof in the condition in which it was when the stay of proceedings was granted, that petitioner is entitled to retain the custody of the said minor until the final determination of the appeal from the judgment. *Ex parte Dupes*, 31 Cal.App. 698, 161 P. 276.

[3] No allegation is made that the trial court has issued or threatens to issue any writ to aid in the enforcement of said judgment. In the absence of any such attempt by the trial court, a writ of supersedeas will not lie. *In re Imperial Water Co.*, 199 Cal. 556, 250 P. 394.

For the reason above stated, the petition is denied, and the alternative writ heretofore issued is discharged.

We concur: WASTE, C. J.; SEAWELL, J.; THOMPSON, J.; SHENK, J.; LANGDON, J.

5 Cal.2d 676

PEOPLE v. BYERS.

Cr. 3943.

Supreme Court of California.

March 24, 1936.

1. Municipal corporations ⇨156

Where city charter did not affirmatively provide that no money should come into city attorney's hands and authorized him to handle legal work of city, funds received by him for purpose of paying expenses of official trips *held* received by him under color of office and hence failure to account therefor and making of false report as to expenditure of such money constituted misconduct in office (Pen.Code, §§ 758-771).

2. Municipal corporations ⇨159(1)

In proceeding against city attorney accused of misconduct in office, whether other city officers had authority to advance expense moneys for official trips of city attorney who allegedly misappropriated them *held* not to affect city attorney's liability for misconduct in failure to account therefor (Pen.Code, §§ 758-771).

3. Municipal corporations ⇨159(6)

In proceeding against city attorney for misconduct in office for which only punishment was removal from office, admission of evidence that city attorney refused to answer questions before grand jury on ground of self-incrimination *held* not reversible error, where entire testimony was read and city attorney without testifying objected only to evidence of refusal to answer certain questions (Pen. Code, §§ 758-771; Const. art. 1, § 13, as amended in 1934).

4. Municipal corporations ⇨159(1)

In proceeding to remove city attorney, evidence *held* sufficient to sustain conviction of city attorney of misconduct in office through misappropriation of city funds requiring his removal (Pen.Code, §§ 758-771).

5. Municipal corporations ⇨159(4)

In proceeding to remove city attorney, district attorney *held* entitled to comment on city attorney's refusal to explain certain facts before grand jury before which he had voluntarily appeared in view of constitutional amendment authorizing jury to consider failure of defendant to testify (Pen.Code, §§ 758-771; Const. art. 1, § 13, as amended in 1934).

In Bank.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

C. L. Byers was found guilty of misconduct in public office, and from a judgment removing him from office, he appeals.

Affirmed.

For prior opinion, see (Cal.App.) 49 P. (2d) 344.

Dempster McKee, of San Diego, for petitioner.

Thomas Whelan, Dist. Atty., and John T. Holt, Deputy Dist. Atty., both of San Diego, for the People.

PER CURIAM.

A hearing was granted in this case to give further consideration to certain contentions made by appellant. After reading the entire record, we are satisfied that the District Court of Appeal, Fourth Appellate District, has properly analyzed the evidence and has properly disposed of appellant's contentions. We, therefore, adopt as a portion of the opinion of this court the following portions of the opinion of the Appellate Court, which opinion was prepared by Mr. Presiding Justice Barnard and concurred in by Justices Marks and Jennings:

"The defendant, who is city attorney of the city of San Diego, was charged under sections 758 to 771, inclusive, of the Penal Code, with willful and corrupt misconduct in office and after trial by a jury was convicted on eight counts of the charge. These counts relate to various charges of misappropriating city funds drawn by him for the purpose of paying expenses of trips taken on official business connected with his office as city attorney, and making false reports as to his expenditure of such moneys. From a judgment removing him from the office of city attorney of said city, the defendant has appealed.

"The purchasing department of the city of San Diego maintained a revolving fund from which the appellant had been in the habit of drawing expense money for trips up to the amount of \$25, and later filing accounts with the purchasing agent showing the disposition of moneys thus advanced. On August 11, 1933, he signed and presented to the city auditor a claim for \$25 setting forth that it was for the

expenses of himself, the city treasurer and two police officers on a trip to Los Angeles on August 12, 'to obtain R. F. C. cash.' The claim was sworn to in the usual manner, reciting that it was correct and legal, that the items contained therein were furnished to the city and that the amount was due. A warrant for that amount was issued to him, which he cashed that day at the city treasurer's office. The next day the appellant, the city treasurer and two police officers went to Los Angeles in a police car belonging to the city of San Diego for the purpose of delivering certain bonds to a federal reserve bank in furtherance of city business. That night the appellant and the city treasurer stayed at the Alexandria Hotel. It appears that the appellant did not buy any gasoline or oil on the trip to Los Angeles, that he did not pay the hotel bill for himself or the city treasurer, that he did not pay for certain meals eaten by the treasurer and the two officers in the course of the trip, and that he did not give any moneys to the city treasurer or to the two officers for the purpose of paying any expense incurred by them. [He did, however, pay for a luncheon for the party, amounting to \$2 or \$3, and paid his fare back to San Diego, amounting to but several dollars.] He did not inform any of the other parties that he had city funds with which to pay the expenses of the trip and the city treasurer testified that when they left the hotel the appellant told him that it would be convenient for him if the treasurer would pay the bill. The treasurer paid the bill for both of them and was not reimbursed by the appellant. After returning to San Diego the treasurer put in a claim to the city and was paid the sum of \$17 to reimburse him for the expenses thus paid by them. No return or accounting was ever made by the appellant as to what was done with the \$25 advanced for the expenses of this trip.

"On October 30, 1933, an ordinance was passed by the council of San Diego appropriating \$2,500 from the El Capitan dam bond fund for the purpose of providing funds to pay certain costs in connection with the application of the city to the United States for a grant to complete the El Capitan dam project, it being provided that its purpose was only and exclusively to provide funds to pay legal, engineering and sustenance expenses of the city and its attorney. On November 6 and November 8, 1933, upon sworn

claims, the appellant received and cashed two warrants, receiving a total of \$1,600 from the funds so appropriated. On November 17, 22, 23 and 24, 1933, the appellant signed certain checks and slips at the Alexandria Hotel in Los Angeles. His hotel bill at the hotel on that trip was \$116.28 and he left the hotel on November 25, 1933, without paying any part thereof. [The largest portion of this bill was for personal expenses, but in the account later filed by appellant he charged against the city certain amounts for room and meals for the above days.] He returned to Los Angeles on December 1, 1933, going to a different hotel. While he was in Los Angeles most of December, 1933, and part of January 1934, he did not communicate with the Alexandria Hotel or pay that bill. Many statements sent to him during 1933 and 1934 by that hotel were not answered. On September 4, 1934, he answered one of their letters, stating that he did not know who was entitled to receive the money. The bill was placed in the hands of an attorney and the appellant informed this attorney that the bill was due and should have been paid a long time ago, but that he had been hard-pressed financially and would take care of it on October 5, 1934. He paid \$50 on the account on or about October 1, 1934, and later an action was brought, judgment by default was entered, and the balance was finally obtained by levying execution against his salary. In the meantime, on May 3, 1934, the appellant filed an accounting with the city auditor as to the \$1,600 received by him, setting forth various expenses incurred, including the charges of the Alexandria Hotel on November 17, 22, 23, 24, 1933, and returning the balance of the amount received.

"In this account filed on May 3, 1934, the appellant included as expenses certain items for meals and hotel on December 20 and 21, 1933, totaling \$24.40 and other items for hotels, meals and telephone on December 28 and 29, 1933, to the amount of \$17.15. It appears from the evidence that bills for these amounts were incurred by him on those dates at the Biltmore Hotel in Los Angeles, that he left that hotel on December 31, 1933, without paying any of said charges, that a number of letters written to him by the hotel were not answered, and that the bill was not paid until August 14, 1934, some months after the accounting was filed with the city.

"On November 28, 1933, the appellant received \$22 from the purchasing agent of San Diego to cover the expense of a trip to Los Angeles. On December 11, 1933, he received \$4.56 from this department purportedly covering the balance of his expenses on that trip. An itemized account covering these expenses was filed on December 11, 1933. In his accounting for the \$1,600 received, which he filed on May 3, 1934, the appellant again included and received credit for the same items, exact in date and amount, which had been turned in to the purchasing department in his accounting of December 11, 1933, the duplication amounting to \$26.56.

"On January 28, 1935, the appellant appeared before the grand jury of San Diego county, at its request, and gave certain testimony. In the beginning he stated that he was willing to and would answer any questions relating to the conduct of his office in connection with city affairs, but that he refused to answer any questions relating to his personal affairs on the constitutional ground that to answer such questions might tend to degrade or incriminate him. He testified that he had known that he was to be called before the grand jury to be questioned with regard to his expense accounts and that, at his request, his chief deputy had made an examination of his accounts and compared his records with those of other city officers. He admitted that there was a duplication in the accounts as to the \$26.56, which he said he could not explain, and also admitted that he had never filed an account for the \$25 received by him on or about August 11, 1933. He also stated that on that morning before coming before the grand jury he had repaid to the city the sum of \$25 and \$26.56, paying the same out of his personal moneys. While he refused to answer many questions on the constitutional ground referred to, an inference may fairly be drawn from his statements to the grand jury that he was without funds during at least a part of the time material here if, in fact, there is not a direct admission to this effect. At the trial of the action the appellant did not take the stand.

[1] "The first point raised is that it was no part of the official duties of the appellant, as city attorney, to possess or disburse any city funds, that any possession of city funds on his part was neces-

sarily outside the scope of his official duties and, therefore, that anything he might do with relation to city moneys which were actually in his possession could not constitute misconduct in office. Cases are cited on the proposition that the conduct of an officer which is outside the scope of his official duties, even though criminal in nature, will not constitute misconduct in office and many cases are cited from this and other jurisdictions in actions on official bonds where it has been held that the particular act in question is not within the contemplation of the bondsmen in assuming liability for the official acts of the officer. It is argued that in no case has it been held that misappropriation of money by an officer is within the line of his official duties unless under a strict interpretation of the law he was authorized to receive the money, and that no such authorization here appears. Some very technical rules have been applied in some such cases in favor of bondsmen on official bonds. While some jurisdictions have followed the rule that the surety in such a case is liable only for the acts of his principal *virtute officii*, the rule in this state seems to be established that such a surety is liable for the facts of his principal *colore officii*. *Abbott v. Cooper*, 218 Cal. 425, 23 P.(2d) 1027. It should also be kept in mind that the problem here is somewhat different from that presented in the line of cases referred to, where the rights of third party sureties were involved.

[2] "The appellant insists that the city charter of San Diego makes no provision for any funds coming into the hands of the city attorney. While this is true, the charter does not affirmatively provide that no money shall come into the hands of the city attorney, and it does authorize and direct that officer to handle the legal work of the city. There can be no question that the work upon which the appellant was engaged at the times here in question was well within the line of his official duties. If in carrying out such duties city funds came into his hands in connection therewith and as a part thereof, we should hesitate to hold that such money was not received, and held by him under color of his office or that any failure to properly account for the same would not constitute misconduct of his office. * * *

[In this special proceeding, the accused is not entitled to the same defenses available to a bondsman under a definite con-

tract.] The only punishment provided is removal from office. A high standard should be and is required of public officers in the conduct of their duties and many things may constitute misconduct in office which might not be sufficient to meet more severe requirements in other matters. There can be no question that the appellant received this money because he was city attorney and for the direct purpose of enabling him to perform certain services for the city as such officer. Whether or not other officers of the city had authority to advance expense money to him the trips were a part of the appellant's official duty and having funds in his possession which he knew to be city funds and which he had obtained through his official position and solely for the purpose of paying the expenses of such trips, it became his duty to account for them and a failure to do so is none the less misconduct in office, if, in fact, other officers of the city are not free from blame. * * *

[3] "The appellant's second point is thus stated by him: 'In admitting over objection evidence that the accused refused to answer certain questions propounded to him by a deputy district attorney at a meeting of the grand jury, on the ground that to answer might tend to degrade and incriminate him, the court permitted reversible error.' It is argued that the admission of such evidence was error in that it compelled the appellant to be a witness against himself and deprived him of his constitutional privilege not to answer questions. While it seems to be conceded that the statements which were made by the appellant to the grand jury were voluntarily made it is argued that the particular portions objected to, that is the refusal to answer certain questions on the ground named, could not be considered as voluntary statements and were not admissible.

"While the introduction into evidence in a criminal case of testimony given by a defendant before a grand jury has been often questioned and under some circumstances held to be error, other cases indicate it may be admitted as an admission when voluntarily given at a time when no formal charge is pending and when a defendant is represented by counsel or otherwise is cognizant of his rights. *People v. Young*, 31 Cal. 563; *People v. Sexton*, 132 Cal. 37, 64 P. 107; *People v. O'Bryan*,

165 Cal. 55, 130 P. 1042. If such evidence is ever admissible it should be in such a case as this which, while criminal in nature, is a special proceeding designed to protect the government itself by securing faithful performance of their duties by its officers and servants and this is especially true where, as here, the person accused is an able lawyer fully cognizant of his legal rights, who has voluntarily appeared and made such statements as he considered favorable to himself.

"When the transcript of the appellant's testimony before the grand jury was offered in evidence, his counsel started to object without stating the grounds of his objection and then suggested that the prosecuting attorney 'offer the questions and answers.' The court suggested that the testimony be read to the jury instead of giving them the transcript and that the appellant's counsel interpose such objections as he had. Thereupon the statements made by the appellant to the grand jury were read to the jury and no objection was made except at those points where questions were asked and where the appellant refused to answer on the ground that the answer might tend to degrade or incriminate him. Such refusal to answer occurred some twenty-three times in the transcript of this testimony and in each instance, as the reader came to that point, an objection was made to that particular part only. These objections were all overruled. The appellant did not take the stand at the trial. * * * Under such circumstances, where the appellant with full knowledge as to his legal rights voluntarily undertook to make certain statements to the grand jury * * *, we think it was not prejudicial error to admit the entire record and that the appellant was not entitled to claim immunity as to parts thereof while acquiescing in the admission of other portions more favorable to himself. This is particularly true in an action of this nature, involving the good faith of a public official in the performance of his duties, and we think that such an official should not under such circumstances be allowed, without taking the stand, to secure the benefit of such parts of a voluntary statement as he considered favorable and to object to other portions thereof in which he refused to explain matters suggested by his own statements and which obviously called for an explanation.

"The appellant argues that the only purpose in reading his testimony before the grand jury was to prejudice him by getting before the jury the fact that he had declined to answer certain questions. The transcript thus read to the jury contains statements made by the appellant which were material to the matter in issue. Among other things the appellant stated to the grand jury that he would try to answer all questions relating to city affairs having to do with his official position; that he drew \$25 on or about August 11, 1933, for a trip to Los Angeles on August 12; that he presumed one of the police officers paid for the gasoline used on the trip to Los Angeles; that he could not remember whether he had paid for any meals; that he could not remember who paid the hotel bill; that the city treasurer paid the hotel bill on one trip, but he did not remember which one; that he did not repay the treasurer this amount; that either on this trip or another trip the city treasurer paid for some meals; that on this particular trip he did not pay any of the expenses of the treasurer or the two officers; that he presumed he had paid his own way back but could not remember; that he had the \$25 with him while on the trip; that he could not remember why he did not pay his or the treasurer's hotel bill; that he could not recall whether or not he was in financial difficulties at that time but that he did not have any bank account; that he drew the \$25 in advance for the purpose of having funds for that trip; that it is possible that there may have been times since that day when he had no money and had to borrow some; that he repaid the \$25 to the city that morning before coming before the grand jury because he had discovered it had never been accounted for; that he had contemplated being before the grand jury for a number of days; that he turned in another \$26.56 that morning; that there was a duplication as to this which he could not explain; that he repaid these amounts out of his personal money; that when he drew \$26.56 in November, 1933, and put in an account for that amount for expenses of November 30, December 1 and December 2, 1933, he had the \$1,600 in his pocket which he had drawn for expenses for that sort of trip; that he was unable to explain this; and that when he made his accounting in May, 1934, he knew he had not paid the hotel bills in Los Angeles. He refused to answer a question as to where the \$1,600 was at the time he drew addi-

tional \$26.56, refused to answer a question as to whether he had not used the greater part of the \$1,600 for personal affairs at that time, refused to answer a question as to whether he did not have to borrow money at one time to make up a part of the \$1,600 in order to make a trip; and when asked if he had used any part of the \$1,600 for any of his personal affairs, he replied: 'The money was received lawfully and in my possession, the expenses were paid and the balance turned into the city and every penny of the balance turned into the city and every penny of the \$1,600 accounted for. Beyond that, I will refuse to answer.'

"Under the circumstances of this case we are unable to hold that the admission of evidence of appellant's refusal to answer certain questions before the grand jury was reversible error. Under the recent amendment to the Constitution (article 1, § 13 [as amended in 1934]), even in a criminal case, the refusal of a defendant to explain evidence against him may be considered by the jury. The jury had the right to consider the fact that the appellant did not take the stand or explain the evidence against him, and it is difficult to see how the fact that he had previously refused to explain could be much more prejudicial.

[4] "It is finally urged that the evidence is insufficient to sustain the verdict and judgment. In this connection it is argued that, at best, the evidence merely shows that certain expenses incurred were not paid, but fails to show what was actually done with the money; that although the money drawn was not used for particular expenses shown, it may have been otherwise spent for the benefit of the city; that while certain hotel bills were not paid the appellant may, at the same time have had rooms in other hotels paying for the same with the city money; that in any event he may have had the money at all times available and ready to return; that no demand was made upon him for the return of the money; and that any actual shortages were later paid.

"The repayment of certain moneys many months later is not in itself a sufficient answer to such a charge even though such payments preceded a demand therefor. The jury was not required to draw the other inferences suggested, and the evidence, a portion of which has been herein summarized, is the best answer to the rest of

these contentions. In our opinion, the evidence discloses a situation inconsistent with proper conduct in such an office and entirely sufficient to constitute misconduct therein within the meaning of the statutes. In the absence of any adequate explanation we think the evidence, including the statements and admissions of the appellant which were admitted without objection, is, with the inferences which the jury might reasonably draw therefrom, amply sufficient to sustain the verdict and judgment."

The amounts involved in the charges above referred to are small. As to most of the items involved in these charges, the jury might well have found that they were the result of mistake or carelessness. If appellant had seen fit to make a complete and fair disclosure of the facts, either to the grand jury or to the trial jury, and if the truth is that the apparent misappropriations were the result of mistake or carelessness, he could undoubtedly have convinced the two juries of that fact. However, appellant saw fit, as he had a right to do, to refuse to testify at all at his trial, and refused, as he had a right to do, to answer many questions asked him after he had voluntarily appeared before the grand jury. The people, as the above summary of the evidence indicates, proved a prima facie case of misappropriation of public funds. This prima facie case was not rebutted by appellant. Under such circumstances, this court must affirm the judgment.

[5] One of the main points urged by appellant on this petition is that it was error to admit into evidence at his trial all of appellant's testimony before the grand jury, including his refusal to answer certain questions on the ground that his answers might tend to incriminate him, and to permit the district attorney to comment on this refusal in his argument to the jury. That all of appellant's statements made before the grand jury were admissible seems clear. *People v. Sexton*, 132 Cal. 37, 64 P. 107; *People v. West*, 3 Cal.App.(2d) 568, 40 P.(2d) 278. Having voluntarily gone before the grand jury and given certain testimony, most of which was favorable to himself, and having refused to explain before the grand jury certain incriminating facts, we think that, under the new constitutional amendment above referred to, the district attorney was entitled to

comment on that fact. Having elected voluntarily to appear before the grand jury as a witness, he necessarily assumed the responsibilities incident to that position.

The judgment and order appealed from are affirmed.



5 Cal.2d 619

BURNS v. PETERS et al.**L. A. 15553.****Supreme Court of California.****March 17, 1936.****1. Mortgages ⇨138**

While ordinarily trust deed conveys title and is not strictly speaking a lien, it may at times and for some purposes be treated as an encumbrance.

2. Trusts ⇨169(1)

Trust will not be permitted to fail because of refusal of named trustee to act.

3. Mortgages ⇨67

Delivery to beneficiary of trust deed which was given to secure indebtedness owing to beneficiary held sufficient delivery so far as principal parties were concerned, notwithstanding that there was no delivery to trustee.

4. Mortgages ⇨97

Where clause in trust deed conflicts with other portions of instrument and meaning of entire instrument is involved, court must look to entire instrument and to surrounding circumstances to determine intention of parties.

5. Contracts ⇨162

Where two clauses of contract cannot be reconciled, first clause should be received and the latter rejected.

6. Contracts ⇨163

Intention disclosed by written portions of contract prevail over printed portions where the two are conflicting (Civ.Code, § 1651).

7. Contracts ⇨170(1)

Construction placed upon instrument by parties themselves is most persuasive.

8. Contracts — 153

Where two constructions of contract are possible, construction which leaves contract valid will be preferred, since it is reasonable to suppose that parties meant something by their agreement.

9. Mortgages — 8, 151(4)

Trust deed which was given to secure indebtedness owing to beneficiary created equitable lien or mortgage as between parties thereto, whether or not trust deed was effective as a trust deed, and took precedence over subsequent attachment by settlor's creditor.

10. Mortgages — 151(4)

Attaching creditor is not bona fide purchaser, and when attaching property subject to mortgage, whether recorded or not, he takes only interest mortgagor had at time of levy.

In Bank.

Appeal from Superior Court, San Diego County; Clarence Harden, Judge.

Action by May B. Burns against W. H. Peters and another. From a judgment in favor of the named defendant, the plaintiff appeals.

Reversed, with directions.

Prior opinion, 48 P.(2d) 171.

John C. Mead, of Los Angeles, and Wright, Monroe, Thomas & Glenn and John T. Hon, all of San Diego, for appellant.

Hamilton, Lindley & Higgins and John H. McCorkle, all of San Diego, for respondents.

WASTE, Chief Justice.

This cause was taken over by this court after decision in the District Court of Appeal, Fourth Appellate District, not because of any dissatisfaction with the opinion therein prepared, but solely because it presents an action to quiet title, the jurisdiction to determine which, in the absence of transfer thereto by this court, does not lie with the District Courts of Appeal. Our examination of the record satisfies us that the opinion heretofore prepared by Mr. Presiding Justice Barnard correctly disposes of the cause, and we adopt it as and for the decision of this court. It reads:

In this action both parties sought to quiet their title to certain real property

in San Diego county. This appeal is from a judgment in favor of the defendant Peters, who will be referred to as the respondent. The facts are undisputed and the question involved is whether a sale under a trust deed given to the appellant by the corporation owning the property gave her title, notwithstanding another sale to the respondent upon execution and after attachment in an action brought by him against the corporation.

The action last referred to was filed on May 4, 1931, and an attachment issued the same day was levied against the real property. Judgment followed on May 24, 1932, and the property was sold on execution to the respondent on July 5, 1932.

The appellant was the secretary of the corporation which was indebted to her in the sum of \$5,000. On August 30, 1928, the corporation executed and handed to her a note for that amount, together with a trust deed securing the same and covering this real property. The trustee named in the trust deed was Title Insurance & Trust Company and, admittedly, the instrument was not delivered to that company. This trust deed was recorded on December 13, 1930, and was apparently acknowledged on that date; the acknowledgment being irregular, as will hereafter appear. On September 4, 1931, the appellant commenced an action in the superior court of San Diego county to have a trustee appointed under the trust deed. Judgment was entered in this action on September 23, 1931, appointing another trustee in lieu of Title Insurance & Trust Company. A foreclosure sale under the trust deed was had on January 23, 1932, and a trustee's deed to the appellant was recorded on February 16, 1932.

This controversy has arisen in part because of the manner in which the instrument was acknowledged but mainly because of the following statement which appears in the trust deed: "This deed of trust shall not be effective unless prior to its recordation, the trust is accepted by the trustee, under its corporate name and seal, by a duly authorized official thereof." A photostatic copy of the trust deed is in the record, from which it appears that a printed form was used in which the name of the trustee, Title Insurance & Trust Company, occurs three times; the last being at the end of the instrument where a

place was provided for the acceptance of the trust by that company. While the name of the company is there printed, no signature appears in the space provided for the signature of a trust officer of the company. With this exception the blanks in the body of the instrument are appropriately filled in and the instrument was executed by the corporation owning the land through its president and secretary, with its seal attached. The trusts upon which the land is to be held are set forth in seven numbered paragraphs and following that the paragraph above quoted appears.

At the beginning of the acknowledgment are the printed words, "State of California, County of Los Angeles." The words "Los Angeles" therein are crossed out and "San Diego" written in place thereof with a pen. The acknowledgment then recites that on "this 13th day of December," no year appearing, the president and secretary of the corporation, all named, appeared before William H. Frailey, a notary public "in and for said county" and acknowledged in the usual manner that the corporation had executed the same. Following the notary's signature appear the words, "Notary Public in and for the county of Los Angeles, State of California." Attached to the acknowledgment is the notary's seal containing the words, "Wm. H. Frailey, Notary Public, San Diego Co., Calif."

While the respondent concedes that an attachment lien reaches only such interest as a debtor has at the time of the levy and that a deed or trust deed which actually conveys a title takes precedence over a subsequent attachment, he argues that there was no conveyance or pledge here which had become effective at the time his attachment issued, that this trust deed was an absolute nullity unless the trust was accepted before the instrument was recorded, that having been recorded before the trust was accepted by the trustee it could never become effective for any purpose and that, in any event, it was without force and effect until a decree was entered in the action seeking the appointment of a trustee, which was after the attachment had been levied. It is further argued that the clause requiring acceptance by the trustee named is a condition precedent which was never performed, that no title ever passed to the trustee, that

a trust deed does not create a lien but conveys a title, and that, therefore, no question of a lien can be here considered. And, further, that the instrument in question was never delivered, since it was handed to the beneficiary and not delivered to the trustee named therein.

[1-3] While ordinarily a trust deed conveys title and is not, strictly speaking, a lien, we are not in accord with respondent's contention that it may not be considered in that light under proper circumstances. The general nature of a trust deed is well set forth in *MacLeod v. Moran*, 153 Cal. 97, 94 P. 604, where the court points out that such an instrument is, after all, practically and substantially only a mortgage with a power of sale. It may at times and for some purposes be treated as an encumbrance. *Hollywood Lumber Co. v. Love*, 155 Cal. 270, 100 P. 698. It is a general rule that a trust will not be permitted to fail because of the refusal of the named trustee to act. In view of the purpose of such a trust deed as this and the nature of the interest of the parties thereto, it must be held that it is not rendered void by failing to deliver the same to the trustee, and that the delivery to a beneficiary is a sufficient delivery, at least in so far as the principal parties thereto are concerned. *Field v. Arrowsmith*, 3 Humph.(Tenn.) 442, 39 Am.Dec. 185; *Stewart v. Fowler*, 3 Ala. 629; *Wells v. German Ins. Co. of Freeport, Ill.*, 128 Iowa, 649, 105 N.W. 123; *Crocker v. Lowenthal*, 83 Ill. 579.

[4-8] While the respondent argues that the clause requiring an acceptance by the trustee is plain and calls for no construction, he overlooks the fact that that clause conflicts with other portions of the instrument and that the meaning of the entire instrument is involved. Under such circumstances the courts often must look to the entire instrument and to the surrounding circumstances for the purpose of determining the intention of the parties. 6 R.C.L. 849. The general rule is that where two clauses of a contract cannot be reconciled the first shall be received and the latter rejected. 6 R.C.L. 847. The intention disclosed by the written portions of a contract should prevail over the printed portions thereof, where the two are conflicting. Civ.Code, § 1651. The construction placed upon an instrument by the par-

ties themselves is also most persuasive. *Moore v. Superior Court*, 114 Cal.App. 333, 299 P. 760. Where two constructions are possible, the one leaving the contract valid will be preferred, since it is reasonable to suppose that the parties meant something by their agreement. 6 Cal.Jur. 268. A contract must be so interpreted as to make it operative if this can be done without violating the intention of the parties. Civ.Code, § 1643. An interpretation which gives effect is preferred to one which makes void. Civ.Code, § 3541.

In applying these rules we are not convinced that the clause relied upon by the respondent destroys the effect of this instrument as a trust deed. The clause in question appears in the printed form which was used and obviously was not noticed or considered controlling by the parties as shown by their conduct. Not only was this clause for the protection and benefit of the trustee, but the entire circumstances negative the idea that it was the intention of the parties that this instrument should have no effect until an acceptance by the trustee was secured. The trial court found that \$5,000 had been actually advanced by the beneficiary to the corporation which then owed her that amount. The trust deed was delivered to her and later acknowledged and then recorded. The evidence is that the trustee was not spoken to about the matter until foreclosure proceedings were being started. In a subsequent court action between the principal parties to the transaction another trustee was appointed, followed by the sale of the property. The clause in question is practically the last clause in the instrument, and theretofore the trust deed recites that the corporation is indebted to the beneficiary in the sum of \$5,000 and has agreed to pay the same, that one of the purposes of the execution of the instrument is to secure the payment of said indebtedness, that in consideration of the debt the trustor does hereby grant and convey the property to the trustee to secure the debt and to be reconveyed upon payment of the same, with appropriate provisions for sale and payment of the amount due in case of default, and paragraph 7 reads as follows: "This deed of trust secures the payment of all the indebtedness and the performance of all the obligations hereinbefore referred to, and in all its parts, except as herein otherwise

provided, applies to, inures to the benefit of, and binds, the heirs, administrators, executors, successors and assigns of all and each of the parties hereto."

The appellant and the corporation treated this as a valid trust deed as between themselves, as shown by their actions and conduct, and its validity as between them was recognized in the action for the appointment of another trustee, in which action the corporation was a defendant, and which action is binding on the real parties in interest to the trust deed. In *Wood Estate Co. v. Chanslor*, 209 Cal. 241, 286 P. 1001, 1004, the court said:

"It is too elementary to need citation of authority that, if the corporation is estopped, in absence of fraud, the estoppel likewise applies against the creditors of the corporation. This is so because the creditors get only the rights of the debtor, and no more. 10 Cal.Jur. 652.

"It should also be pointed out that the two parties to the trust deed—i. e., the mining company and respondent—are not seeking to avoid the instrument, but, in fact, both are seeking to uphold it. Appellants' objection is that the authority of the agent must be in writing under our statute of frauds. Just how a third party to such a contract can attack it, when the two principals do not object, is not made to appear. It would seem to be the rule that third parties cannot avail themselves of the defense of the statute if the two principals acquiesce. 12 Cal.Jur. 925; 25 R.C.L. 736."

[9,10] Whether or not this instrument be construed to be sufficient as a trust deed, we think it must be upheld as an equitable lien or mortgage. *Earle v. Sunnyside Land Co.*, 150 Cal. 214, 88 P. 920; *Hollywood Lumber Co. v. Love*, supra; *Wood Estate Co. v. Chanslor*, supra; *Withers v. Bousfield*, 42 Cal.App. 304, 183 P. 855.

Being effective as between the parties this instrument took precedence over a subsequent attachment. An attaching creditor is not a bona fide purchaser and when attaching property subject to a mortgage, whether recorded or not, he takes only the interest the mortgagor had at the time of the levy. *Motor Acceptance Co. v. Finn*, 124 Cal.App. 766, 13 P.(2d) 761; *Ahern v. Tulare Lake Canal Co.*, 115

Cal.App. 93, 1 P.(2d) 490; Iknoian v. Winter, 94 Cal.App. 223, 270 P. 999; Richman v. Bank of Perris, 102 Cal.App. 71, 282 P. 801; Eichler v. Gray (C.C.A.) 27 F.(2d) 328; Farmers' Exch. Bank v. Purdy, 130 Cal. 455, 62 P. 738.

Under our views on the main points presented it is not necessary to pass on the sufficiency of the acknowledgment on this instrument, although we would hesitate to hold that it was not sufficient to entitle the paper to be recorded, since it plainly appears therefrom that it was acknowledged in San Diego county before a notary public in and for that county, although the name of the county was not changed in the final line of the printed form of certificate.

The trial court found that on August 30, 1928, the corporation in question was indebted to the appellant in the sum of \$5,000, that it then executed this instrument for the purpose of securing this indebtedness, that on that day it placed the same in the hands of the appellant, and that it was filed for record on December 13, 1930. As conclusions of law, the court found that the deed of trust was not delivered, that the purported delivery to the appellant was not sufficient to pass any title, that the deed of trust by its own terms did not become effective for any purpose because it was not accepted by the trustee named therein prior to its recordation, that the deed of trust was not so acknowledged as to entitle it to be recorded, that the spreading of it upon the records of San Diego county did not constitute notice to the respondent, and that the appellant had no right, title, or interest of any kind in and to said real property at the time the attachment was levied on May 14, 1931. Under the circumstances here appearing we think this instrument was not a nullity, and that the conclusions drawn are erroneous.

The judgment is reversed, with directions to the trial court to amend its findings and conclusions of law to conform to the views herein expressed and to enter judgment in favor of the plaintiff, quieting her title.

We concur: LANGDON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

5 Cal.2d 784

**PYROIL SALES CO., Inc., v. PEP BOYS,
MANNY, MOE & JACK OF
CALIFORNIA.
L. A. 14954.**

Supreme Court of California.

March 26, 1936.

In Bank.

On rehearing.

For prior opinion, see 55 P.(2d) 194.

PER CURIAM.

The petition for a rehearing herein is denied.

The judgment heretofore entered herein is modified to read as follows: "Therefore, on the authority of the decision in Max Factor & Co. v. Kunsman (Cal.Sup.) 55 P. (2d) 177, this day filed, the judgment herein is reversed, and it is ordered that the trial court enter judgment in the within cause in favor of appellant as prayed.



12 Cal.App.2d 459

**KOHN v. SUPERIOR COURT IN AND FOR
CITY AND COUNTY OF SAN FRAN-
CISCO et al.
Civ. 10107.**

District Court of Appeal, First District,
Division 2, California.

March 14, 1936.

Hearing Denied by Supreme Court
May 11, 1936.

1. Courts ⌚40

Act of court or other tribunal in violation of statutory prohibition is in excess of jurisdiction.

2. Searches and seizures ⌚7(25)

In action to replevin letters wrongfully taken from plaintiff, allowing defendant to interrogate plaintiff as to each letter, thereupon to offer letter in evidence and read its contents into record, held improper, in view of constitutional prohibition against unreasonable searches; it being court's duty, if letters were wrongfully taken, to order them

returned with as little inspection as issues permitted (Code Civ.Proc. §§ 1000, 1985; Const. art. 1, §§ 19, 22).

3. Prohibition §3(1)

Plaintiff in pending action to replevin letters wrongfully taken from plaintiff held entitled to prohibition restraining court from admitting letters in evidence and allowing contents thereof to be read, as against contention that plaintiff had adequate remedy at law by dismissal of replevin action (Civ.Code, § 3523; Code Civ.Proc. §§ 1000, 1985; Const. art. 1, §§ 19, 22).

Application by Marion H. Kohn for a writ of prohibition against the Superior Court of the State of California in and for the City and County of San Francisco and Louis H. Ward, Judge of Department 3 of said court.

Peremptory writ of prohibition granted.

Pillsbury, Madison & Sutro, Philip S. Ehrlich, and Marshall P. Madison, all of San Francisco (Eugene D. Bennett, of San Francisco, of counsel), for petitioner.

Sullivan, Roche & Johnson and Heller, Ehrman, White & McAuliffe, all of San Francisco, for respondents.

STURTEVANT, Justice.

This is an application for a writ of prohibition. Heretofore the plaintiff had in his possession a large number of letters, cards, and telegrams. There were from 1,000 to 2,000 of them. Some were originals, others copies. Some were letters received by the plaintiff from his mother; others letters received by him from his wife. Some were copies of letters written by the plaintiff to his mother, or to his wife, or to some other person. The plaintiff kept the documents under lock and key either in his desk or in a trunk or chest. While the said documents were so in his possession the plaintiff's wife, who at that time was estranged from him, opened the receptacles containing said documents, and took out instruments variously estimated at from one thousand to two thousand and delivered them to Edward Rothchild in San Francisco. He delivered them to George Kohn, since deceased, the father of the plaintiff who was also estranged from the plaintiff. Mr. Kohn delivered them to Mr. Jerome B. White, an attorney at law, with

instructions to examine the documents and advise George Kohn whether said documents contained such information as would furnish the evidence to justify an action for damages against Mrs. George Kohn for the alleged cause of alienating the affections of this plaintiff, her son, from Dorris Kohn, her daughter-in-law. Mr. White made the examination and reported adversely. While the documents were in his possession, Mr. White marked each one with a letter and number, and as so indexed he later produced them in court together with a complete written description. He also caused photostatic copies of each document to be made. Later George Kohn died while the said documents were still in the possession of Mr. White. George Kohn left a will by the terms of which he left nothing to this plaintiff, his son. In the will he named Crocker First National Bank of San Francisco and Jerome B. White as executors of the will. They were appointed as special administrators and as such took possession of said documents and now hold them. This plaintiff filed a contest against the petition to admit the will of George Kohn to probate. That contest is at issue and will soon be tried.

This plaintiff commenced an action in replevin against the Crocker First National Bank of San Francisco and Jerome B. White to recover the possession of said documents. On the trial the plaintiff called Mrs. Dorris Kohn, who testified she broke open plaintiff's locked trunk and his locked desk during the absence of the plaintiff, took out the documents in suit, put them in a suitcase, and mailed it to Mr. Edward Rothchild. He took the stand and testified that he turned the suitcase and its contents over to Mr. Jerome B. White. The latter was called as a witness by the plaintiff and testified that he received from Mr. Rothchild the suitcase and its contents and produced the same in court. After the plaintiff rested his case the defendants made a motion for a nonsuit. The motion was denied, and thereupon the defendants called the plaintiff to the stand and, after some preliminary examination, proceeded to interrogate the witness as to each document, thereupon to offer the document in evidence and read its contents into the record. This plaintiff objected to all questions having the effect of giving publicity to the contents of said documents and objected to said documents being read

into the record, but his objections were overruled. After five or more of said documents had been read an adjournment of said hearing was granted and the plaintiff commenced this proceeding.

[1,2] The briefs of counsel cite many authorities from outside of the state of California. As the statutes on which they were decided were not identical with the statutes of this state, many matters are presented that are not helpful in the instant litigation. The plaintiff contends that the trial court is depriving him, and threatening to deprive him, of his constitutional rights. He cites section 19 of article 1 of the Constitution. That section provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches, shall not be violated." Section 22 of article 1 provides: "The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." Even when a statute containing prohibitions is the embodiment of the law, the doing of an act by a court or other tribunal in violation of the terms of such prohibitions is an excess of jurisdiction. *Modoc Land, etc., Co. v. Superior Court*, 128 Cal. 255, 256, 60 P. 848. As shown above, when the suitcase and its contents were produced in court it transpired that the documents had been taken from the plaintiff without his consent and not pursuant to the manner provided by law. Code Civ.Proc. §§ 1000, 1985. Although the court was in no manner responsible for the wrongful act of taking said documents from the possession of this plaintiff and had done nothing regarding the production of the papers in court, nevertheless when the nature of the documents appeared the prohibitions contained in the Constitution were a clear limit on the power of the court to receive said documents in evidence or to make any inspection thereof. *Potter v. Beal (C.C.A.)* 50 F. 860. Presenting the same questions from a slightly different angle, it is the settled law of the state of California that when the plaintiff was on the stand as a witness if the trial court had directed him to go to his office or residence, as the case might be, and bring from there the suitcase containing approximately one thousand different documents, without specifying the particular documents, or any showing being made as to the materiality of the contents of said documents in the action on trial,

said order would be in excess of jurisdiction and the plaintiff would not be bound to comply therewith. *Ex parte Clarke*, 126 Cal. 235, 58 P. 546, 46 L.R.A. 835, 77 Am.St.Rep. 176. Under the facts above recited, Mrs. Kohn had wrongfully taken the documents and they had passed from hand to hand until they had come, without the consent of the plaintiff, into the hands of the special administrators. When thereafter the documents were offered in evidence, and by order of the court they were read in evidence, the only difference between the situation there presented and that presented in the case of *Ex parte Clarke*, supra, rested in the fact that the court had not ordered the documents into the courtroom. The infringements of the rights of the plaintiff were otherwise the same. By ordering the documents admitted and afterwards read in evidence, the court exceeded its jurisdiction.

Nothing said above is in any way opposed to anything decided in *People v. Mayen*, 188 Cal. 237, 205 P. 435, 24 A.L.R. 1383. In that case the defendant was charged with grand larceny. His premises were illegally searched and certain articles of personal property were taken therefrom. Later some of said articles were offered in evidence against him. The defendant objected claiming that said articles had been illegally taken from his possession. The trial court held, and its holding was upheld in the decision cited, that in the criminal action on trial the court would not pause to inject a collateral issue as to whether the offered evidence was obtained legally or illegally but as it was relevant to the issue on trial it would be admitted. Whereas, in the replevin action out of which this proceeding arose, the very issue before the court was whether the documents in suit had been wrongfully taken from this plaintiff. If, as he claimed, they had been wrongfully taken, then it was the duty of the court to order them returned to him with as little inspection as the issues would permit and not to aid, nor become a party to, the wrongful taking in any respect whatever.

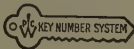
[3] The plaintiff cites many authorities to the effect that prohibition may properly be granted where the court or tribunal sought to be restrained is about to make an unauthorized application of judicial power in a matter otherwise properly cognizable by it. 50 C.J. 666; 21 Cal.Jur. 584; *High's Extraordinary Remedies* (3d

Ed.) 734. The defendants do not challenge that general rule, but they assert that entertaining this application while the hearing of the replevin action is on trial will be a dangerous precedent. We think not, but necessary and proper under the facts involved.

Nor do we find that the plaintiff has an adequate remedy at law. The defendants assert he may dismiss the replevin action and that such dismissal is such a remedy. *Yolo Water, etc., Co. v. Superior Court*, 43 Cal.App. 332, 185 P. 195. That case is not an authority to the effect claimed for it. To hold that a dismissal is, as to this plaintiff, his remedy, is in effect to hold that he has no remedy for being deprived of his private correspondence. But in this state it is statutory that for every wrong there is a remedy. Civ. Code, § 3523.

It is therefore ordered that a peremptory writ of prohibition issue as prayed for in the petition on file herein.

I concur: SPENCE, J.



13 Cal.App.2d 27

PEOPLE v. TABER et al.

Cr. 320.

District Court of Appeal, Fourth District,
California.

March 30, 1936.

Hearing Denied by Supreme Court
April 27, 1936.

1. Conspiracy ☞47

In prosecution for conspiring to burn an apartment building with intent to defraud insurance company and for arson, corroboration of testimony of accomplices *held* sufficient to sustain conviction.

2. Criminal law ☞1170½(5)

Refusing to permit cross-examination of accomplice as to whether he testified with hope of leniency, if error, *held* not reversible, where accomplice had been sentenced and term fixed by prison board.

3. Criminal law ☞1186(4)

Refusing to permit defendant to prove his reasons for hiring attorney to defend alleged accomplice in former action, for paying

such attorney, and for giving various amounts to accomplice's mother and his wife while he was in jail, *held* prejudicial error, where such acts were particularly relied on by prosecution as corroborating testimony of accomplice (Const. art. 6, § 4½).

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Edward R. Taber was convicted in prosecution for conspiring to burn an apartment house with intent to prejudice and defraud an insurance company, and for arson, and he appeals.

Reversed and remanded for new trial.

Burke & Herron, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Warner I. Praul, Deputy Atty. Gen., and W. F. Menton, Dist. Atty., and Preston Turner, Deputy Dist. Atty., both of Santa Ana, for the People.

BARNARD, Presiding Justice.

The defendants were charged with conspiring to burn an apartment house owned by the defendant Taber and occupied by the defendant Sibley, with the intent to prejudice and defraud an insurance company which had insured the building. In a second count they were charged with arson, in intentionally setting fire to and burning this building. In the fall of 1932 one Eli and one Rose had been convicted of arson in connection with the burning of this building, as a result of which they were confined in the penitentiary. The defendant Taber was convicted by a jury, and has appealed from the judgment and from an order denying a motion for a new trial.

It is conceded that the appellant and his wife were the owners of the building which was insured for \$4,000; that in March, 1932, the house was partially prepared for burning by Eli but was not ignited; that there was a fire in the building on April 23, 1932, as a result of which the appellant collected \$285 on the insurance policy; that the building was destroyed by fire on June 7, 1932, as a result of which the insurance company paid the appellant \$2,000; that both of these fires were incendiary in nature; and that at the time of both fires the apartment house was occupied by Rose and by Sibley.

Rose testified that in the fall of 1931 he rented the building from Taber with the understanding that each was to have half the profits therefrom and that Rose should remove the building from the property by the first of the year, and should have the same for the work of removing it; that about the 1st of March, 1932, at Taber's office in Los Angeles, he and Taber agreed that he was to burn the building and that Taber was to pay him half of the insurance collected; that he arranged with Eli to assist in burning the building for half of his share of the proceeds; that a week or two later he returned to the house and found that Eli had made preparations for a fire but had not lighted it; that a few days later he arranged with Sibley to burn the building, and it was agreed that the money to be received from Taber should be divided between the other three; that on April 23d Sibley poured gasoline and set fire to the building, but the fire was put out by the fire department, with only a slight damage to the building; that shortly after this fire Taber told him that his insurance had been canceled, but that he could go ahead with the burning after the insurance was straightened out; that two or three weeks later Taber came to the apartment house and told him it was all right to proceed when he felt safe; that he repeated this to Eli and Sibley, and Sibley agreed to make another effort to burn the building; that shortly after the building was burned, on June 7, 1932, Eli reported that fact to him and the two went to Los Angeles, where he told Taber that the building had been burned; and that Taber said it would be four or five days before the insurance would be straightened out. He then testified that he went to see Taber several times, and each time Taber told him that he had not yet settled with the insurance company; that on each of these occasions Taber gave him some money, usually \$5 or \$10, but once \$50 and once \$100; that on one of these occasions Taber agreed to get him out on bond in the event he was arrested; that, after he was arrested, an attorney named Bush came to the jail to see him and represented him throughout his trial; that he had not theretofore known Bush; and that he did not hire him or pay him.

It is first contended that there was no legal corroboration and that, aside from the testimony of the accomplices, Rose and Eli, the evidence is insufficient to connect, or tend to connect, the appellant with the conspiracy or with the arson. The rules gov-

erning such corroboration are well settled. In *People v. Negra*, 208 Cal. 64, 280 P. 354, 356, the general rules are thus set forth: "While the jury may consider the circumstance that a witness is an accomplice, in passing upon his credibility as a witness (*People v. Clough*, 73 Cal. 348, 354, 15 P. 5), his testimony is not to be rejected merely because he is an accomplice, and if there is other evidence which measures up to the requirement of the Code (*supra*), tending to connect the defendant with the commission of the crime charged, then such testimony of the accomplice is to be considered by the jury, as is any other testimony, and must be given the weight to which the jurors may conclude that it is entitled. *People v. Hoosier*, 24 Cal.App. 746, 142 P. 514. The evidence tending to connect a defendant with the commission of the crime may be slight and, when standing by itself, entitled to but little consideration. *People v. McLean*, 84 Cal. 480, 24 P. 32. The law does not require that the evidence necessary to corroborate the testimony of an accomplice shall tend to establish the precise facts testified to by the accomplice; and strong corroborative testimony is not necessary to support a judgment of conviction founded on the testimony of an accomplice. Even though circumstantial and slight, the evidence is, nevertheless, sufficient if it tends to connect the accused with the commission of the offense. *People v. Martin*, 19 Cal.App. 295, 125 P. 919. The defendant's own statements and admissions, made in connection with other testimony, may afford corroboratory proof sufficient to sustain a verdict. *People v. Armstrong*, 114 Cal. 570, 46 P. 611; *People v. Sullivan*, 144 Cal. 471, 473, 77 P. 1000. It is not necessary that the corroborating evidence should go so far as to establish by itself, and without the aid of the testimony of an accomplice, that the defendant committed the offense charged. *People v. Solomon*, 6 Cal.Unrep. 305, 58 P. 55. It is not necessary to cite the great number of authorities which sustain these fundamental principles of law relating to the testimony of an accomplice. An examination of the decisions will show that the evidence in each case must be considered in the light of these rules, applied to its particular facts, and a determination reached accordingly."

[1] While the appellant denied having had anything to do with the burning of this building, he admitted that he rented the property to Rose, that Rose came to see

him on these various occasions, and that after the first fire he gave Rose \$50 which he said Rose was to use in repairing the building. It is not disputed that the appellant owned the building and that he had insured it. It fully appears that he increased the insurance from \$3,000 to \$4,000 the last time it was insured, in August, 1930, and that, although the building was totally destroyed, he accepted \$2,285 from the insurance company. From this and from the fact that the appellant had agreed that Rose should remove the building from the premises, it would appear that the building was over-insured. The appellant was notified by the fire department of the two previous attempts to burn the building, and, without making any attempt to investigate the matter, permitted Rose and Eli to remain in the building. He hired and paid an attorney to defend Rose on a charge of burning the property, and furnished money to Rose's wife while he was in jail. While the appellant would benefit from any insurance money collected, no satisfactory motive for burning the building appears on the part of Rose and Eli, in the absence of some such arrangement as that testified to by them. The appellant made a number of conflicting and contradictory statements about these matters. At the trial of this action he testified that he visited the premises about the 1st of May, 1932, while at the trial of Rose and Eli he testified that he had not been near the property during that time. This also furnishes some support for Rose's testimony that Taber came to the building about that time and told him that his insurance had been straightened out and that they were to proceed with the plan. The appellant further testified that the last time he insured the house he had cut the insurance from \$6,000 to \$4,000. The insurance agent who wrote the insurance testified that on that occasion the insurance was increased from \$3,000 to \$4,000. When the appellant was arrested, he stated to the officers that he had not hired the attorney, Bush, to defend Rose in the former action in 1932, that he hardly knew him, and that he had not paid him any money for defending Rose. He testified here that he employed Bush to defend Rose in the other action, that he paid him \$260 for his services, and the check with which he paid him was admitted in evidence. The mother of Rose testified that shortly after Rose was arrested she told the appellant that, if her son was guilty of arson, he was equally guilty, and that the appellant made no de-

nial. A woman who owned an adjoining building testified that before the first of these fires she had a talk with the appellant, at which time he asked her, "Why couldn't we have a fire?" While the appellant denied having paid money to Rose after the fire, with the exception of the \$50 which he said was for repairs, he confirmed the testimony of Rose's wife and mother to the effect that they visited him several times after the second fire and that on each occasion he gave them some money; these amounts totaling \$50 or more. The record is very voluminous, and we have not attempted to summarize all of it. In our opinion, there is ample corroboration of the testimony of the accomplices, under the established rules, and the evidence is sufficient to sustain the judgment.

[2] The appellant contends that the court erred in restricting the cross-examination of the accomplice, Rose, as to the motives which actuated him in testifying. It had been brought out that this witness had been convicted and was serving a term in the penitentiary, and that his term had been fixed by the prison board. While he was being cross-examined, he was asked whether he entertained a hope that he would be given some leniency if he came down and testified in this case for the people. To this question he replied: "I had no arrangement with the district attorney." He was then asked: "Q. You had no hope in your heart that you would be given an early parole or your sentence otherwise shortened because of your appearance here?" An objection to this question was sustained; the court holding that he might be questioned only as to what promises had been made to him. The appellant argues that he had the right to cross-examine this witness on his state of mind, and relies upon the case of *People v. Pantages*, 212 Cal. 237, 297 P. 890. In that case the court said that it was entirely proper, either by cross-examination or otherwise, to show a belief or even a hope on the part of a witness that he might secure immunity or a lighter sentence in return for his testimony, and that the long delaying of sentence after a plea of guilty is evidence tending to show the existence of such a hope. In the instant case, the witness in question had already been sentenced and his term fixed by the prison board. Even his time of parole after serving of sentence was fixed, and there would not seem to have been much basis for a hope of obtaining leniency. There was no offer of proof and nothing to show that any

answer to the question would have been favorable to the appellant. However the question might have been answered, any hope for leniency must have been based upon an inference from other facts. These facts were before the jury, and could be used as a basis for arguing to the jury that the witness must have had such a hope. The appellant had the right to so argue anyway, and probably did, as the district attorney seems to have answered such an argument. There is no showing of prejudice, and, even if error be assumed, it would not appear to have been sufficiently prejudicial to justify a reversal.

[3] It is next contended that the court erred in refusing to permit two witnesses for the appellant to answer certain questions as to conversations they had with him and in refusing to permit the appellant to answer certain questions asked of him. The essence of these assignments is that the court erred in refusing to permit the appellant to prove, by his own testimony and that of other witnesses, his reasons for hiring an attorney to defend Rose in the former action, for paying this attorney, and for giving various amounts of money to Rose's mother and wife while Rose was in jail. The appellant had testified that Rose had threatened that in the event of his arrest he would implicate the appellant, unless the appellant furnished him a lawyer, furnished bail, and took care of his family. The appellant offered to prove that he talked this matter over with his office associates and with his regular attorney, and that this attorney advised him that he ought to underwrite Bush's fee for defending Rose to the end that Rose would have an honest lawyer who would not frame him, whereas, if Rose did not have the money to employ an honest lawyer, he might get a shyster who would do so, and that he acted upon this advice. He also offered to prove that he gave small sums to Rose's mother and wife because of Rose's threat to wrongfully implicate him, and also because he felt sympathy for Mrs. Rose and the children.

The prosecution introduced evidence to the effect that the appellant had employed Bush to represent Rose, who was charged with burning this building, and that he had given money to Rose's wife after Rose was arrested. This evidence was introduced for the purpose of corroborating the testimony of Rose and of connecting the appellant with the conspiracy and the arson. The prosecution placed great emphasis upon this

evidence as showing that these acts were done by the appellant for the purpose of inducing Rose to remain silent as to his connection with the affair. The rejected evidence above referred to was offered for the purpose of showing what was actually in the appellant's mind and what were his reasons for doing these acts. While the appellant was prevented from explaining these things, upon the objection of the district attorney, it was repeatedly argued to the jury that these acts had not been and could not be explained. The following quotations from the argument indicate how the matter was stressed:

"If Mr. Taber is as innocent as he would have you believe, if he was being blackmailed, as he would have you believe, why should he not go to the district attorney of this county, or the district attorney of Los Angeles county, or some police department, for protection? Instead of that, he hires a lawyer to defend the man who burns this building, and I challenge them to satisfactorily explain that circumstance, especially in view of the incriminating circumstances which are in the record here. Without investigation, without anything, he takes his word for it; he knows nothing about it, except that John Rose told him, and he hires a lawyer to come down here and defend him.

"If someone burned your building down, would you hire a lawyer to defend him, * * * and then expect the jury to believe that the reason you did that was because he was blackmailing you? Or would any reasonable person, instead, go to the district attorney and lay the facts before him and ask for protection?"

"* * * You people are all intelligent but do you believe for one moment that if the defendant Taber had all of these witnesses to the fact that he was being blackmailed, that he would hire a lawyer to defend the man who burned his building for protection, instead of going to the district attorney and asking for protection where it could be given and would he wait three years before saying anything about it, if it actually happened?"

"Assume that one of you people owned a building in Huntington Beach * * * and it burned down * * * and then * * * when the finger of suspicion was pointing at some individual in the community, and the officers were investigating that man, would you be giving him a little money before he was put in jail, and then when

he was placed in custody and the charges filed against him for burning your property, is it the act of an innocent person to finance this man's defense?

"And why then, in the face of accusations of this kind, did he go ahead and do the very thing that would implicate him, namely, hiring a lawyer * * *?"

The general rule is thus given in Jones on Evidence (2d Ed.) § 170: "It is the prevailing rule, sustained by the great weight of authority, that whenever the motive, intention or belief of a person is relevant to the issue it is competent for such person to testify directly upon that point, whether he is a party to the suit or not."

In *People v. Moore*, 48 Cal.App. 245, 191 P. 980, 982, the court said: "An objection was sustained to the following question asked the defendant: 'Did you intend, Mr. Moore, at the time when you got these cattle from Mr. Edmands to cheat or defraud Mr. W. O. Edmands or W. H. Edmands out of those cattle or any of them?' We think this question was proper, and that the defendant should have been allowed to answer it. 'The general rule is well settled that, under our system, a witness may be examined as to the intent with which he did a certain act, when that intent is a material thing in the action.'"

In *Fleet v. Tichenor*, 156 Cal. 343, 104 P. 458, 460, 34 L.R.A.(N.S.) 323, the court used this language: "The general rule is well settled that under our system a witness may be examined as to the intent with which he did a certain act, where that intent is a material thing in the action. A jury or trial judge is not bound, of course, to believe the witness when he says he did not have a certain intent, but may find in the circumstances, actions and language an entirely different intent, but the testimony of the witness 'is competent and relevant, and not immaterial.'"

The matter here in question went directly to the motive of the appellant in doing certain acts which were particularly relied upon by the prosecution as corroborating the testimony of the accomplices. These acts were emphasized in the argument to the jury as furnishing such corroboration, and it was argued, in effect, that they had not been explained and could not be explained, and the appellant was challenged to explain them, although his explanation had been shut out on the objection of the district attorney. So far as the jury knew, no attempt had been made to explain these

circumstances, and, while the district attorney was free to draw inferences from the absence of an explanation, the appellant was deprived of the basis for any argument that his explanation was valid and that he had a good reason for acting as he did. In our opinion, the exclusion of the offered testimony was erroneous, under the circumstances shown by the record.

The question remains whether this error was sufficiently prejudicial to justify a reversal, in view of the provisions of section 4½ of article 6 of the Constitution. In *People v. O'Bryan*, 165 Cal. 55, 130 P. 1042, 1046, the court said: "On the other hand, we do not understand that the amendment in question was designed to repeal or abrogate the guaranties accorded persons accused of crime by other parts of the same Constitution or to overthrow all statutory rules of procedure and evidence in criminal cases. When we speak of administering 'justice' in criminal cases, under the English or American system of procedure, we mean something more than merely ascertaining whether an accused is or is not guilty. It is an essential part of justice that the question of guilt or innocence shall be determined by an orderly legal procedure, in which the substantial rights belonging to defendants shall be respected."

In *People v. Salaz*, 66 Cal.App. 173, 225 P. 777, 781, the court said: "While it is true that section 4½ of article 6 of the Constitution confers upon this court the power to weigh, to a limited extent, the entire evidence upon which a conviction was had, still 'we are not substituted for the jury. We are not to determine, as an original inquiry, the question of defendant's guilt or innocence.' We are to 'decide whether, in our judgment, any error committed has led to the verdict which was reached.' *People v. O'Bryan*, 165 Cal. 55, 130 P. 1042. (Italics ours.) And whenever we are unable to determine whether the defendant would have been convicted had erroneously admitted testimony been withheld from the jury's consideration, this section of the Constitution cannot be applied to uphold the judgment."

In *Tupman v. Haberkern*, 208 Cal. 256, 280 P. 970, 973, the court said: "Whether the error found to be present 'has resulted in a miscarriage of justice' presents a question of law on the record before the court, and the purpose of the section was to require the court to declare as matter of law whether the error has affected the substan-

tial rights of the party complaining against it, and not for the purpose of determining the evidentiary value of the testimony or where the preponderance of the evidence lies."

In *People v. Davis*, 210 Cal. 540, 293 P. 32, 39, the court said: "And even if it be assumed that the so-called corroborative testimony is technically sufficient to prove the asking, agreeing to receive, and receiving a bribe from Ed Rosenberg, nevertheless it leaves the case in that weak and unsatisfactory condition in which errors become important, because in such case they much more easily lead to a miscarriage of justice than in those cases where there is abundance of reliable evidence of the defendant's guilt. Section 4½ of article 6 of the Constitution was not intended to mean that the mere fact that the evidence may legally be able to stand up under the weight of the judgment is sufficient reason in all cases for refusing to set aside the judgment. The phrase "miscarriage of justice," used as descriptive of that condition of a cause which justifies the reversal of a judgment, has no hard and fast definition. It seems assured, however, that where errors have been committed, and where the appellate court finds that upon the record it is seriously doubtful that without such errors the defendant would have been convicted, then it may well be that errors which otherwise would not be considered to be seriously prejudicial, will require a reversal."

The jury would naturally feel, especially in view of the argument made, that the hiring and paying of a lawyer to defend Rose in the former action and the giving of money to Rose's family while he was in jail would strongly tend to show the appellant's connection with the fires, which were admittedly incendiary, and it seems extremely probable that these facts materially contributed to his conviction. As the case went to the jury, it had no knowledge of any explanation on the part of the appellant as to why he had done these things. If the jury had heard his explanation of these matters and believed the same, they might have entertained a reasonable doubt as to one necessary element; that is, whether the testimony of the accomplices had

been sufficiently corroborated. It is entirely possible that the jury might have acquitted the appellant but for the exclusion of this testimony, and, under such circumstances the error is necessarily prejudicial. See *People v. Smith*, 206 Cal. 235, 273 P. 789. We cannot tell whether or not the jury would have accepted the appellant's explanation had it been submitted to them, but its exclusion directly affected the most important evidence against him, evidence which could well have been controlling in the case and which was strongly emphasized by the district attorney in his argument. The appellant's explanation was that he had done these things under a threat of blackmail and to guard against the carrying out of a threat to frame him. Many an innocent man has yielded to blackmail. While we cannot know whether the jury would have accepted this explanation as sufficient, the excluded evidence would have added a substantial item to the balance in the appellant's favor, and it is entirely possible that its admission might have changed the verdict. Under such circumstances, it cannot now be positively asserted that "the result was just, and that it would have been reached if the error had not been committed." See *People v. Estorga*, 206 Cal. 81, 273 P. 575, 576; *People v. Barrett*, 207 Cal. 47, 276 P. 1003; *People v. Wilson*, 23 Cal. App. 513, 138 P. 971. In our opinion, the appellant should have been permitted to explain the most damaging evidence which had been produced against him. Since he was prevented from doing this and the absence of such an explanation was especially urged to the jury as a reason for his conviction, the ends of justice require that he be given a new trial.

The last two points raised by the appellant require no consideration. The first of these is without merit, and the second, if not entirely corrected by the court's ruling, will undoubtedly not be repeated on a second trial.

The judgment and order are each reversed, and the cause remanded for a new trial.

We concur: MARKS, J.; JENNINGS, J.

12 Cal.App.2d 672

ACKEL v. AMERICAN CREAMERY CO.

Civ. 9462.

District Court of Appeal, First District,
Division 1, California.

March 25, 1936.

1. Appeal and error ⇨970(2)

Admission or rejection of evidence regarding speed vehicle is traveling before collision occurs rests in trial court's discretion, which will not be disturbed on appeal, in absence of abuse.

2. Automobiles ⇨243(7)

Excluding testimony as to speed of truck and its position on highway when it passed witness about block and half distant from intersection where collision occurred *held* not error.

3. Trial ⇨260(1)

Refusing alleged requested instruction *held* not error, where court fully and fairly instructed jury on subject covered thereby.

4. Trial ⇨296(3)

Instruction that, if there was exercised all the care that was "reasonably practicable," there was no negligence on defendant's part, *held* not error, since quoted words were equivalent of "reasonable care" and court had in other instructions repeatedly advised jury as to degree of care required of defendant.

[Ed. Note.—For other definitions of "Reasonable Care" and "Reasonably Practicable," see Words & Phrases.]

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Edward Ackel against the American Creamery Company. Judgment for defendant, and plaintiff appeals.

Affirmed.

George K. Ford, of San Francisco, for appellant.

Jesse H. Steinhart and John J. Goldberg, both of San Francisco, for respondent.

TYLER, Presiding Justice.

Action for personal injuries growing out of an automobile collision. Plaintiff was a guest riding in a Buick roadster with his brother-in-law Frederick Salih when the

vehicle in which they were riding collided with a truck owned by defendant. The collision occurred in Oakland at the intersection of Fourteenth and Adeline streets. Defendant's truck was loaded with several tons of fresh milk. There was evidence to show that at the time of the accident the streets were wet and slippery. As is usual in such cases, there is a decided conflict in the evidence as to the speed of the different vehicles and their relative positions at the time of the accident. There is evidence to show that the machine occupied by plaintiff was proceeding in an easterly direction on Fourteenth street, while defendant's truck was going west along the same thoroughfare. As the car occupied by plaintiff reached Adeline street, an unidentified automobile proceeding north on that street failed to stop on the south side of such street, notwithstanding a stop signal, and proceeded across the intersection of the two streets. As a result of this interference Salih, the driver of the Buick automobile, applied his brakes in order to stop or slow down so as to permit the trespassing car to cross in front of him. The sudden application of the brakes and the slippery condition of the pavement caused the Buick to skid and turn around several times within the intersection, and it was deflected against the left front of defendant's truck, pulling the steering gear out of the driver's hands and causing him to lose control of it. The jury rendered a verdict in favor of defendant. No question is here raised as to the sufficiency of the evidence to support the verdict in defendant's favor, it being claimed merely that the trial court erred in the rejection of certain evidence and the jury was erroneously instructed on the subject of reasonable care.

[1, 2] In support of the first contention it is claimed that the court erred in refusing to permit a certain witness to testify as to the speed of the truck and its position on the highway when it passed him about a block and a half distant from where the collision occurred, and beyond a street intersection. The purpose of the proffered testimony was to show that the truck was traveling at an excessive speed at this particular point and that it extended over the center of Fourteenth street. It is claimed that considering the conflict of evidence as to the relative speed of the vehicles at the time of the collision, it was error on the part of the court to refuse to receive such testimony. Respondent insists that the evidence, had it

been received, would not have been given serious consideration by the jury in view of the fact that it was shown the witness had been convicted of a felony, and subsequent to the accident had solicited and received employment from the owner of the Buick, who also had an action pending against defendant, though he was unacquainted with him prior to the time of the accident. Had the trial court received the proffered evidence, its weight would have been a matter for the jury. However, the trial court refused to receive it, concluding that it was too remote. The law is well established in this state that the admission or rejection of evidence as to the rate of speed a vehicle is traveling before a collision occurs rests in the sound discretion of the trial court. The question rests so largely within its discretion that no fast or positive rule can be laid down governing the matter, for which reason the ruling of the trial court as to the admission or rejection of this sort of evidence will not be disturbed except upon a showing of abuse of discretion. *Ritchey v. Watson*, 204 Cal. 387, 268 P. 345; *Traynor v. McGilvray*, 54 Cal.App. 31, 200 P. 1056; *Wagy v. Brave*, 133 Cal.App. 413, 24 P.(2d) 209. Here there is no such showing.

[3] Appellant complains of the court's refusal to give a requested instruction to the effect that a defendant in operating his automobile is not necessarily exempt from liability for injuries to other persons, occurring in a public street or highway, by showing simply that at the time of the accident he was running such automobile at a rate of speed allowed by law; that he was bound to anticipate he might meet other persons on the highway and was required, in order to avoid a charge of negligence, to keep a reasonable lookout and keep his automobile under such control as would enable him to avoid a collision with another person who was exercising reasonable care, and, if the situation required it, exercise reasonable care to slow up and, if reasonably necessary, stop. Our attention is called to the fact that the transcript does not indicate the above instruction was among those requested by plaintiff. We have been unable to find where such instruction had been refused. In fact, the record shows that the instructions presented by plaintiff and which were given by the court fully cover this subject. In addition thereto the charge of the court fully and fairly instructed the jury upon the subject.

[4] And, finally, appellant complains that the court erred in instructing the jury, at the request of defendant, that in determining any issue as to its negligence, if there was exercised all the care that was reasonably practicable, there was no negligence on its part. It is claimed that by substituting the words "reasonably practicable" for "ordinary care," the court confused the jury and introduced an element of uncertainty by use of the substitution. The words objected to are the equivalent of reasonable care. If defendant exercised all the care that was reasonably practicable, it exercised reasonable care. The instruction does not relax or modify the rule of ordinary care. *Staley v. Commissioner of Highways*, 214 Ill.App. 403; *Beck v. Board of Commissioners of Shawnee County*, 105 Kan. 325, 182 P. 397; *Feary v. Metropolitan Street Railway Co.*, 162 Mo. 75, 62 S.W. 452; *Benjamin v. Metropolitan Street Ry. Co.*, 245 Mo. 598, 151 S.W. 91. Moreover, the court in its instructions repeatedly advised the jury as to the degree of care imposed by law upon defendant and the meaning of the words "reasonable care." The departure complained of does not justify a reversal.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.



12 Cal.App.2d 733
SHARICK v. GALLOWAY et al.

Civ. 1764.

District Court of Appeal, Fourth District,
California.

March 26, 1936.

1. Appeal and error §419(1)

Appeal held not dismissible as being from nonappealable order sustaining demurrer to complaint, where notice of appeal stated that appeal was taken from judgment made on date when action was dismissed.

2. Appeal and error §419(1)

Appeal held not dismissible as being from nonappealable order of June 6th sustaining demurrer to complaint, rather than judgment of June 8th dismissing action, where notice of appeal stated that appeal was from judg-

ment of July 6th sustaining demurrer to complaint and from whole of order and each and every part of judgment, although no order or judgment was rendered on July 6th, in view of recitation in judgment of dismissal that demurrer to complaint had been sustained.

3. Appeal and error $\Rightarrow$ 1074(3)

Technical objections to presentation of appeals are not favored, and will not be sustained, in absence of showing of injury to some right of adverse party.

4. Appeal and error $\Rightarrow$ 419(2)

Appeal is not invalidated by fact that notice of appeal incorrectly states date on which judgment appealed from was rendered.

5. Appeal and error $\Rightarrow$ 608(1)

Transcript prepared by clerk pursuant to notice given after judgment dismissing action as to two defendants, but before judgment dismissing action as to other defendant, *held* to relate to appeal from first judgment and to present sufficient record for review thereof (Code Civ.Proc. § 953a).

6. Appeal and error $\Rightarrow$ 816

Where single transcript was prepared pursuant to notice given after judgment dismissing action as to two defendants, but before judgment dismissing action as to other defendants, and defendants moved to dismiss appeal from second judgment on ground that there was no record on which to base such appeal, court, on its own motion, consolidated both appeals and considered them on single record, where record contained all that was necessary for review of both judgments (Code Civ.Proc. § 953a).

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by Benjamin Sharick against Mollie Galloway and others. Judgments for defendants, and plaintiff appeals. On motions to dismiss the appeals.

Motions denied.

Clifton Hildebrand and John Corgiat, Jr., both of Oakland, and Philander B. Beadle, of San Francisco, for appellant.

W. G. Machetanz, of Visalia, for respondents Mollie Galloway and Fred Boon.

McFadzean & Crowe, of Visalia, for respondents Sun-Maid Raisin Growers Ass'n and Sun-Maid Raisin Growers of California.

JENNINGS, Justice.

The plaintiff instituted this action against four defendants to recover damages for personal injuries alleged to have been sustained by him as the result of his being struck by an automobile which at the time of the accident was being operated by one of the defendants who is alleged to have been the agent of, and employed by, two other defendants. The fourth defendant, Mollie Galloway, is alleged to have been the owner of the automobile which at the time of the accident was being driven by the defendant Boon, with her consent. The prayer of the complaint is for a judgment against the defendant Boon and his alleged employers in the amount of \$25,000 and against the defendant Galloway in the amount of \$5,000. To this complaint the defendants Sun-Maid Raisin Growers Association and Sun-Maid Raisin Growers of California interposed a joint demurrer both general and special. The defendants Boon and Galloway likewise filed a joint demurrer both general and special to the pleading. These demurrers were sustained by the trial court without leave to amend the complaint on June 6, 1935. On June 8, 1935, a judgment dismissing the action as to the defendants Boon and Galloway was signed and filed. On July 27, 1935, the plaintiff gave the following notice of appeal, which was addressed to the clerk of the trial court: "You will please take notice that plaintiff Benjamin Sharick hereby appeals to the District Court of Appeal of the State of California, Fourth Appellate District, from the judgment in the above entitled action of July 6th, 1935, sustaining defendants' demurrer to plaintiff's sixth amended complaint without leave to amend and from the whole of said order and from each and every part of said judgment."

On August 23, 1935, a judgment dismissing the action as to the defendants Sun-Maid Raisin Growers Association and Sun-Maid Raisin Growers of California was signed and filed. On September 17, 1935, the plaintiff gave notice of appeal from the judgment thus made and entered.

The two appeals which have been taken by the plaintiff from the separate judgments rendered as above noted are here presented on a single record which is entitled "Clerk's Transcript on Appeal." This document contains copies of the pleadings filed in the action, the trial court's order of June 6, 1935, sustaining the demurrers without

leave to amend, the two judgments of dismissal entered as above indicated, and the notices of appeal. It contains a certificate of the county clerk wherein it is stated that the contents of the transcript consist of true and correct copies of the various documents specified in the certificate.

The defendants Boon and Galloway have joined in a motion to dismiss the appeal from the judgment dismissing the action as to them which was entered on June 8, 1935. The two remaining defendants have likewise joined in a separate motion to dismiss the appeal from the judgment of August 23, 1935.

The grounds which are urged in support of the two above-mentioned motions are, first, that the appeal attempted to be taken is from an order sustaining a demurrer without leave to amend which is a nonappealable order, and, second, that no transcript on appeal has been prepared for the presentation of this appeal as required by the Code.

[1] With respect to the contention of the defendants Sun-Maid Raisin Growers Association and Sun-Maid Raisin Growers of California that the appeal is from a nonappealable order, it is manifest that it may not be sustained. The notice of appeal clearly states that the appeal is taken from "that certain judgment given, made and entered in the above-entitled cause on or about the 23d day of August, 1935." No mention is made of the order sustaining demurrers to the complaint. The judgment from which the appeal is taken is therefore definitely identified, and it is patent that the appeal is from the judgment and not from the order sustaining demurrers to the complaint.

[2-4] The contention of the other defendants that the appeal as to them is taken from the order sustaining demurrers which is concededly a nonappealable order requires consideration because of the unfortunate wording of the notice of appeal. As above indicated, this notice states that the appeal is taken "from the judgment in the above-entitled action of July 6, 1935, sustaining defendants' demurrer to plaintiff's sixth amended complaint without leave to amend and from the whole of said order and from each and every part of said judgment." Since neither the order sustaining demurrers nor any judgment rendered in the action was made on July 6, 1935, it is apparent that the date thus given is erroneous. It is the contention of the defendants who seek to have the appeal

dismissed that the date which was intended to be specified was June 6, 1935, and that consequently an appeal was taken from the nonappealable order and must be dismissed. This contention has apparent support in the reference to the judgment as one sustaining a demurrer without leave to amend and the words: "And from the whole of said order." However, the notice begins with the statement that the plaintiff appeals "from the judgment in the above entitled action" and ends with the language, "and from each and every part of said judgment." Since a judgment dismissing the action as to these defendants had been entered on June 8, 1935, which judgment contained a recitation that the demurrer of these defendants to plaintiff's sixth amended complaint had been sustained without leave to amend, it is our conclusion that the notice of appeal sufficiently identified the judgment and indicated that the appeal was taken from the judgment rather than from the nonappealable order. Technical objections to the presentation of appeals are not favored and, in the absence of a showing of injury to some right of the adverse party, will not be sustained. *McMahon v. Hamilton*, 202 Cal. 319, 325, 260 P. 793; *Tasker v. Warmer*, 202 Cal. 445, 261 P. 474; *Lynch v. Coe*, 203 Cal. 422, 264 P. 747. That the notice is defective in its reference to the date of the judgment is obvious. No judgment or order in the action was made on July 6, 1935, the date specified in the notice as the date of the judgment. However, the rule is settled that a mistake of this character does not invalidate an appeal. *Weyl v. Sonoma Valley R. Co.*, 69 Cal. 202, 10 P. 510; *Anderson v. Goff*, 72 Cal. 65, 13 P. 73, 1 Am.St.Rep. 34; *Swasey v. Adair*, 83 Cal. 136, 23 P. 284; *Wilson v. Union Iron Works Dry Dock Co.*, 167 Cal. 539, 140 P. 250; *Harrelson v. Miller & Lux, Inc.*, 182 Cal. 408, 188 P. 800; *Oberkotter v. Woolman*, 187 Cal. 500, 202 P. 669; *Title Guarantee & Trust Co. v. Lester*, 216 Cal. 372, 14 P.(2d) 297. At the time the notice was given a judgment had been entered in the action, and only one judgment had then been entered, and the mistake in date is not a defect of such importance as to invalidate the appeal. *Foss v. Johnstone*, 158 Cal. 119, 123, 110 P. 294; *Wilson v. Union Iron Works Dry Dock Co.*, supra; *Oberkotter v. Woolman*, supra.

[5] There remains for consideration the contention that no transcript on appeal has been prepared as required by the Code. While this contention is urged by both pairs

of defendants who have moved to dismiss the appeals, we entertain the opinion that its importance rests chiefly with respect to the motion presented by the defendants Sun-Maid Raisin Growers Association and Sun-Maid Raisin Growers of California. The record shows that but one notice to prepare a clerk's transcript was given by plaintiff. This notice, which bears the filing date, June 15, 1935, contains a request for the preparation of a transcript pursuant to the provisions of section 953a of the Code of Civil Procedure which should include the sixth amended complaint, the demurrers of the defendants thereto, and all rulings, acts, and statements of the trial court relating thereto, and any judgment made and entered in the action. At the time this notice was given, the first judgment dismissing the action as to the defendants Galloway and Boon had been entered. The second judgment dismissing the action as to the two remaining defendants was not entered until August 23, 1935, and notice of appeal from the latter judgment was not filed until September 18, 1935. It is our conclusion that the transcript which was prepared by the clerk in accordance with the above-mentioned notice relates to the appeal taken from the first judgment and that it presents a sufficient record for the review of that judgment.

[6] Since, however, it is obvious that two appeals have been taken by the plaintiff from two separate judgments entered in the action and only one transcript has been prepared which, in our opinion, was prepared with reference to the appeal taken from the judgment first entered, it follows that there is before us no record on which to base the appeal taken from the second judgment unless we are justified in considering both appeals on the single transcript which has been filed herein. The plaintiff maintains that we are amply justified in considering both appeals on the single record, since in both appeals there is but the one appealing party who attacks both judgments on the

single ground that the trial court's action in sustaining demurrers to the sixth amended complaint without leave to amend was erroneous. It is apparent that, under the peculiar circumstances which are here present, the contention that there is no record on which to consider the second appeal is highly technical. The record which is before us contains all that is necessary for a review of both judgments. If the plaintiff had given notice for the preparation of a second record to be used on his appeal from the second judgment, it is obvious that it would necessarily have been a duplicate of the record which we now have. Nevertheless, the fact remains that there are two appeals from two separate judgments entered in the action, and no stipulation has been entered into between the parties providing for consolidation of the two appeals, in which event an order of consolidation could have been made and the appeals could have then properly been considered on the single record. *Pacific Palisades Ass'n v. Menninger*, 219 Cal. 257, 262, 26 P.(2d) 303. Bearing in mind the highly technical nature of the objection urged by the defendants and the desirability that, whenever possible, appeals shall be considered on their merits, it is our conclusion that we should, on our own motion, order a consolidation of the two appeals taken by plaintiff in this action.

It is therefore ordered that the appeal taken by plaintiff from the judgment bearing date June 8, 1935, dismissing the action as to the defendants Mollie Galloway and Fred Boon, and the appeal of plaintiff from the judgment bearing date August 23, 1935, dismissing the action as to the defendant Sun-Maid Raisin Growers Association (a corporation) and Sun-Maid Raisin Growers of California, be consolidated.

The motions to dismiss the appeals herein are denied.

We concur: BARNARD, P. J.; MARKS, J.

12 Cal.App.2d 614

PEOPLE v. McKENZIE.

Cr. 2818, 2819.

District Court of Appeal, Second District,
Division 1, California.

March 23, 1936.

1. Criminal law ☞1159(2)

Where record showed no inherent improbability in testimony, argument that evidence was insufficient to support verdict and request that appellate court consider what would ordinarily occur under circumstances related could not be considered by appellate court.

2. Criminal law ☞741(1)

Weight of evidence is solely within province of jury.

3. Criminal law ☞720(7)

District attorney may state to jury various conclusions that he draws from evidence so long as he keeps within scope of conclusions which may be properly drawn, and it is only when district attorney refers to matters not in evidence or expresses his own conclusions not founded upon evidence before jury, or indulges in unwarranted attacks upon defendants, that district attorney's argument is reversible error.

4. Criminal law ☞1023(3, 8)

Order denying motion for arrest of judgment and order denying motion to strike from information alleged prior conviction of felony are not appealable.

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Ronald B. McKenzie was convicted of violation of the state Narcotic and Drug Act and of assault with intent to commit rape, and he appeals from the convictions and from an order revoking an order for probation made and entered.

Affirmed.

Anna Zacsek, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

YORK, Justice.

Appeal No. 2818 is from an order revoking an order for probation of defendant theretofore made and entered, and from

judgment and sentence imposed upon him on October 23, 1925, for violation of the state Narcotic and Drug Act (St. 1907, p. 124, as amended).

Appeal No. 2819 is from a judgment finding defendant guilty of the crime of assault with intent to commit rape, and from an order denying his motion for new trial, from order denying motion in arrest of judgment, and from order denying motion to strike from the information an alleged prior conviction of felony.

The appeal in No. 2818 was apparently taken for the purpose of protecting the record in case of a reversal of the judgment in No. 2819. In view of the fact that we are affirming the judgment in 2819, there is nothing to discuss with reference to the appeal from the order and judgment in No. 2818, as no error is called to the attention of this court in that proceeding, if this judgment becomes final.

[1, 2] The only matters urged by appellant on appeal as to No. 2819 concern the insufficiency of the evidence to support the verdict, and the propriety of the argument of the deputy district attorney to the jury, appellant charging certain specified misconduct on the part of said deputy district attorney. The entire argument as to the sufficiency of the evidence to support the verdict of the jury raises no more than a question as to the weight to be given to the testimony and a request that this court consider what would ordinarily occur under the circumstances related by such testimony. The argument is one that would have been proper, if addressed to the jury, but it cannot be considered by this court, as there is no inherent improbability in any of the testimony adduced on the trial, in so far as the record before us shows, and the right to weigh evidence is a right solely within the province of the jury.

[3] The charge of misconduct against the deputy district attorney in his prosecution of the case raises no question excepting as to certain statements made by him in his argument to the jury, as to the conclusions he would draw or which he thought any one else should draw from the evidence introduced. It is the province of a district attorney to state to a jury the various conclusions that he draws from the evidence, and to make it clear to the jury that conclusions in his opinion should be drawn from the evidence introduced, so

long as he keeps within the scope of conclusions which may properly be drawn. With reference to the point here under consideration, it is only when he refers to matters not in evidence or expresses his own conclusions which are not founded upon evidence before the jury, or where he indulges in unwarranted attacks upon defendants, or interferes with the orderly processes of the court in some way, that his alleged misconduct in argument to the jury may be construed to be reversible error. We find no such misconduct in this case.

[4] The judgment of conviction of the crime of assault with intent to commit rape and the order denying motion for a new trial are affirmed. The order denying motion for arrest of judgment and the order denying motion to strike are not appealable orders, and the appeals therefrom are dismissed. The order revoking probation and the judgment and sentence for violation of the state Narcotic and Drug Act are affirmed.

We concur: HOUSER, P. J.; DORAN, J.



12 Cal.App.2d 678

JENSEN et al. v. HANSEN et al.

Civ. 1391.

District Court of Appeal, Fourth District,
California.

March 25, 1936.

1. Automobiles ⇨181(2)

Automobile passenger was not driver's "guest," as respects driver's liability for passenger's death, where deceased passenger, driver, and another passenger were engaged in making appraisements and could not receive compensation therefor until appraisements were signed by all (St.1931, p. 1693, § 141½).

[Ed. Note.—For other definitions of "Guest," see Words & Phrases.]

2. Automobiles ⇨171(9)

Motorist watching truck approaching intersection from left and colliding with automobile approaching from right which first entered intersection *held* negligent (St.1931, p. 2126, § 131 (a)).

3. Appeal and error ⇨1067

In action against motorist for death of passenger in collision, refusing instruction respecting negligence of driver of other automobile involved *held* not prejudicial to motorist, where instruction presented no circumstances under which he would be relieved from responsibility and jury found that other driver was negligent.

4. Death ⇨99(4)

\$7,500 for death of 66 year old man who was a good husband and father and provided for his family *held* not excessive.

5. Trial ⇨46(2)

Testimony of deceased's son in death action as to deceased's annual income *held* not objectionable as secondary or hearsay, absent showing that son was without personal knowledge of deceased's income.

6. Appeal and error ⇨237(2)

Admitting evidence of deceased's son in death action as to deceased's annual income *held* not to require reversal, where it was subsequently developed that son's answer was based partly on hearsay, absent motion to strike.

7. Trial ⇨46(2)

Testimony of deceased's wife, in death action, as to deceased's annual income, *held* not inadmissible as secondary or hearsay, where it did not appear that wife's answers were not based on her personal knowledge.

8. Appeal and error ⇨1046(1)

Presence of one juror in courtroom during part of argument on motions for nonsuit *held* not to warrant reversal, where court instructed that counsel's statements must not be regarded as evidence and that jury must look entirely to evidence in deciding issues and there was no offer of proof that juror heard any of judge's remarks.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Mathilda Jensen and others against Peter P. Hansen and others. From a judgment for plaintiffs, named defendant appeals.

Affirmed.

Ray W. Hays, of Fresno, for appellant
Harold M. Child and David E. Peckinpah, both of Fresno, for respondents.

MARKS, Justice.

This action was brought by the widow and children of Chris Jensen. Jensen was killed in a collision between an automobile in which he was riding, and which was owned and was being driven by Peter P. Hansen, and a car owned by O. A. Olson which was being driven by his wife, Sabina Olson, with his consent. The accident occurred on the morning of September 8, 1933, in the intersection of Academy and Adams avenues in Fresno county. The case was tried before a jury which returned a verdict against all defendants in the sum of \$7,500. All defendants appealed, but the appeal of Mr. and Mrs. Olson has been dismissed. We will, therefore, refer to Peter P. Hansen as the appellant.

Academy avenue runs north and south. It is about forty feet wide with a strip in its center which is improved with a hard oiled surface. From a point about three hundred feet south of Adams avenue it dips and then rises again to Adams avenue with the low point about eighteen inches below the grade of Adams avenue. On the morning of the accident a grape vineyard in full leaf occupied the southwest corner of the intersection and formed a solid obstruction to vision about five feet high. Vision on this corner was further obstructed by two large wooden signs elevated above the grape vines.

Adams avenue runs east and west. It is about forty feet wide and has a paved strip about sixteen feet wide in its center with improved shoulders of an undetermined width.

On the morning of the accident Mrs. Olson was driving north on Academy avenue. When about one hundred yards south of the intersection she saw appellant's car approaching from the west at about a like distance on Adams avenue. When her car entered the depression, she lost sight of the Hansen car and did not see it again until she had cleared the vineyard. It was then probably about fifteen feet west of the intersection. Both cars continued on their way and came into collision at a point somewhere between six and thirty inches north-east of the center of the intersection. The Olson car proceeded across the intersection and into a power pole on its northeast corner. The Hansen car was swung around by the impact and came to rest facing northwest with its rear back of the Olson car. Chris Jensen was thrown

through a door of the Hansen car and landed on his head on the pavement. He suffered a fractured skull which caused his death. The speed of both cars in entering and crossing the intersection was estimated at between fifteen and twenty-five miles an hour.

Hansen testified that he did not see the Olson car until he was within a few feet of it and that upon seeing it he swerved to his left in an attempt to avoid a collision.

A study of the record leaves the impression that the Olson automobile entered the intersection first and that the accident would have been avoided had either driver exercised the care required of a reasonably prudent person operating a motor vehicle under the conditions here disclosed.

For some time prior to September 9, 1933, Chris Jensen, Mads Madsen, and Peter P. Hansen had been employed as appraisers by the Selma-Del Rey Federal Loan Association. No loan could be made without an appraisal of the property by these three men. When an application for a loan was made, it was referred to the appraisers. Sometimes the three men went together to view the property, riding in the automobile of one of them, and then another, so as to equalize the expense of travel. At times, two, or even one, would inspect a property. On such occasions the three would meet and agree on a valuation to be placed upon it from their general knowledge of the country and the description given by the one or two who had viewed it. They received \$5 for each appraisal which they divided equally. The compensation could not be drawn until the appraisal was signed by all three.

A short time prior to September 8, 1933, Chris Jensen had fallen from a ladder and was injured. On the day of the accident the appraisers had several properties to inspect and the three had traveled together in Hansen's car. Prior to the time of the accident they had appraised three properties and were then on their way to appraise a fourth. Mr. Jensen had not alighted from the automobile at the three properties appraised owing to the above-mentioned injuries.

The complaint alleges in general terms the negligence of all defendants. The answer of Hansen denies his negligence; alleges that Jensen was riding as a guest, that he was riding as a passenger, and that Hansen and Jensen were engaged in a joint undertaking. The several special

defenses were probably made necessary because the complaint failed to allege the capacity in which Jensen was riding with Hansen.

Appellant does not argue his special defense of joint undertaking. This is probably due to the absence of any evidence showing that Jensen had any right of control over the operation of the automobile in which he was riding on the fatal journey. See *Bryant v. Pacific Electric Ry. Co.*, 174 Cal. 737, 164 P. 385.

In the statement of the issues involved, counsel present the following grounds for a reversal of the judgment:

"1. Where the evidence shows the respondent is a guest in appellant's automobile and neither wilful misconduct nor intoxication are pleaded nor proved, may a judgment in favor of respondent be sustained?

"2. When the evidence indicates that the respondent was a guest in the car of the appellant, and neither wilful misconduct nor intoxication are proved or pleaded, is the failure of the court to grant a nonsuit reversible error?

"3. Where in an action for personal injuries the evidence does not support a finding that the appellant was guilty of simple negligence, may a judgment in favor of respondent be sustained?

"4. Where the drivers of two cars are made defendants, one of them being the appellant, is it reversible error for the court, after instructing the jury to the effect that the other driver had the right of way over respondent, to refuse to instruct the jury that such other driver could not blindly and carelessly insist upon such right of way?" Assignments of error 1 and 2 will be considered together.

[1] We cannot agree with appellant that Jensen was a guest of Hansen. Section 141 $\frac{3}{4}$ of the California Vehicle Act (St. 1923, p. 517, as added by St.1929, p. 1580, as amended by St. 1931, p. 1693), in effect at the time of the accident, defined a "guest" as "a person who accepts a ride in any vehicle without giving compensation therefor." Where a real advantage or benefit accrues to the driver from the presence of another person in his car that other person is not a guest. *Crawford v. Foster*, 110 Cal.App. 81, 293 P. 841; *Parrett v. Carothers* (Cal.App.) 53 P.(2d) 1023. In the instant case the record shows that the three appraisers had so many appraise-

ments confronting them on September 8, 1933, that they decided they could save time by going together in appellant's car. The compensation could not be received by any of them until the appraisements were signed by all of them. Thus the presence of the three appraisers conferred a benefit on each of them by enabling all of them to receive their compensation more promptly.

We agree with appellant that the evidence in this case is not sufficient to support any implied finding of wilful misconduct on his part. The facts are almost identical with those of the case of *Parrett v. Carothers*, supra, in which it was held that wilful misconduct was not established. The negligence shown in the instant case is not as gross as that in the case of *Meek v. Fowler*, 3 Cal.(2d) 420, 45 P.(2d) 194, in which it was held that wilful misconduct was not proven.

As stated above, the facts of the instant case are almost identical with those of *Parrett v. Carothers*, supra. In that case two real estate brokers, Parrett and Rix, were trying to effect an exchange of properties for their respective clients. Rix invited Parrett to accompany him in an automobile to inspect a parcel of property which he hoped might be used in the exchange. If successful, each broker would receive a commission from his client, but would not share in the commission of the other. Rix drove the car in which the two rode and Parrett was killed in an intersection collision caused by the negligence of Rix and another. The court held that Parrett was riding as a passenger and not as a guest and that Rix owed him the duty of ordinary care. A judgment in favor of the heirs at law of Parrett was affirmed and a hearing was denied by the Supreme Court.

[2] We cannot agree with appellant that negligence on his part was not proven. The evidence justifies the conclusion that Mrs. Olson entered the intersection first and on the right of appellant. It thereupon became his duty to yield the right of way to her. Section 131, subd. (a), California Vehicle Act (St. 1923, p. 560, as amended by St.1931, p. 2126), in effect in 1933. The evidence also supports the conclusion that appellant was not watching the road ahead of him, or for vehicles approaching the intersection from his right, but was watching a truck approaching the intersection from his left. It was his duty to keep a reasonably vigilant lookout for

vehicles approaching the intersection from both directions. These facts, and others which it is unnecessary to detail, justify the inference of negligence on his part.

Appellant complains of the refusal of the trial judge to give an instruction requested by him to the effect that even though Mrs. Olson had the right of way at the intersection "she had no right to proceed blindly in reckless disregard of obvious danger," but that it was her duty to keep her automobile under such control as would enable her to avoid a collision by the use of ordinary care and stop, if necessary, to avoid an obvious danger; that if she could have so stopped by the use of ordinary care, after the danger became apparent to her, or if she failed in other respects to use ordinary care to avoid the collision and failed to do so, then she was "guilty of negligence proximately causing the accident."

[3] We have already expressed the opinion that the evidence shows Mrs. Olson guilty of negligence. However, if we should assume that the instruction properly states the law and that it should have been given, it is clear that the failure to give it had no effect on the verdict of the jury. The instruction merely informed the jury of circumstances under which it could find Mrs. Olson guilty of negligence. It did not attempt to present any circumstances under which appellant would be relieved from responsibility. The jury found Mrs. Olson guilty of negligence and assessed damages against her. It could not have done more had the instruction been given and implicitly followed. There is no prejudice shown in failing to give the instruction.

[4] Appellant claims the damages awarded were excessive. Deceased was sixty-six years of age, a good husband and father who provided for his family. What is said on the amount of damages awarded in *Parrett v. Carothers*, *supra*, is exactly applicable to the instant case and we cannot hold the damages awarded here excessive.

[5-7] Appellant complains of two rulings of the trial court on his objections to questions propounded to witnesses for plaintiffs. While C. B. Jensen, a son of deceased and one of the plaintiffs, was on the stand the following occurred:

"Q. Do you know anything about your father's business affairs? A. Yes, I do.

"Q. Can you tell us at this time what his annual—what his business was? A. He was a farmer and he had equities in lots of ranches.

"Q. By that you mean he had invested his money? A. Yes.

"Q. And what was his business besides farming? A. He was looking after those interests, and he also worked for this committee that appraised these properties for the Federal Farm Loan Association.

"Q. Now then, can you tell us what his annual income was, we will say the year just preceding the date of his death?

"Mr. Hays: Object to that as not the best evidence, and hearsay.

"Mr. Child: He says he knows.

"The Court: If he knows.

"Mr. Hays: And not the best evidence. (Argument.)

"The Court: The objection is overruled.

"A. His income for that year was approximately between thirty-four to thirty-six hundred dollars."

At the time of the ruling there was nothing to indicate that this witness did not have personal knowledge of his father's annual income. For that reason, and as it did not appear that the evidence was secondary or hearsay, the objection was properly overruled. It was subsequently developed that the answer of the witness was partly based on hearsay. No motion to strike was made. Similar objections were made to like questions asked Mrs. Mathilda Jensen, widow of Chris Jensen, and a like objection was made and overruled. She was not cross-examined, and it does not appear that her answers were not based on her personal knowledge. She might have personally collected, received and handled all of her husband's income.

[8] Lastly, appellant presents an unusual circumstance as a ground for reversal of the judgment. At the close of plaintiff's case the jury was excused and each counsel for the defendants made separate motions for nonsuit. Counsel for appellant made the following proffer of proof preparatory to the making of a motion for mistrial: "I make the offer at this time, your Honor, to prove that juror Jack Hart remained in the court room during the first five minutes of my presentation of a motion for a nonsuit." This proffer was denied. In the instructions given the jury the court included one to the effect that

statements of counsel must not be regarded as evidence and that that body must look entirely to the evidence in deciding the issues of the case. No proffer of proof was made to the effect that the juror heard any remark of the trial judge during the discussion of the motions. Under the facts here shown we cannot conclude that appellant suffered prejudice sufficient to warrant a reversal of the judgment because of the presence of one juror in the court room during part of his argument.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.



12 Cal.App.2d 572

RABBITT v. CARTHAGE MARBLE CORPORATION OF MISSOURI.

Civ. 10078.

District Court of Appeal, Second District,
Division 1, California.

March 20, 1936.

1. Appeal and error ☞1010(1)

Finding of trial court, supported by sufficient evidence, that party, who was president of both a California and a Utah corporation bearing same name, had no actual or ostensible authority to make alleged agreement authorizing settlement of obligation due California corporation by deducting obligation owed its debtor by Utah corporation, *held* conclusive.

2. Appeal and error ☞169

New issues, which were not raised in trial court, were not included in written stipulation filed, and were not directly contrary to oral declarations of appellant made to trial court as to what issues were, could not be considered for first time on appeal.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by M. L. Rabbitt, trustee in bankruptcy of the bankrupt estate of the Inter-Mountain Marble Company, bankrupt, against the Carthage Marble Corpo-

ration of Missouri. Judgment for plaintiff, and defendant appeals.

Affirmed.

W. H. Douglass, of Los Angeles, for appellant.

Daily & Gallaudet, of Los Angeles, for respondent.

ROTH, Justice pro tem.

This action is brought by trustee in bankruptcy of the bankrupt estate of Inter-Mountain Marble Company, a corporation, which corporation for convenience will be referred to as "California corporation," to recover from defendant Carthage Marble Company of Missouri a balance of \$2,250.21, with interest from August 28, 1931. California corporation had judgment, and defendant appeals from same.

On or about December 7, 1929, California corporation entered into a written contract with defendant to do and perform certain work and services, for which defendant promised to pay to California corporation a sum in excess of \$70,000. During the performance of the contract various amounts were paid by defendant to California corporation from time to time, and on July 17, 1931, there was a balance due from defendant to California corporation on account of said contract in the sum of \$13,615.33 which defendant acknowledged. At the same time there was owing to defendant from a separate Utah corporation which had a name identical to that of the California corporation, the sum of \$2,250.21. One Herbert A. Welch was at said time, and had been for some time prior thereto, the president of the California corporation and the president of the Utah corporation. On the date mentioned, defendant requested Welch's permission to deduct \$2,250.21, which the Utah corporation owed to defendant, from the \$13,615.33 which the defendant admitted it owed to the California corporation. Defendant predicates its assertion, that Welch agreed with the California corporation that this deduction should be made, upon a letter sent and signed by Welch dated August 5, 1931. This letter appears to be on the stationery of the Utah corporation. It was in fact mailed on that date from Salt Lake City, Utah. In order to narrow the issues at the trial, counsel entered into a

written stipulation which provided in part as follows:

"(6) That the issues to be determined in this case are:

"(a) Plaintiff claims that the Carthage Marble Company never paid it in full, and that \$2250.21 is yet due them on the contract, as Welch had no authority to make an agreement, if he did, with the Carthage Marble Company to deduct the \$2250.21 from the amount it owed to the Inter-Mountain Marble Company of California, in settlement of the debt due the Carthage Marble Company by the Inter-Mountain Marble Company of Utah.

"(b) The defendant claims that Welch did have authority, either actual or ostensible, to make the agreement and did make the agreement with the Carthage Marble Company whereby it was authorized to settle by deducting the amount due it from the Inter-Mountain Marble Company of Utah.

"(7) The above facts are stipulated to in order to limit the issues on the trial of this cause, and are stipulated to for the purpose of this trial only, and it is not intended in the stipulation to undertake or determine the authority of Welch, or the reasons for, or any matter connected with any alleged agreement for the deduction of the \$2250.21 as herein stated."

[1] The trial court found as a fact that the stipulation referred to, which included the excerpts quoted, was made, and further found that Welch had no actual or ostensible authority to make the alleged agreement. There is ample evidence to support the finding. It is settled, of course, that if the evidence is conflicting and there is sufficient evidence to support the finding of the trial court, that that finding would be binding upon us. *Carrier v. Piggly Wiggly of San Francisco* (Cal.App.) 53 P.(2d) 400. There is, however, no evidence which would support a finding or warrant a conclusion that there was authority of any character in Welch to make such an agreement for the California corporation. The evidence in fact does not show that any agreement was ever made between the California corporation and defendant. The letter of August 5, 1931, upon which defendant bottoms its claim that an agreement was made, has no legal implications binding upon California corporation other than the fact that Welch, who was president of both corporations,

signed it. Since the trial court found as a fact that Welch had no authority to bind the California corporation, the only legal implications that the letter in question could have is that Welch was attempting to act for the Utah corporation. The record affirmatively shows that the letter in question did not have the seal of the California corporation; that there was no resolution of the board of directors authorizing such an agreement; and that the president of the California corporation had no authority under the by-laws to make it.

[2] Defendant has attempted to inject a plethora of issues on this appeal which have no materiality to the fundamental point involved, and to which counsel by stipulation narrowed the actual trial of the case. The alleged facts upon which defendant now attempts to raise new issues were not raised in the trial court, are not included in the written stipulation filed, and are directly contrary to the oral declarations of defendant made to the trial court, as to what the issues were. In addition many of the facts now urged controversially are admitted by the pleadings. Under such circumstances, new issues of the character now urged and their legal implications or significance cannot be considered for the first time on appeal. *Carrier v. Piggly Wiggly of San Francisco* (Cal.App.) 53 P.(2d) 400; *McKee v. Title Insurance & Trust Co.*, 159 Cal. 206, 113 P. 140; *Blanc v. Connor*, 167 Cal. 719, 141 P. 217; *United States Farm Land Co. v. Darter*, 42 Cal.App. 292, 303, 183 P. 696; *White v. City of San Diego*, 126 Cal.App. 501, 507, 14 P.(2d) 1062; 6a Cal.Jur. p. 240. We may add, however, that since the evidence shows affirmatively that no agreement was ever made by the California corporation, and that since Welch had no authority, actual, ostensible or otherwise, to make the agreement, even if it were made, for the California corporation, and that since there is no evidence which would justify a finding of estoppel or ratification by California corporation and no finding of either, and no evidence upon which ratification or estoppel would be found, that the legal questions now raised by defendant for the first time are without merit.

The judgment is affirmed.

We concur: YORK, Acting P. J.; DO-RAN, J.

BOTELER et al. v. BAGBY.*

Civ. 10886.

District Court of Appeal, Second District,
Division 2, California.

March 30, 1936.

On Rehearing May 18, 1936.

1. Corporations ⇨550(2)

Conveyance of property and business of corporation to trustee for benefit of those concerned in business of corporation, including stockholders and creditors, for purpose of placing in production an uncompleted oil well, *held* not void as an attempted assignment for benefit of creditors not complying with statutory requirements (Civ.Code, §§ 3449-3473).

2. Corporations ⇨182

Consent of holders of two-thirds of capital stock of corporation to assignment of property and business of corporation to trustee primarily for purpose of placing in production an uncompleted oil well *held* not required, where only property and business relating to drilling of oil well were transferred and the corporation retained an interest in assigned property and could continue business under its franchise (Civ.Code, § 361a, as added by St.1903, p. 396).

3. Appeal and error ⇨1010(1)

In suit by stockholders to rescind conveyance of corporate property and business to trustee, findings of trial judge based on substantial evidence in trustee's favor that conveyance was properly authorized and there was no fraud were not disturbed.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Suit by L. Boteler, as trustee of the estate of Unity Oil Company, Limited, a corporation, and others, against R. Lee Bagby. From an adverse judgment, plaintiffs appeal.

Affirmed.

Avery M. Blount, of Los Angeles, for appellants.

Libby & Sherwin, of Los Angeles, for respondent.

GOULD, Justice pro tem.

Plaintiff corporation, in financial difficulties while drilling an oil well, made an agreement with defendant as trustee for the benefit of said corporation, its creditors and

stockholders, whereby it conveyed its property and business to defendant for the purpose of managing and conducting the same, and particularly for the purpose of entering into a contract with one L. C. Hisey to take over the completion of its well. Provision was made for the payment of the costs and charges of operation, for the reimbursement of advancements made by Hisey, for the payment of creditors, and for the distribution of any remainder to the corporation and its stockholders. This action was commenced by certain stockholders for themselves and plaintiff corporation in four counts, for the cancellation of the agreement with defendant for alleged illegality, for its rescission upon the ground of alleged fraud, to recover damages, and for an accounting. Defendant prevailed, and plaintiffs appeal.

[1] The illegality of the trust agreement between plaintiff corporation and defendant is asserted to be in this, that the contract was in effect an assignment of all the property of the corporation for the benefit of its creditors and is void because it does not comply with the provisions of sections 3449-3473 of the Civil Code. But the wording of the agreement in question is sufficient to demonstrate that it was not intended to be an assignment for the benefit of creditors as contemplated by division 4, part 2, title 3, of the Civil Code. The terms of the instrument itself make plain that it conveys property in trust for the benefit of all parties concerned in the business of the corporation, including the stockholders and creditors, and its principal object was the placing on production of the uncompleted oil well. Such a transfer in trust for the purpose of securing certain obligations of the debtor is countenanced and approved in *Jarvis v. Webber*, 196 Cal. 86, 236 P. 138, 143, where the Supreme Court declares that such "transfers are not invalid because they do not conform to the provisions of the sections of the code relating to assignments for the benefit of creditors."

[2] As section 361a of the Civil Code (as added by St.1903, p. 396) read at the time of the transfer here involved, it required consent of the holders of at least two-thirds of the capital stock of a corporation to sell, assign, or transfer the corporation's business, franchise and property as a whole. Such stockholders' consent was not obtained in this case and therefore, appellants argue, the assignment and transfer of plaintiff cor-

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Rehearing granted on Court's own motion. Original opinion adhered to on rehearing.

poration's property to defendant was void because it was in effect a transfer of all the corporate property. Findings of the court were to the contrary, and we are of the opinion that substantial evidence sustains such findings. The assignment did not purport to transfer all the corporate business but only that described in the annexed schedule, which the court found pertained only to the drilling of the uncompleted well. The corporation retained an interest in the assigned property, and in addition thereto was left free to continue in business under its franchise. To the validity of such a transfer the consent of stockholders is not essential. *Shaw v. Hollister Land & Improvement Co.*, 166 Cal. 257, 135 P. 965.

[3] As to appellants' further claim that the assignment agreement was not authorized by a duly constituted board of directors and that respondent was guilty of at least constructive fraud in his dealings with the corporation and its officers, the trial court found in respondent's favor. Conflicting evidence was before the court, and without reviewing the same it is sufficient to state that substantial evidence supports the findings.

Judgment affirmed.

We concur: CRAIL, P. J.; WOOD, J.



12 Cal.App.2d 627

**WILSON v. CROCKER FIRST NAT. BANK
OF SAN FRANCISCO.**

Civ. 10038.

District Court of Appeal, First District,
Division 2, California.
March 24, 1936.

1. Gifts ☞47(2)

As regards determination of whether delivery of savings passbook was gift, owner of passbook would be presumed to have intended ordinary consequences of his voluntary action.

2. Gifts ☞30(3)

Gift of savings passbook is gift of money on deposit, since gift of symbol of thing is gift of thing itself.

3. Husband and wife ☞49½(4)

Husband's delivery of savings passbook to wife with statement that he gave it to her and that it was "not in the will," while husband was confined to bed during last illness, held valid "gift" of savings deposit.

[Ed. Note.—For other definitions of "Gift," see Words & Phrases.]

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Suit by Marie Wilson against the Crocker First National Bank of San Francisco. Judgment for defendant, and plaintiff appeals.

Reversed, with directions.

Ralph L. Hathorn, of San Francisco (Russell W. Cantrell, of San Francisco, of counsel), for appellant.

Chickering & Gregory, of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued to quiet title to a fund in a savings account deposited by her deceased husband. The defendant had judgment, and the point of plaintiff's appeal is that the evidence and the findings do not support the judgment.

Plaintiff and the deceased were married in 1920, and lived together continually until the death of the husband on July 22, 1934, at the age of 84 years. The deceased left an estate of approximately \$95,000, of which he bequeathed to his wife \$15,000 and devised the apartment house in which they were residing appraised at \$9,000. The residue of the estate was left to distant relatives. On February 26, 1934, the deceased was confined to his bed with a serious illness from which he subsequently died. At that time, in the presence of a witness, he called his wife to the bed and asked her to get the passbook from a closet in which he kept his personal effects and to bring it to him. When the book was handed to him he returned it to the plaintiff and said, "This is your book. This is for you, Marie. I give this to you. It is not in the will." In April, 1934, the wife handed to him two dividend checks amounting to \$390, which the husband returned to her after indorsement, saying, "These are for you; put these into your book." This sum was thereupon deposited by the plaintiff in the account evi-

denced by the passbook. In June of the same year his wife handed to him two dividend checks amounting to \$335. These were indorsed by the deceased and handed to the plaintiff with the remark, "Put this to one side where you can draw it any time you are in mind to but don't disturb my gift." This sum was deposited by plaintiff in a separate account and used for the expenses of the last illness of the deceased. On the day before his death the deceased called his wife and for the first time informed her of the contents of his will. He then said, "I made a mistake. I am sorry what I have done to you. That book will be a help to you."

[1] Upon this evidence the trial court found that the deceased handed over and delivered to plaintiff the savings passbook, and that plaintiff took possession and maintained control over the book until after the death of her husband, but that the deceased did not intend to give to plaintiff the moneys evidenced by the passbook. All the evidence demonstrated a complete and valid gift of the passbook. There is no intimation of fraud or undue influence on the part of the plaintiff. Her evidence is corroborated by another witness, and the trial court found this evidence to be true. There was no evidence to the contrary and no evidence of any character to support the conclusion that an intention to transfer the moneys on deposit was lacking. The defendant offered some testimony tending to show that the deceased had not surrendered complete dominion of the fund because he had not revoked an earlier authorization to the bank to pay certain charges out of the fund, and that plaintiff did not assume complete dominion of the fund because she did not draw out any of the moneys prior to the death of her husband. But none of this testimony was evidence of anything more than that the parties did not have a complete knowledge of business and banking conditions. Some reliance is placed on the evidence that a few days after the death of her husband the plaintiff returned the book to the bank upon the demand of the latter that it needed the book to post the account, but this fact has no possible bearing upon the question of the intention of the deceased at the time the gift was made. On the other hand, this issue is controlled by the undisputed facts proved; by the presumption that the deceased intended the ordinary consequences of his voluntary action; and by the only reasonable inference that could be drawn from the facts

proved. Because of these circumstances, the finding on the issue of intention becomes more one of law than one of fact.

[2, 3] The rule that a gift of a savings passbook is a gift of the money on deposit rests upon the well-settled doctrine that a gift of the symbol of a thing is a gift of the thing itself. This rule has been accepted and affirmed by all the authorities in this state. In *Dellepiane v. Hynes*, 83 Cal.App. 604, 257 P. 180, 182, these authorities were rather extensively reviewed. It is said, 83 Cal.App. 604, on page 609, 257 P. 180, "It is an equally well-settled rule that delivery of a savings bank passbook is a valid gift of the money deposited because such book is the record of the depositor's account and its production authorizes control of the deposit. 28 C.J. 702, and cases cited." The leading case referred to in that decision was *Snidow v. Brotherton*, 140 Va. 187, 124 S.E. 182. That case is extensively reviewed in 40 A. L.R. pages 1246, 1249. The *Dellepiane* Case was cited with approval in *Donovan v. Hibernia Savings & Loan Society*, 90 Cal.App. 489, 265 P. 995, where many of the leading authorities on the subject are discussed. To the same effect is *Crane v. Reardon*, 217 Cal. 531, 533, 20 P.(2d) 49, and *Mellor v. Bank of Willows*, 173 Cal. 454, 160 P. 567. The *Crane* Case involved a gift of certificates of corporate stock, and the *Mellor* Case involved a gift of certificates of deposit in a commercial account; both were without the indorsement or written assignment of the donor. In both cases the Supreme Court held that a chose in action when evidenced by a written instrument such as a note, bank passbook, bill of exchange, etc., is the subject of a valid gift by mere manual delivery. The principle involved in both cases was that a manual delivery of the paper or symbol representing the fund was a gift of the fund itself.

Since there is no question of fact to be retried, the parties should not be put to the expense of further litigation. Whether the finding on the issue of the intention of the deceased is a finding of fact or a conclusion of law, it makes little difference so far as the interests of the parties are concerned.

The judgment is therefore reversed, with directions to enter judgment for the plaintiff as prayed.

We concur: STURTEVANT, J.; SPENCE, J.

12 Cal.App.2d 549

**CORONA FOOTHILL LEMON CO. et al. v.
LILLIBRIDGE et al.**

Civ. 1579.

District Court of Appeal, Fourth District,
California.

March 19, 1936.

1. Costs ⇨189

Where daily transcript was made by two reporters in attendance on session of court, but one reporter's per diem charge of \$15 could be made for each day's reporting (Code Civ.Proc. § 274).

2. Costs ⇨189

Where only one reporter's per diem charge could be made, although daily transcript was made by two reporters in attendance on sessions of court, trial court held without authority to add reporter's per diem charge to cost of transcribing evidence, since that which could not be done directly could not be accomplished by indirection (Code Civ. Proc. § 274).

3. Costs ⇨190

Where one copy of daily transcript was ordered by judge to be paid for equally by parties and counsel privately arranged with reporter for copy for themselves, court properly taxed against defendants one-half of statutory cost of transcription of judge's copy (Code Civ.Proc. § 274).

4. Costs ⇨187

Litigant cannot have taxed as costs witness' fees of expert witnesses while sitting in courtroom merely as expert engineering advisers for such litigant or while qualifying them to testify as witnesses in case.

5. Costs ⇨184(10)

Party is entitled to tax as costs all time actually spent by witness attending session of court while awaiting to be called to witness stand.

6. Appeal and error ⇨1011(1)

Conflicts in evidence are addressed to trier of facts, and appellate court cannot reverse judgment because of conflicts in evidence.

7. Costs ⇨187

Where plaintiff's counsel testified that witnesses were acting both as witnesses and as expert engineering advisers for plaintiff and were listening to testimony for purpose of qualifying them to testify and also stated

that presence of witnesses was required because plaintiff did not know at what time it would be necessary to call them, action of court in taxing as costs all time spent by witness attending court could not be reversed.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Action by the Corona Foothill Lemon Company and others against Charles E. Lillibridge and others. From an order taxing costs, defendants appeal.

Order modified, and, as so modified, affirmed.

W. G. Irving, of Riverside, Rutan & Mize and Head, Wellington & Jacobs, all of Santa Ana, and Barker & Keithly, of Los Angeles, for appellants.

Guy Richards Crump, of Los Angeles, and Walter S. Clayson, of Corona, for respondents.

MARKS, Justice.

This is an appeal from an order taxing costs. It involves the reporter's per diem fees, the cost of a daily transcript ordered by the trial court, and the witness fees of four witnesses.

The cost bill as originally filed contained the following: "Reporter's fees, per diems 70 days @ \$15.00, \$1050.00. One-half Transcript ordered by Court, \$1531.00." At the time of the hearing of the motion to tax costs these items were amended on motion of counsel for plaintiff as follows: "Reporter's fees per diems 70 days @ \$7.50, \$525.00. One-half of reporting and Transcript of testimony as ordered by Court, \$2056.00." The following witness fees are challenged: "F. C. Finkle, 18 days attendance @ \$2.00 per day, \$38.00"; "Louis C. Hill, 22 days attendance @ \$2.00 per day, \$44.00"; "W. P. Rowe, 27 days attendance @ \$2.00 per day, \$54.00"; "C. Gully, 33 days attendance @ \$2.00 per day, \$66.00." The items were taxed in the amounts set forth in the cost bill as amended, subject to a reduction of 30 per cent. made on all costs to and including March 2, 1932.

At the commencement of the trial the following colloquy occurred between the court and counsel concerning a daily transcript:

"The Court: In making my notes, what arrangement have you made with regard

to the reporter's transcript? Are you going to have a daily transcript?

"Mr. Irving: Yes, sir, the defendants desire a daily transcript.

"The Court: I think that would be better.

"Mr. Crump: I do not think the plaintiffs will desire a daily transcript of all of the testimony. There will be a number of lay witnesses that we shall not desire a daily transcript of their testimony. There will be some witnesses where we want a daily transcript, and we will advise the court reporters in advance of that, so that the shift can be made on those witnesses. I do not know what your Honor's custom is in that regard, but it is my understanding—it has been my experience that the daily transcript, unlike the ordinary reporter's fee, is not divided unless both sides desire the daily transcript. One side wants one part, and the other side wants another part. We do not wish to have a daily transcript of the entire proceedings.

"Mr. Irving: My statement, in response to the court, was made on the assumption that the other side had already requested the reporter to make a daily transcript. The expense will be pretty heavy for one party to be responsible for. In the event that the other side does not desire one, we might also proceed under the same arrangement that Mr. Crump has stated. We will suggest to the reporter from time to time the portion of the transcript that we would like to have written up. It is going to be rather a hardship on your Honor.

"The Court: Yes. I was going to say

"Mr. Irving: I would suggest that your Honor order an original transcript for the Court; and that the expense of that be divided between the parties; and if any of the parties to the action desire copies of the transcript, that they so designate that portion to the reporter; but I think there should be a transcript made for the convenience of the court.

"The Court: It will be ordered that a daily transcript be prepared for the court, the expense of same to be stood one-half by each party; and as the parties may desire transcripts, they can arrange with the reporter."

The reporter was called as a witness and testified that the total number of days in which he was engaged in court in reporting the case was seventy, of which

twenty-three were to and including March 2, 1932, and that the total number of folios transcribed were 15,310, of which 4,827 were transcribed to and including the same date. He further testified that three complete copies of the daily transcript were made each day with one delivered to the trial judge and one to each of the parties.

Defendants contend that where a daily transcript is made by two reporters in attendance on the sessions of court but one reporter's per diem charge of \$15 can be made for each day's reporting, and that as three complete copies of the transcript were simultaneously made, the transcription charges should have been 11 cents per folio for the copy ordered by the trial judge, instead of 20 cents per folio, one-half of which was taxed by the court to defendants. It is admitted that one-half of the per diem reporting costs and one-half of the transcription costs of the court's copy of the daily transcript were paid by defendants as the trial progressed.

Defendants maintain that as the per diem charges of the reporter could only be \$15 for each day, one-half of which they paid, the amendment of the cost bill was correct in this respect. They point out that while the reporter's per diem costs were properly reduced by \$525, that exact amount was added to the cost of the daily transcript when the cost bill was amended which required them to pay 10 cents per folio for transcribing the court's copy of the daily transcript and an additional \$7.50 per day for reporting the testimony. They maintain that as the reporter was entitled to but one per diem the court could not double that fee by indirectly charging it as costs of the daily transcript.

Section 274 of the Code of Civil Procedure, as in effect at the time of the trial, provided in part as follows: "For his services the official reporter shall receive the following fees, except in counties where a statute provides otherwise: For reporting testimony and proceedings, in contested cases, fifteen dollars per day. * * * For transcription for one copy, twenty cents per one hundred words; for two copies made at one time, fifteen cents each per one hundred words; for three copies made at one time, eleven cents each per one hundred words."

[1,2] The amount of the per diem fee to be charged where two reporters are in attendance on a single session of court and are making a daily transcript has been set-

tled by the case of *Rappaport v. Payne*, 139 Cal.App. 772, 35 P.(2d) 183, 184, where it was said: "With regard to December 21st, we must assume that both reporters were not taking down testimony at the same time, but that, while one was so engaged, the other was transcribing testimony theretofore taken down by him in the same case, and that, when he reappeared in the courtroom after doing so, he began taking down testimony and continued to do so while the other was transcribing the testimony taken by him. The \$15 per diem was fixed by the Legislature to cover reporting services. The time the reporter is engaged in transcribing the testimony himself, or in dictating the notes taken for an assistant to write up, is to be paid for out of the fee which the Legislature has fixed for transcribing. There would seem to be no need for more than one reporter in court at a time, so far as the actual reporting is concerned, and therefore no need for but one per diem."

We are of the conclusion that what may not be done directly cannot be accomplished by indirection, and that the trial court had no authority to add a reporter's per diem charge to the cost of transcribing the evidence.

[3] The question of the amount to be taxed as costs for transcribing the daily transcript where one copy is ordered by the judge, to be paid for equally by the parties, and counsel privately arrange with the reporter for copies for themselves is settled by the case of *Mt. Shasta Power Corporation v. McArthur*, 111 Cal.App. 640, 295 P. 1049, where it was said: "The record shows that at the beginning of the trial the court ordered that an original transcript of the testimony be made by the reporter from day to day, and the expense thereof charged to the respective parties in equal proportions, to wit, at 10 cents a folio, being 20 cents a folio for the transcript ordered by the court. The record further shows that at the time of the making of the order just referred to the plaintiff and the defendants also ordered one copy each of the transcript, at a cost of 6½ cents per folio. On the following day the record shows that the plaintiff desired two extra copies of the testimony, which copies the reporter agreed to furnish the plaintiff, as follows: One extra copy for 4 cents per folio and one extra copy for 3 cents per folio.

"One-half of the total cost of the original transcript of the testimony ordered by the court amounted to the sum of \$675.48. The plaintiff, and also the defendants, in their cost bills, set forth an item of cost in the sum above named, and costs were allowed the respective parties in the sum mentioned, for and on account of the original copy of the transcript of the testimony ordered by the court. * * *

"A reference to the case of *Barkly v. Copeland*, 86 Cal. 493, 25 P. 3, 4, confirms what we have heretofore stated. In that action the court had ordered an original transcription, chargeable one-half to the respective parties, and, thereafter, one of the parties obtained additional copies and inserted the expense thereof in the cost bill. The court in dealing with this question used the following language: 'By the order of the court, this half of the fees thus paid by the defendant in the first instance became a necessary part of the costs and disbursements incurred by him in defense of the action. He was therefore entitled to recover it from his adversary against whom he obtained judgment. As to the second item, * * * paid by the defendant for the second transcription, he could not recover that, or any part of it, from the plaintiff, as neither the latter nor the court had ordered it, but the defendant alone. * * * "The party ordering the reporter to transcribe any portion of the testimony or proceedings must pay the fees of the reporter therefor."' The record shows in this case that the respective parties were charged, and had paid the amounts apportioned by the court order for the original transcription. The remaining copies were matters of private agreements."

Defendants seek to distinguish the *Mt. Shasta Power Corporation* Case from the instant case because of the statement in the quoted portion of that opinion to the effect that the trial court there ordered the parties to pay the cost "in equal proportions, to wit, at 10 cents a folio, being 20 cents a folio for the transcript ordered by the court." They suggest that the foregoing language quoted from the opinion was probably a summary of the order made by the trial judge.

An examination of the bill of exceptions in the *Mt. Shasta Power Corporation* Case shows that the inference drawn by defendant that the court in its order fixed the total costs for the transcription at 20 cents

per folio, of which 10 cents was to be paid by each party, is not supported by the record which shows the following:

"Mr. Jones: Your Honor, before we adjourn, we might state that we desire a daily copy of the transcript. We assume that the other side does, and we think that there should be an original for your honor, the cost to be borne equally by both sides.

"The Court: (Addressing Mr. Preston) Does that appeal to you?

"Mr. Preston: Well, I haven't conferred with my clients, but I will give you an answer on that point.

"The Court: Do you want to talk to your clients first, Mr. Preston? If you do, we will take a recess and take it up at 2 o'clock.

"Mr. Chenoweth: The reporter ought to know now, your honor.

"Mr. Preston: Well, I will talk to my clients now. (After conferring with clients.) That is all right.

"The Court: Mr. Reporter, make an original of the daily transcript, the expense to be borne equally by both sides."

The order made in the Mt. Shasta Power Corporation Case is so similar to the one in the instant case that the decision rendered there is controlling here. The trial court properly taxed against defendants 10 cents per folio, or, one-half the statutory cost of transcription of one copy of the record ordered by the trial judge for his own use.

The objection to the witness fees of the four witnesses for plaintiffs is based on the evidence of one of the counsel for plaintiffs which is thus summarized in the bill of exceptions: "The witnesses F. C. Finkle, Louis C. Hill, W. P. Rowe, and C. Gully were acting both as witnesses in said action and also as expert engineering advisers for the plaintiffs. They were also listening to the testimony given in the action for the purpose of qualifying them to testify as witnesses in the case. Their presence was required on the days on which they were in court for the reason that plaintiffs did not know at what time it would be necessary to call them as witnesses."

[4] Defendants urge that as these witnesses were in court as technical advisers to plaintiffs part of the time, and as witnesses part of the time, and as it is impossible to determine the number of days they were in court on the one mission and

the number on the other, we should only allow fees for the days each was on the stand testifying. We agree with defendants that a party should not be permitted to tax as costs witness fees of expert witnesses while sitting in the court room merely as "expert engineering advisers for the plaintiffs" or while merely "listening to the testimony given in the action for the purpose of qualifying them to testify as witnesses in the case." When acting as expert advisers only, they were not in any sense attending court in the capacity of witnesses. While listening to the testimony for the purposes specified, they were gathering data for the purpose of becoming witnesses. The time spent by an expert witness in gathering data to qualify himself to testify should not be charged to the adverse party no matter whether that time be spent in the office, in the field, or in the courtroom. *Miller v. Highland Ditch Co.*, 91 Cal. 103, 27 P. 536.

[5] However, the attorney also testified that the presence of the four witnesses "was required on the days in which they were in court for the reason that plaintiffs did not know at what time it would be necessary to call them as witnesses." A party is entitled to tax as costs all the time actually spent by a witness attending the sessions of court while waiting to be called to the stand.

[6, 7] The statements in the evidence of the attorney seem to be conflicting. Conflicts in the evidence are addressed to the trier of fact, and we cannot reverse an order or judgment because of conflicts in the evidence.

The trial court was in error in including the \$525 reporter's per diem in the cost bill under the item charging for transcription of evidence. The order taxing costs has already reduced this amount by \$51.75, being 30 per cent. of the portion of this item accruing to and including March 2, 1932, leaving a remainder of \$473.25 which should be deducted from the \$2,660.56 taxed as costs by the trial court. It is admitted that the fees of the witness Finkle should have been taxed at \$36 instead of \$38, and plaintiff agrees to a reduction in that sum of \$2 for the erroneous computation of the fees of this witness.

It is ordered that the sum of \$2,660.56 taxed as costs by the trial court be reduced by deducting the sum of \$475.25 therefrom, leaving a balance of taxable costs in the sum of \$2,185.31, and that the order

taxing costs be modified in that respect, and as so modified is affirmed. The parties will each pay their own costs on appeal.

We concur: BARNARD, P. J.; JENNINGS, J.



12 Cal.App.2d 748

LOWY v. REARDON, Director of Department of Industrial Relations, et al.

Civ. 10757.

District Court of Appeal, Second District,
Division 2, California.

March 27, 1936.

Hearing Denied by Supreme Court
May 25, 1936.

1. Mandamus ☞77(4)

Discharged attorney in bureau of labor statistics *held* entitled to maintain mandamus proceeding to compel reinstatement and issuance of salary warrant (Pol.Code, §§ 364, 364a, as amended by St.1927, pp. 733, 734, §§ 1, 2, and §§ 364e, 364h, as added by St.1927, pp. 736, 737, §§ 6, 9).

2. States ☞53

Director of industrial relations had power to appoint and discharge employees of various divisions of department, including attorney in division of labor statistics and law enforcement, as against contention that division chief appointed by Governor had sole power to discharge employees within his department (Pol.Code, §§ 364, 364a, as amended by St.1927, pp. 733, 734, §§ 1, 2, and §§ 364e, 364h, as added by St.1927, pp. 736, 737, §§ 6, 9).

3. States ☞53

Discharge of attorney in division of labor statistics and law enforcement of department of industrial relations *held* effective upon receipt of notice of discharge so that attorney was not entitled to benefits of civil service amendment where notice was received prior to time amendment became effective (Pol. Code, §§ 364, 364a, as amended by St.1927, pp. 733, 734, §§ 1, 2, and §§ 364e, 364h, as added by St.1927, pp. 736, 737, §§ 6, 9; Const. art. 24, § 5(e), adopted in 1934).

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Mandamus proceeding by Charles F. Lowy against T. A. Reardon, as Director of the Department of Industrial Relations of the State of California, and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Edward J. Cotter and Arch G. McLay, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Eugene M. Elson, Deputy Atty. Gen., Charles Dreyfus, of San Francisco, and Leo L. Schaumer, of Los Angeles, for respondents.

WOOD, Justice.

Plaintiff seeks by a writ of mandate to compel various state officers to reinstate him as attorney in the division of labor statistics and law enforcement of the department of industrial relations and to compel the issuance of his salary warrant. The lower court sustained a demurrer to his petition without leave to amend and plaintiff appeals from the consequent judgment.

[1] The defendants contend that mandamus is not a remedy available to plaintiff, since he is attempting to compel his admission to the use and enjoyment of a public office, and that a quo warranto action is the only proper remedy. It is alleged in the complaint that the defendant officials have refused to issue a warrant for plaintiff's salary. In a number of cases it has been held that the issuance of salary warrants may be compelled by mandamus proceedings. *McKannay v. Horton*, 151 Cal. 711, 91 P. 598; *Ward v. Marshall*, 96 Cal. 155, 30 P. 1113, 31 Am.St.Rep. 198; *Sevier v. Riley*, 198 Cal. 170, 244 P. 323. Therefore plaintiff's cause of action cannot be defeated on the sole ground that the kind of action selected is not appropriate.

A more serious problem is presented in the contention of defendants that plaintiff was legally discharged from his position and consequently is not entitled to a salary warrant. From the allegations in the complaint, it appears that plaintiff was in 1924 regularly appointed attorney in the bureau of labor statistics as it then existed and has continued to discharge his duties as such until December, 1934. Plaintiff received on December 19, 1934, a written notice from the director of the department of industrial relations bearing the date of December 18, 1934, that "the position you now hold as Attorney has been terminated as of December 18, 1934." Plaintiff contends that the chief of the division of labor

statistics and law enforcement was the only official who had authority to discharge him or abolish his position; and that he has automatically acquired civil service status, since he held his position more than six months before December 20, 1934, the effective date of the constitutional amendment under the terms of which those enjoying civil service status cannot be discharged without cause (Const. art. 24, § 5(e)).

[2] The Legislature in 1927 (St.1927, p. 733, § 1) amended section 364 of the Political Code by creating a new department which was given jurisdiction over the bureau in which plaintiff had been employed. The section in part provides: "A department of the government of the state of California to be known as the department of industrial relations is hereby created. The department shall be conducted under the control of an executive officer to be known as director of industrial relations, which office is hereby created." At the same time (St.1927, p. 734, § 2) section 364a was amended to read in part as follows: "For the purpose of administration, the department shall be forthwith organized by the director, subject to the approval of the governor, in such manner as he shall deem necessary properly to segregate and conduct the work of the department. The work of the department is hereby divided into at least five divisions to be known respectively as the division of industrial accidents and safety, the division of immigration and housing, the division of state employment agencies, the division of labor statistics and law enforcement and the division of industrial welfare. Each division, except as otherwise expressly provided by law, shall be in charge of a chief, who shall be appointed by, and hold office at the pleasure of the governor and shall receive such salary as may be fixed by the governor, not to exceed five thousand dollars per annum." A new section 364e was added (St.1927, p. 736, § 6) reading as follows: "The director of industrial relations, as head of the department of industrial relations, shall perform all duties, exercise all powers and jurisdiction, assume and discharge all responsibilities and carry out and effect all purposes now or hereafter vested by law in the department of industrial relations, except as otherwise expressly provided by law." Another new section, 364h, was added (St.1927, p. 737, § 9) reading as follows: "Except as in this article otherwise provided, the department of industrial relations is hereby invested with the power and is charged with the

duty of administering and enforcing all laws now or hereafter imposing any duty, power or function upon any of the offices, officers, deputies or employees herein transferred to the department."

It is not disputed that the bureau in which plaintiff was an attorney was by the legislation of 1927 merged into the new department of industrial relations. An executive official was given control over the new department and it became his legal duty to organize the department in order to properly conduct the department's work. Under the amendment, he was required to "perform all the duties" and "exercise all powers and jurisdiction" of the department. The department was charged with the duty of administering and enforcing all the laws imposing duties upon the various officers and employees who were by transfer merged into the department. It was evidently the intention of the Legislature to give to the director such control over the new department as is customarily exercised by heads of governmental departments. This, of course, includes the power to appoint and discharge those employees not serving for a fixed term and not subject to the civil service amendment. The fact that the Governor is given the power of appointment of the division officials does not of itself deprive the director of the department of his control over the activities of the component parts of his department. A department head cannot exercise control over the activities of his department unless he has control of the various employees carrying out the details of the department's work. A ruling that the Governor could appoint the division chiefs and that they in turn had sole power to appoint and discharge the employees, would nullify the plain provisions of the statute which gives control of the department to the director and makes it his duty to perform the functions of the department.

[3] Plaintiff presents the ingenious argument that he came within the provisions of the civil service constitutional amendment on December 20, 1934, for the reason that he did not receive his notice of discharge until December 19, 1934, it having been mailed from another office of the director on December 18, and since the law disregards fractions of a day, he must be considered as employed in his position up to the instant the new amendment became effective. Whether the discharge became effective on December 18, the day on which the notice was dated and mailed, or on De-

ember 19, the date on which it was received, the discharge was unquestionably effective the instant plaintiff actually received the notice. No contention is made that the notice was not received before the time at which the constitutional amendment became effective.

The judgment is affirmed.

We concur: CRAIL, P. J.; McCOMB, Justice pro tem.



12 Cal.App.2d 720

BISHOP et al. v. MORROW et al.
Civ. 5450.

District Court of Appeal, Third District,
California.

March 26, 1936.

1. Cancellation of Instruments ⇨47

Evidence that old man and his daughter, who had had no previous business experience, were induced to sign note secured by trust deed upon fraudulent representation that they would receive certain cash payment and that assignee of note and deed knew that no money was ever received by makers, *held* to support judgment canceling instruments on ground that holders were not holders in due course (Civ.Code, §§ 3133, 3136).

2. Bills and notes ⇨339

Purchase of note at grossly inadequate price with knowledge of maker's solvency, but without inquiry as to consideration, is sufficient to put prudent person upon inquiry (Civ. Code, §§ 3133, 3136).

3. Quieting title ⇨10(5)

Grantors could maintain action to quiet title to realty covered by trust deed, since such deed carried none of incidents of ownership other than right to convey upon default.

Appeal from Superior Court, Los Angeles County.

Action by Rufus F. Bishop and another against Harry C. Morrow and others. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Charles J. Kelly and H. Sidney Laughlin, both of Los Angeles, for appellants.

James B. Ogg, of Alhambra, and Zach Lamar Cobb and Earl A. Littlejohns, both of Los Angeles, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Plaintiffs executed and delivered to Nate J. Matthews their promissory note for \$30,000, due one year after date, secured by a deed of trust upon certain real property. The note and deed of trust was assigned by Matthews to Harry C. Morrow, and by various assignments came into the possession of appellants herein, Arnold V. Morrow and Mignon J. Ittner, two children of Morrow. The note was not paid at maturity, and appellants were proceeding to cause the security to be sold when plaintiffs brought an action to cancel the note and deed of trust, alleging that there was no consideration therefor, and later filed an amended complaint, and from the judgment based thereon this appeal is based, alleging, in addition to a lack of consideration, fraud, and, as a separate cause of action, set up an action to quiet title to the property involved.

Judgment was rendered in favor of plaintiffs, and the findings, in brief, disclose that Rufus F. Bishop and Ethel W. Bishop, father and daughter, had resided on the property in question as their home continuously for over 50 years. At the time the note here in question was executed Rufus F. Bishop was over the age of 90 years, and his daughter a woman entirely unfamiliar with business affairs. For many years the business of plaintiff had been cared for by his son, who died in 1924, and thereafter, while plaintiffs were attempting to handle their affairs, they met Nate J. Matthews, who represented to them he had their best interests at heart and induced them to invest large sums in certain vending machines. During this time Harry C. Morrow, a money lender, was acquainted with Matthews and knew of his various promotion activities. Plaintiffs in their dealings with Matthews delivered to him many secured and unsecured notes, and in 1926, executed as co-makers with Matthews two notes for \$3,000 and \$4,000, payable to Morrow. Plaintiffs received no consideration whatsoever for these notes. When these notes became due, plaintiffs executed to Morrow a note for \$7,000 secured by a deed of trust upon the home, in which trust deed Matthews was named as trustee. No consideration was

received by plaintiffs for this note, and Morrow knew it was given to renew the two prior notes.

In 1927, plaintiffs, being obligated on a number of promissory notes to persons other than Morrow or Matthews, desired to raise money to meet the same. Thereupon Matthews represented to plaintiffs he could raise \$30,000 upon the home place, obtaining the same from Morrow. In that way the \$7,000 deed of trust held by Morrow could then be released and Bishop would have \$23,000 to pay off the other outstanding notes. Thereupon plaintiffs, having trust and confidence in Matthews, executed to him their note for \$30,000, secured by a deed of trust. At that time, however, Matthews knew he would not receive \$30,000 or any sum in excess of approximately \$8,700 for the note, which amount Morrow subsequently paid to Matthews. Plaintiffs received nothing. Thereafter, and before maturity, Morrow assigned the note and deed of trust to Liberty Bank of America, and the bank immediately assigned the same to Fannie C. Morrow, wife of Morrow, and later the note and deed of trust was assigned by Mrs. Morrow to Arnold V. Morrow and Mignon J. Ittner; the court finding that all of these parties knew that no consideration whatsoever passed to plaintiffs and that neither Fannie C. Morrow, Arnold V. Morrow, nor Mignon J. Ittner paid any consideration of any kind for the transfer of the note and deed of trust. The court also found that at the time Matthews was named payee in the \$30,000 note he was only a nominal payee and was acting as dummy for defendant Harry C. Morrow, solely for the purpose of giving to Morrow the color of a holder in due course; at that time also Morrow was in possession of such facts as to place him upon notice that Matthews was unable to advance any money to plaintiffs and that plaintiffs had received no consideration therefor. Prior to the sale of the property under the deed of trust, this suit was pending and a lis pendens duly recorded. The court also found that plaintiffs had paid to Morrow on account of principal and interest the sum of \$14,400. Prior to the trial both Rufus F. Bishop and Matthews died.

[1] It is the contention of appellants that the evidence failed to support the finding that defendants were not holders in due course and that Matthews was only a nominal payee and a dummy for Morrow.

The testimony discloses that Matthews had first attempted to get Morrow to accept

a note to mature in two or three years, but he refused, and Matthews, under Morrow's direction, returned to plaintiffs and requested a one-year note, which they agreed to execute. He reported to Morrow he was getting a one-year note which Morrow was willing to accept. When the note was being signed by Miss Bishop, she observed it was made payable to Matthews, and, when she spoke to Matthews of that fact, he replied that Morrow would not have it any other way. It also is in evidence that Morrow was told by Matthews that he and the Bishops were interested in the vending company, and Morrow also knew that Matthews had attempted to borrow from the banks and from him personally, and that Matthews was unable to advance any money to plaintiffs. Morrow also testified that Matthews told him he and the Bishops were equally interested in a vending company, that the Bishops were indorsing the note for Matthews, and that he (Morrow) was loaning the money to Matthews personally.

The evidence clearly establishes that Rufus Bishop was old and infirm in mind and body and that Ethel Bishop had no previous business experience, and that they were induced to sign the note upon the fraudulent representation of Matthews that they would receive \$23,000 in cash and a cancellation of the \$7,000 note. Morrow knew, as the court found and the evidence bears out, that before acquiring the note Matthews was unable financially to advance any money to Bishop on the note, and that no money had been advanced to Bishop on account thereof, and he made no inquiry of the Bishops if they had received anything of value.

It is apparent from the foregoing brief summary of the evidence that appellants were neither purchasers without notice nor for value and were not therefore holders in due course.

Section 3133 of the Civil Code defines a holder in due course as one who has taken the instrument under the following conditions: "(1) That it is complete and regular upon its face; (2) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; (3) That he took it in good faith and for value; (4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." A title is defective within the meaning of the foregoing paragraph when a person who negotiates the instrument has ob-

tained the instrument or any signature thereto by fraud, duress, force, or fear or other unlawful means. Section 3136 of the Civil Code.

Notice of a defect in the title of the person negotiating the instrument may be actual, or knowledge of such facts that the taking of the instrument amounts to bad faith. Here Morrow knew of the age and physical condition of Bishop and the inexperience in business of the daughter. He knew of the financial status of Matthews and that he (Matthews) could not and had not advanced anything of value to Bishop. He also knew and dealt with Matthews on the theory the money was going into a joint enterprise and not to the Bishops and that he looked upon them as indorsers. He also knew that Matthews had not loaned to the Bishops anything on the \$30,000 note, and he also knew at the time he acquired the note and deed of trust it had not been acknowledged and delivered to Matthews, and that no title certificate had been issued, and that the deed of trust had not been recorded. After knowing these things, Morrow met and talked to the Bishops, but made no inquiry of them as to the consideration for the note, nor did he tell them what he was giving for the note.

It is claimed that the cancellation of the note for \$7,000 constituted sufficient consideration for the note of \$30,000, but it must be recalled that the note of \$7,000 was made up originally of two notes of \$3,000 and \$4,000 for which there had been no consideration, so the release of the \$7,000 note did not therefore constitute consideration.

However, if it should still be contended that such was the fact, the record discloses that Morrow has already received a payment of \$5,000 on account of the principal and interest on the unpaid balance in the sum of \$3,600. The note of \$7,000 appears therefore to have been more than repaid. It also appears that for this \$30,000 note secured by real property appraised by Morrow for \$45,000 he gave Matthews \$8,500 in cash, and the balance was made

up of canceled notes, an unauthorized bonus, and valueless stock.

[2] It is not necessary to cite cases at great length to illustrate the clearly enunciated rule that the purchase of a note at a grossly inadequate price with knowledge of the maker's solvency, but without inquiry as to the consideration, is sufficient to put a prudent person upon inquiry. *Witty v. Clinch*, 207 Cal. 779, 279 P. 797; *Flippen v. Abbey*, 135 Cal.App. 666, 27 P.(2d) 792; *Jordan v. Grover*, 99 Cal. 194, 33 P. 889.

Appellants attempt to establish that the note was obtained from the Bishops, not through fraud, but upon an unexecuted oral agreement, and cite 19 Cal.Jur. 867, *Splivallo v. Patten*, 38 Cal. 138, 139, 99 Am. Dec. 358, and *Flood v. Petry*, 165 Cal. 309, 132 P. 256, 258, 46 L.R.A.(N.S.) 861. There are in those cases no allegations as here, that Matthews could not and did not intend to perform, which fact was known to Morrow, or at least of which he had sufficient knowledge to put him upon inquiry. As stated in *Kinkel v. Harper*, 7 Colo.App. 45, 53, 42 P. 173, 176, quoted with approval in *Flood v. Petry*, supra: "Whenever a bill or note is disposed of for a valuable consideration, the holder is not bound to inquire whether the indorser has performed or will be able to perform the agreement into which he has entered, so long as there is nothing suspicious or out of the usual course of business in the circumstances attending its issue."

[3] Appellants also claim that the legal title to the real property standing in the trustee under the deed of trust precluded plaintiffs from maintaining an action to quiet title. That such a deed carries none of the incidents of ownership other than the right to convey upon default is clearly expressed in *MacLeod v. Moran*, 153 Cal. 97, 99, 94 P. 604.

The findings and judgment being fully supported by the evidence and sustained by the law, the judgment is affirmed.

I concur: THOMPSON, J.

13 Cal.App.2d 40

GIBSON v. RATH.

Civ. 9111.

District Court of Appeal, Second District,
Division 2, California.

March 31, 1936.

1. Limitation of actions — 179(2)

Complaint in action for fraud, filed more than three years after the alleged fraud, must plead affirmatively facts excusing delay and showing circumstances under which fraud was discovered to avoid limitations (Code Civ. Proc. § 338, subd. 4).

2. Limitation of actions — 179(2)

In action for alleged fraud of administrator, filed after three years from date of alleged fraud, complaint containing unsupported statement that fraud was not discovered until date which would not be barred by limitations *held* not to meet requirement that facts excusing delay and showing circumstances under which fraud was discovered must be shown to avoid bar of limitations (Code Civ.Proc. § 338, subd. 4).

3. Limitation of actions — 100(13)

Where party has within his power means of discovering fraud, he will be held to have known of it as regards commencement of limitation statute (Code Civ.Proc. § 338, subd. 4).

4. Limitation of actions — 100(13)

Where plaintiff who sued administrator for fraud in conniving with surviving husband of deceased to turn over all of deceased's property as community property was in court when estate was administered, and inventory and appraisal stated that property was purchased by deceased with husband's earnings, and decree of distribution found property was community property, plaintiff *held* chargeable with knowledge as to any fraud, so that suit brought more than three years thereafter was barred by limitation (Code Civ.Proc. § 338, subd. 4).

Appeal from Superior Court, Los Angeles County; Allan B. Campbell, Judge.

Action by Mabel Elliott Gibson against Clarence C. Rath. From an adverse judgment, the defendant appeals.

Reversed.

Albert Flaxman, of Los Angeles, for appellant.

GOULD, Justice pro tem.

In this action plaintiff charged defendant with fraud, in that he as administrator of an estate connived with the surviving husband of deceased to turn over to the latter all the property of deceased upon the representation to the court that it was community property, whereas in truth and in fact, plaintiff alleged, the whole thereof was separate property, and she as a daughter of deceased was rightfully entitled to two-thirds thereof. Plaintiff won judgment against defendant personally in an amount equal to two-ninths of the property which defendant as administrator turned over to the surviving husband. Defendant appeals.

Deceased died January 10, 1927; defendant was appointed administrator April 5, 1927; his final account was filed October 31, 1927; distribution was ordered November 23, 1927; and the within action was not filed until September 2, 1931, more than three years after the alleged fraud of which respondent complains. Yet she consulted attorneys as to her rights in the estate on December 24, 1927, and by them caused to be filed therein a belated "Demand for Special Notice." In her complaint herein respondent alleged that she did not discover the fraud until June 30, 1929, but she made no explanation therein as to why she did not do so at an earlier date.

[1,2] Although an action upon the ground of fraud must be commenced within three years, the cause of action is not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud. Code Civ.Proc. § 338, subd. 4. But, to excuse the filing of a complaint beyond the statutory three-year period, it is necessary for the party seeking to avoid the bar of the statute to plead affirmatively facts excusing the delay and showing the circumstances under which the fraud was discovered. *Lady Washington Consol. Co. v. Wood*, 113 Cal. 482, 486, 45 P. 809. This requirement was not met in the pleading herein; the complaint simply containing the bald, unsupported statement that the fraud was not discovered until June 30, 1929.

[3,4] Moreover, it is settled that, if a party has within his power the means of discovery of the fraud, he will be held to have known it. *Moore v. Boyd*, 74 Cal.

167, 15 P. 670. In the case here under consideration respondent was in court when the administrator was appointed, so that she had knowledge that the estate was being administered upon; the inventory and appraisement filed in said estate October 31, 1927, stated that all of the property thereof was purchased during the lifetime of deceased and her husband with the earnings of the husband; and the decree of distribution, dated November 29, 1927, and recorded December 13, 1927, found that all of said property was community property, and ordered the whole thereof distributed to the husband as the only heir at law. All these facts were matters of public record, and respondent consulted attorneys with regard to her rights—all more than three years before filing her action. It must therefore be held that she was charged with knowledge of facts sufficient to put her upon inquiry, and that appellant's plea of the statute of limitations is an effective bar to her recovery.

Judgment reversed.

I concur: WOOD, J.

I concur in the judgment: CRAIL, P. J.



12 Cal.App.2d 651

KENNEDY v. BERG.

Civ. 5571.

District Court of Appeal, Third District,
California.

March 24, 1936.

1. Appeal and error ⚙️800

Appeal would not be dismissed on ground that appellant failed to comply with rules of court respecting form of brief where leave was granted appellant to amend opening brief to comply with objection, and amendment had been made.

2. Appeal and error ⚙️786

Appeal *held* not dismissible on ground that questions upon which decision rested were unsubstantial, where appellant contend-

ed that evidence on contributory negligence was without conflict and transcript of testimony contained some 120 pages (Rules of Supreme Court and District Courts of Appeal, rule 5, § 3).

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by Everett Kennedy against M. J. Berg. From a judgment for plaintiff, defendant appeals, and plaintiff moves to dismiss the appeal or affirm the judgment.

Motion denied.

Everts, Ewing, Wild & Everts, of Fresno, for appellant.

C. Ray Robinson and James D. Garibaldi, both of Merced, for respondent.

TUTTLE, Justice pro tem., delivered the opinion of the court.

Upon the filing of appellant's opening brief, respondent makes this motion to dismiss the appeal or affirm the judgment upon the following grounds: First, that appellant had failed to comply with the rules of this court respecting the form of his brief; and, second, that the appeal was taken for delay, and the questions upon which the decision rests are so unsubstantial as not to merit further argument.

[1] As to the first ground, leave has been granted appellant to amend his opening brief to comply with this objection. The amendment has been made, and such ground is now removed from our consideration.

[2] As to the second ground, respondent devotes some ten pages of his brief on this motion to establish the fact that appellant was mistaken when, in his opening brief, he contended that the evidence upon the question of contributory negligence was without conflict. Such contention by an appellant has always been deemed to have been one involving the merits of the controversy. The transcript of the testimony taken at the trial contains some 120 pages. Under such circumstances we cannot say that the decision is "so unsubstantial as not to need further argument," (quotation from section 3, rule V of Supreme Court and District Courts of Appeal).

The motion is denied.

We concur: PULLEN, P. J.; THOMPSON, J.

**SCHROETER v. BARTLETT SYNDICATE
BLDG. CORPORATION, Limited.***
Civ. 10861.

District Court of Appeal, Second District,
Division 2, California.

March 30, 1936.

Hearing Granted by Supreme Court
May 25, 1936.

1. Corporations ¶174

Relation between corporation and stockholder is one of contract, in which charter and by-laws of corporation and pertinent statutes are embodied.

2. Constitutional law ¶48

Corporation *held* not precluded from levying assessments without authority in articles of incorporation on stock issued before code amendment making stock nonassessable unless articles of incorporation so state, since amendment, if given retroactive effect, would impair obligation of contract between corporation and stockholder (Civ.Code, § 331, as amended by St.1929, p. 1268; Const.Cal. art. 12, §§ 1, 3; Const.U.S. art. 1, § 10).

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Ernest U. Schroeter, trustee in bankruptcy of the United States Guaranty Corporation, bankrupt, against Bartlett Syndicate Building Corporation, Limited. From a judgment for plaintiff, defendant appeals.

Reversed.

Bettin, Painter & Wait and Conant Wait, all of Los Angeles, for appellant.

Mathes & Sheppard and Robert A. Cushman, all of Los Angeles (Joseph S. Dubin, of Los Angeles, of counsel), for respondent.

McCOMB, Justice pro tem.

This is an appeal by defendant from a judgment in favor of plaintiff after trial before the court without a jury.

The conceded facts are:

Plaintiff, the owner of 455 shares of the common capital stock of defendant, a California corporation, instituted this action to recover assessments alleged to have been illegally levied and collected by defendant. The assessments were levied subsequent to the 1929 amendment of section 331 of the Civil Code (St.1929, p. 1268), which reads

in part as follows: "Shares are not assessable except as provided in this article. If the articles expressly confer such authority, and subject to any limitations therein contained the directors of any corporation may in their discretion, levy and collect assessments upon all shares of any or all classes made subject to assessment by the articles."

The articles of incorporation of defendant did not contain a provision authorizing, or empowering the board of directors to levy assessments.

[1, 2] This is the sole question presented for determination: Is the 1929 amendment to section 331 of the Civil Code, providing that shares of stock issued by a corporation are not assessable unless the articles of incorporation so state, retroactive, thereby depriving a corporation of the right to levy assessments upon stock issued prior to the amendment of said section, if its articles of incorporation do not expressly confer authority to levy assessments upon shares of its stock?

The relationship existing between a corporation and its stockholder is one of contract (Shattuck & Desmond Warehouse Co. v. Gillelen, 154 Cal. 778, 783, 99 P. 348), in which the charter and by-laws of the corporation and pertinent statutes of the state are embodied (Jones v. Missouri-Edison Electric Co. [C.C.A.] 144 F. 765, 770). In the instant case, when the stock in question was issued, one of the implied terms of the contract was that the directors of the corporation could levy valid assessments, even though the articles of incorporation were silent upon the subject. To hold the 1929 amendment to section 331 of the Civil Code retroactive would result in an impairment of the obligation of a contract entered into between the corporation and its stockholder, which is prohibited by the contract impairment clause in article 1, § 10, of the Constitution of the United States.

A similar question to the one before this court arose in the case of Coombes v. Getz, 285 U.S. 434, 52 S.Ct. 435, 76 L. Ed. 866, in which it was contended that an amendment to section 3, article 12, of the California Constitution of 1879, which relieved directors of theretofore existing liability, was retroactive in view of section 1, article 12, of the Constitution of California, which reads as follows: "All laws now in force in this State concerning corporations, and all laws that may be hereafter passed

pursuant to this section, may be altered from time to time or repealed."

The Supreme Court of the United States in deciding the amendment was not retroactive held the power reserved to the state by section 1 of article 12 was not unlimited, but was subject to the protection of the contract impairment clause in article 1, section 10, of the Federal Constitution.

For the foregoing reasons, the assessments levied upon the shares of stock owned by plaintiff were valid.

The judgment appealed from is reversed.

We concur: CRAIL, P. J.; WOOD, J.



12 Cal.App.2d 597

CASWELL et al. v. GARDNER.

Civ. 5526.

District Court of Appeal, Third District,
California.

March 21, 1936.

Hearing Denied by Supreme Court
May 18, 1936.

1. Landlord and tenant ⇨93

Parties to lease may agree upon contingency that will bring lease to an end before expiration of full term.

2. Mines and minerals ⇨78(2)

Where conditions of oil lease that it should be terminated if oil was not produced within one year or if lessee failed to commence drilling within specified time had not been complied with, successors in interest of lessors held entitled to repossess leased land.

3. Trial ⇨397(1)

Where lessees' allegations of performance of oil lease had been denied by lessors, trial court should have made finding upon such issue.

4. Mines and minerals ⇨78(5)

Lessors of oil lease which had been assigned several times held not to have waived right to claim violation of lease against trustee in bankruptcy of one of assignees who had recognized lease, by seeking cancellation of assignment by such assignee because of failure of subsequent assignees to comply with lease.

5. Bankruptcy ⇨185

Trustee who, knowing facts, procures order on bankrupt for surrender of proceeds of alleged fraudulent transfer still in its hands will be held to have elected to have performed transfer in subsequent suit against alleged fraudulent transferee.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by Cora T. Caswell and others against George Gardner, trustee in bankruptcy of the South Consolidated Oil Company, Limited, a bankrupt Nevada corporation. From an adverse judgment, plaintiffs appeal.

Reversed.

Mayock & Lester, of Los Angeles, for appellants.

Don S. Irwin, of Los Angeles, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an action to quiet title brought by the owners of the fee of certain oil lands against numerous defendants including George Gardner as trustee in bankruptcy of the South Consolidated Oil Company, a corporation, a bankrupt, who claims an interest therein.

In 1927, a lease was executed by William Caswell, Katherine Ellis, and Pacific Southwest Trust & Savings Bank, the predecessors in interest of the present owners, which lease by mesne conveyance on November 25, 1929, came into the possession of South Consolidated Oil Company, Limited, a corporation. On August 9, 1930, this company entered into an agreement to sell and assign its interest in the lease to Wilburn Mayock. On August 13, 1930, four days after this assignment to Mayock, an involuntary petition in bankruptcy was filed against South Consolidated Oil Company, and on December 17, 1931, it was duly adjudicated a bankrupt; defendant was appointed trustee and on February 23, 1932, duly qualified as such. On October 21, 1930, and while the petition to adjudge South Consolidated Oil Company a bankrupt was pending, Mayock assigned his lease to Mason, Hertz & Murphy and they in turn assigned to Guaranty Oil Company, a corporation. Thereafter and on August 17, 1932, defendant as trus-

tee in bankruptcy, made written demand upon Guaranty Oil Company and Mayock, Mason, Hertz & Murphy to cure certain defaults under its lease within ten days. Defaults not having been cured, an order to show cause was issued returnable before the referee in bankruptcy, wherein they were directed to show cause why the terms of said agreement should not be enforced against them, and why they should not be ordered to reassign said lease and personal property to the trustee for the benefit of said estate. Following this order, a notice was served upon the trustee by the Guaranty Oil Company designated "Notice of default and written demand to cure default" wherein it was represented that the bankrupt corporation had failed to furnish a policy of title insurance or to warrant clear and unincumbered title to the leasehold, and alleged that said lessee was not in default and that the covenants in the lease were in full force and effect.

Pending the hearing on these matters before the referee in bankruptcy, plaintiffs herein, as owners, made demand upon Guaranty Oil Company then in possession, to quit and surrender the premises within ten days. After the expiration of the ten-day period, the owners proceeded to the property, and finding no one in possession and the premises abandoned, retook possession, and thereafter, on December 13, 1932, brought this action to quiet title against all persons claiming any interest in said property, including defendant herein as trustee of South Consolidated Oil Company, a bankrupt. Thereafter on January 4, 1933, the referee, pursuant to the order to show cause, directed that the lease from South Consolidated Oil Company to Mayock be reassigned to the trustee in bankruptcy because of the failure of the lessee to pay to the trustee certain royalties specified in the lease. Thereupon Mayock assigned to Gardner as trustee in bankruptcy, all of his right, title, and interest in the lease, reciting, however, that he claimed no interest in said lease, but made the assignment in compliance with said order of the referee.

It also appeared that after the plaintiffs had repossessed the leased property they entered into a new lease with Mayock and Lester, who formed a corporation known as Saratoga Oil Company to operate the property. Defendant trustee makes vigorous charges of fraud and collusion on the part of Mayock and Lester, claiming that they, acting as attorneys for the South Consoli-

dated Oil Company, the bankrupt, and while Lester was a member of the board of directors of that corporation, had gained information which they used to their own advantage and to hinder, delay, and defraud the creditors of the bankrupt, many of which charges the trial court found to be true. The court then found that the lease to South Consolidated Oil Company was not terminated and was still in full force and effect and passed as an asset to the trustee in bankruptcy. Whether the owners of the fee had a right to repossess the lands appears to be the real issue here in dispute; the quarrel between counsel, and the charges and countercharges made during the trial, are not material here for a determination of the issues before us.

It is first to be remembered that plaintiffs herein are the owners of the real property, and the court has so found. It is not charged, nor does the court find that they were parties to any misconduct, nor were they in any way involved in any of the proceedings before the bankruptcy court, nor can any blame attach to them, if any in fact existed, on account of the conduct of attorneys for plaintiffs by reason of the fact that Lester and Mayock at an earlier date are claimed to have acted for or had been officers of the bankrupt corporation.

The original lease provided that it should terminate in the event oil was not produced in paying quantities within one year from the date of its execution. It is not disputed that oil was not produced within a year. It is also provided that the lease should terminate if the lessee failed to commence the drilling of any well required in the lease to be drilled within the specified time; time being of the essence of the contract. Again it is undisputed that the lessee and its predecessors failed to commence the drilling of wells within the time limit, or at all.

[1,2] That the parties to a lease may agree upon a contingency that will bring a lease to an end before the expiration of the full term thereof is beyond question. It is what is commonly known as a conditional limitation, and it is such termination and limitation we are here considering. Respondent seems to contend that we are here dealing with a forfeiture and that the rules applicable thereto should be invoked, but in that he is in error.

In *C. M. Staub Shoe Co. v. Byrne*, 169 Cal. 122, 145 P. 1032, 1035, a lease for a term of years provided for its sooner termination on certain contingencies, one being that

if the premises were partially destroyed by fire so as to be untenable, and another if the premises were damaged to such an extent they could not be repaired within sixty days. The premises were partially destroyed, but the tenant desired to remain; the lessor contended, however, that the lease was terminated. The court there held: "The clause terminating the lease in certain contingencies does not declare a forfeiture. It fixes events, having no relation to any act or default of the parties, upon which it is agreed that the lease shall end."

¹ In *Levin v. Pabst Brewing Company*, 165 Cal. 168, 131 P. 118, the lease was to terminate if the municipal authorities ordered the premises torn down. Later such an order was made, but several years were granted within which the actual removal was to be accomplished. The court held that the lease terminated at the date of the order for removal and the occupancy thereafter was from month to month. This rule also finds support in the cases of *Pedro v. Potter*, 197 Cal. 751, 242 P. 926, 42 A.L.R. 1165, and *Pringle v. Wilson*, 156 Cal. 313, 104 P. 316, 24 L.R.A.(N.S.) 1090.

In point both as to the law and the facts is the case of *Hall v. Augur*, 82 Cal.App. 594, 256 P. 232, 235. The action there was to quiet title against the holder of an oil lease. The evidence discloses several assignments from the original lessee. The lease provided the lessee was to erect a derrick and commence drilling within thirty days thereafter, and to prosecute the same until oil was found in paying quantities or the well sunk to a depth at which further drilling would, in the opinion of the lessee, be unprofitable. There was no condition subsequent, no re-entry clause, no forfeiture nor penalty clause contained in the lease, nor were the leases canceled or abandoned in writing. The court said: "The grantee cannot omit to drill and develop and hold the grant for speculative purposes purely. The duty to drill and develop the property upon the discovery of oil or gas in paying quantities is not to be regarded as a mere covenant, but in a case like this, where practically the whole consideration must depend upon the undertaking it is to be treated as a condition precedent. *Gadbury v. Ohio, etc., Gas Co.*, 162 Ind. 9, 67 N.E. 259, 62 L.R.A. 895. The rule that forfeitures are not favored in law does not apply to oil and gas leases." The court further saying: "Defendants could not revive said leases after their abandonment by assigning them

to third parties. Besides, the evidence shows that no drilling was ever commenced by the assignees of the lessees. The attempted assignment of the leases did not affect the plaintiffs' declared forfeiture of the leases by their act in leasing to other parties. The plaintiffs had a right to forfeiture for conditions broken not only as against the lessees, but as against any assignee of the lessees who might claim possession of the premises under them."

The cases of *Acme Oil & Mining Co. v. Williams*, 140 Cal. 681, 74 P. 296, and *Taylor v. Hamilton*, 194 Cal. 768, 230 P. 656, are likewise enlightening as to the extent the courts will go in protecting a lessor of oil property against a lessee who fails to diligently comply with the terms of his lease.

[3] In the instant case there is no finding that the bankrupt South Consolidated Oil Company or its predecessors had performed the covenants of the lease required of them or that performance had been waived or prevented. In fact the undisputed evidence is to the effect the requirements as to drilling had never been performed and that the rentals had not been paid. Respondents having alleged performance which was denied by appellants, it is essential the trial court find upon that issue. *Hanes v. Coffee*, 212 Cal. 777, 300 P. 963.

Respondents also claim that appellants had waived their right to claim a violation of the lease by the South Consolidated Oil Company or its predecessors because of their consent to the various assignments, but one answer at least to that contention is that the record does not show consent by plaintiffs to any of the various assignments.

[4, 5] It is also to be recalled that the present action was brought in December, 1932, at which time lis pendens was recorded giving notice to the world of the claims therein set forth, and it was not until some ten days thereafter the trustee made his demand upon plaintiffs as owners of the real property for possession thereof. Some few months prior thereto, however, the trustee in bankruptcy had by virtue of an order to show cause, elected to rely upon the lease between Mayock and his business associates and the bankrupt, South Consolidated Oil Company. The referee in bankruptcy, pursuant to said petition, ordered said lease from the oil company to Mayock canceled because of the failure of Mayock and his associates to comply with the terms of said agreement. The trustee thereupon having

elected to recognize and stand upon the lease to the South Consolidated Oil Company, cannot now be heard to attack the validity thereof. That rule is set forth in section 2271, Remington on Bankruptcy, where it is stated: "Where a trustee knowing the facts, has procured an order on the bankrupt for its surrender of the proceeds of an alleged fraudulent transfer still in his hands, the trustee will be held to have elected to have performed a transfer in a subsequent suit against the alleged fraudulent transferee."

Other points are raised, but we believe the foregoing is determinative of the matter. The trial court and counsel for respondents have devoted considerable attention to the relationship between counsel for plaintiffs and the bankrupt, alleging conspiracy and fraud in their dealings, but we find nothing therein that justifies such conclusion.

In view of the foregoing, we believe the trial court erred. The judgment should be reversed, and it is so ordered.

I concur: THOMPSON, J.



12 Cal.App.2d 631

LAUMANN et al. v. CONNER (two cases).
Civ. 10057.

District Court of Appeal, Second District,
Division 1, California.
March 24, 1938.

1. New trial ☞109

Right to move for a new trial is statutory and must be pursued in method pointed out by statute (Code Civ.Proc. §§ 657, 953a, 953e).

2. Appeal and error ☞854(6)

Order granting new trial will not be disturbed on appeal where it can be upheld upon any ground shown by the record.

3. Appeal and error ☞933(4)

Appellate court must assume that motion for new trial was based upon some one or more legal grounds upon which a sufficient showing was made to warrant action of trial court, in absence of any showing to contrary.

4. Appeal and error ☞933(4)

New trial ☞1

Where trial judge specifies ground for granting new trial, presumption in favor of action of trial judge does not control, and, should new trial be granted solely on a specified ground not covered by statute, act would be beyond jurisdiction of trial court, notwithstanding motion for new trial was based on other and statutory grounds (Code Civ.Proc. §§ 657, 953a, 953e).

5. New trial ☞93

Loss of a substantial portion of shorthand notes of trial held not to authorize new trial under statute authorizing new trial where transcript cannot be prepared "because of the death or other disability" of reporter, since "disability," as so used, does not include mere inability to prepare notes (Code Civ. Proc. §§ 657, 953a, 953e).

"Disability," as used in Code Civ.Proc., § 953e, authorizing new trial where transcript cannot be prepared because of reporter's "death or other disability," refers to shorthand reporter and means a disability, short of death, but of a physical or mental character suffered by the reporter, as a result of which he is unable to prepare the transcript.

[Ed. Note.—For other definitions of "Disability," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Separate actions by W. B. Laumann and W. Lloyd Laumann against Nellie V. Conner, special administratrix of the estate of Charles D. Conner, deceased, and against Nellie V. Conner, were consolidated for trial. From an order granting a new trial, defendant appeals.

Reversed.

James W. Bell, of Los Angeles, for appellant.

H. A. I. Wolch, of Los Angeles, for respondents.

DORAN, Justice.

The two above-entitled cases were consolidated for trial in the superior court and the appeal herein attacks the validity of an order granting a motion for a new trial, which order culminated the following series of events: At the conclusion of the testimony for the plaintiffs, defendant made

a motion for a nonsuit on the grounds: First, that neither of the complaints constituted a cause of action; and, second, that the evidence was insufficient to support a judgment for the plaintiffs, which motion was granted on the first ground and denied as to the second.

Plaintiffs filed a notice of appeal from such order, also, a notice and request for a transcript. Thereafter, on April 23, 1934, judgment was entered and plaintiffs likewise appealed from said judgment. On May 11, 1934, and before any notice was made, served or filed of the entry of said judgment, plaintiffs served and filed their notice of intention to move for a new trial, which notice specified several statutory grounds, namely, the grounds allowed by subdivisions 1, 3, 6 and 7 of section 657, Code of Civil Procedure, and, in particular, the ground that the phonographic notes taken at the trial by the court reporter had been lost and were not available to complete the record on appeal under section 953a of the Code of Civil Procedure. An affidavit by counsel supported the last-mentioned ground.

The pertinent part of the order granting the motion for a new trial is as follows: "After oral argument the following order is made: It appearing that the phonographic reporter through inadvertence has lost a substantial portion of the notes of the testimony taken at the trial of these actions plaintiffs' motion for new trial is hereby granted in accordance with the provisions of section 953e of the Code of Civil Procedure."

Respondents rely upon the authority of *Moore v. Specialty Oil Tool Co.*, 128 Cal. App. 662, 18 P.(2d) 82, in support of the contention that the court had authority to grant the motion. This case declares that the court is vested with discretion in the matter of passing upon motions for new trial made pursuant to the provisions of section 953e of the Code of Civil Procedure, but does not by any means hold that this discretion extends beyond the limit of the provisions of the section.

It is also contended by respondents that an order granting a new trial will not be disturbed on appeal if such order can be upheld on any ground shown by the record, and it is urged in this connection that the notice of the motion for a new trial also specified errors of law occurring at the trial; that the trial court had erred in

granting the motion for a nonsuit and had authority to correct the error by granting the motion for a new trial.

[1-3] It should be noted at the outset, "that the right to move for a new trial is statutory and must be pursued in the method pointed out by the statute" (*Diamond v. Superior Court*, 189 Cal. 732, 210 P. 36, 38); and an order granting a new trial will not be disturbed on appeal if it can be upheld *upon any ground shown by the record* (*Phillips v. Powell*, 210 Cal. 39, 290 P. 441). As was stated in *Power v. Fairbanks*, 146 Cal. 611, 80 P. 1075, 1076: "We must assume in favor of the action of the trial court that the motion for a new trial was based upon some one or more legal grounds upon which a sufficient showing was made to warrant the action of the trial court in regard thereto. *The record before us does not show the contrary.*" (Italics added.)

[4] But the record in the instant case does, in fact, "*show the contrary.*" It reveals definitely that the motion was granted for but one reason, namely, that the notes of the testimony taken at the trial had been lost, and that therefore, in accordance with the provisions of section 953e of the Code of Civil Procedure, the new trial was allowed. If, as was stated in *Diamond v. Superior Court*, supra, it was granted "solely on a ground not covered by the statute," the court was acting beyond its jurisdiction.

[5] In the light of the foregoing, the meaning of the phrase "because of the death or other disability," in section 953e of the Code of Civil Procedure, is determinative of the decisive question presented herein. As to that question there appears to be little, if any, doubt that the word "disability" cannot, by the application of any rule of construction or interpretation, be held to include mere inability. In the sentence under consideration the words "death" and "disability" are both objects of the same preposition and to this extent, at least, they are akin. Obviously the word "disability" refers to the shorthand reporter and must be held to mean a disability, short of death, but of a physical or mental character suffered by the reporter, as a result of which he is unable to prepare the transcript. Manifestly the loss of shorthand notes does not come within the meaning of such definition, and therefore,

inasmuch as the motion was granted "solely on a ground not covered by the statute," the court was acting beyond its jurisdiction in granting the motion for a new trial.

The order appealed from is reversed.

We concur: HOUSER, P. J.; YORK, J.



12 Cal.App.2d 608

**COOK et al. v. SUPERIOR COURT IN AND
FOR LOS ANGELES COUNTY et al.**
Civ. 10619.

District Court of Appeal, Second District,
Division 1, California.
March 23, 1936.

1. Statutes $\hookrightarrow$ 243

On creation of a new statutory right, for which a special remedy is provided, in a proceeding by which the beneficiary of such right and such remedy may seek to avail himself thereof, the statute will be given a strict construction.

2. Automobiles $\hookrightarrow$ 248

Injured person recovering judgment against owner and operator of automobile *held* required to attempt to satisfy judgment out of property of operator before resorting to owner's property, under statute requiring in such circumstances "recourse" first to property of operator as against contention that merely by levying on property of owners no "recourse" was had against them (Civ.Code, § 1714¼).

"Recourse" may be defined as a resort for the meeting of an obligation or a seeking of an expedient means for an end, a source of help or supply.

[Ed. Note.—For other definitions of "Recourse," see Words & Phrases.]

Original proceeding by George Cook and Connie Cook for an alternative writ of mandate directed to the Superior Court of the State of California, in and for the

County of Los Angeles, and the Honorable Robert Walker Kenny, a judge thereof.

Alternative writ made permanent.

Benjamin P. Riskin, of Los Angeles, for petitioners.

Everett W. Mattoon, Co. Counsel, and Douglas De Coster, Chief Deputy Co. Counsel, both of Los Angeles, for respondents.

HOUSER, Presiding Justice.

From the record herein, it appears that on a pertinent date George Cook and Connie Cook, who are the petitioners herein, were the owners of a certain automobile which, at said time, with their permission, was in the possession of, and was being operated by, one Grace, solely in his own business and on his own account; that said Grace, by reason of his negligence, caused said automobile to collide with and thereby to injure one Mildred Woods; that in an action brought against said Grace by said Mildred Woods and her husband to recover a judgment for damages on account of such injuries, under the provisions of section 1714¼ of the Civil Code, the said George Cook and Connie Cook were joined as defendants; and that in that action a judgment was rendered against all the said defendants. Thereupon, without first seeking to satisfy said judgment out of the property of Grace alone, the plaintiffs caused a writ of execution to issue against all the defendants, and to be levied against property that was owned by the defendants George Cook and Connie Cook only. A motion presented by said defendants Cook to the trial court to quash said writ of execution or the levy thereunder, as far as it affected their property, was denied; whereupon, at the instance of said defendants Cook, this court caused its alternative writ of mandate to issue, directed to said court, to the effect that it quash the said writ or the said levy; or, that on a specified date it show cause why it had not done so, pursuant to said alternative order. Neither the said writ nor the said levy was quashed, and the question of the legality of the said levy is now presented to this court for its determination.

Although it may be assumed that, in accord with the provisions of section 1714¼ of the Civil Code, where an owner of an automobile has lent it to another to

be used by the latter solely in his own business or on his own account, the owner may become liable in damages for the negligent operation of the automobile by the borrower thereof, nevertheless, by the express terms of the statute, in satisfying any judgment that may be recovered by an injured person against the owner of the automobile and its operator, "recourse shall first be had against the property of said operator."

But on behalf of respondents, in effect it is urged that since the language of the statute contains no express terms by which the word "recourse" is defined or limited in its scope, in his attempt to satisfy the judgment, short of an immediate and actual satisfaction thereof out of the property of the owner of the automobile, the judgment creditor should be accorded any and every available remedy or process afforded by other existing statutes.

[1] It is manifest that the remedy against the owner of an automobile, as afforded by the provisions of section 1714 $\frac{1}{4}$ of the Civil Code, is purely statutory. No authority directly in point has been submitted to this court for its consideration; but indirectly, and as applied to situations that are analogous to that in the instant matter, the authorities are ample and convincing quite to the contrary of that suggested by respondent. In substance, they are to the effect that on the creation of a new statutory right, regarding which for its enforcement a particular and special remedy is provided, in a proceeding by which the beneficiary of such right and such remedy may seek to avail himself thereof, the statute will be given a strict construction.

In 59 Corpus Juris, at page 1129, it is said that: "A statute creating a new liability, or increasing an existing liability, or even a remedial statute giving a remedy against a party who would not otherwise be liable, must be strictly construed in favor of the persons sought to be subjected to their operation." Citing *Leppard v. O'Brien*, 225 App.Div. 162, 232 N.Y.S. 454, affirmed 252 N.Y. 563, 170 N.E. 144; *City of Mt. Vernon v. Brett*, 193 N.Y. 276, 86 N.E. 6; *Griffeth v. Green*, 129 N.Y. 517, 29 N.E. 838; *Jones v. Union County*, 63 Or. 566, 127 P. 781, 42 L.R.A. (N.S.) 1035; *Highway Trailer Co. v. Janesville Elec. Co.*, 187 Wis. 161, 204 N.W. 773.

And in the same volume of *Corpus Juris*, at page 1110, the same thought is expressed in the following language: "A statute prescribing a new right and a particular remedy must be strictly construed, and the manner provided in the statute whereby the right may be acquired must be strictly followed." Citing *Goldsmith v. Valentine*, 36 App.D.C. 63; *Com. v. Glover*, 132 Ky. 588, 116 S.W. 769; *Page v. New York Realty Co.*, 59 Mont. 305, 196 P. 871; *Card v. Groesbeck*, 204 N.Y. 301, 97 N.E. 728; *Town of Windfall City v. State*, 172 Ind. 302, 88 N.E. 505.

In the case of *Leppard v. O'Brien*, 225 App.Div. 162, 232 N.Y.S. 454, affirmed in 252 N.Y. 563, 170 N.E. 144, it was held that under the provisions of a statute respecting the liability of an owner of an automobile for the negligence of a person to whom it had been lent, a joint owner of an automobile was not liable "for consequences of negligent operation by his co-owner or latter's agent." In part the court said: "It is clear that under the authorities in this state the defendant would not be liable, unless a liability was created by said statute. 'If a statute creates a liability where otherwise none would exist, or increases a common-law liability, it will be strictly construed. A statute, even when it is remedial, must be followed with strictness, where it gives a remedy against a party who would not otherwise be liable.'"

In the case of *Swing v. Lingo*, 129 Cal. App. 518, 19 P.(2d) 56, 59, in which a construction of a part of section 1714 $\frac{1}{4}$ of the Civil Code was involved, the court made use of the following language: "Since the statute imposes a new and unusual liability which partakes of the nature of a penalty, it should not, at least, receive a construction favoring the imposition of such liability." (Citing authorities.)

And in principle the following California and other cases are in point: *Dean v. Shingle*, 198 Cal. 652, 246 P. 1049, 46 A.L.R. 1156; *Otis v. City and County of San Francisco*, 170 Cal. 98, 100, 148 P. 933; *Snell v. Bradbury*, 139 Cal. 379, 382, 73 P. 150; *Chase v. Putnam*, 117 Cal. 364, 367, 49 P. 204; *Russell v. Pacific Ry. Co.*, 113 Cal. 258, 45 P. 323, 34 L.R.A. 747; *Moore v. Lent*, 81 Cal. 502, 506, 22 P. 875; *Davis v. Heimbach*, 75 Cal. 261, 17 P. 199; *Trumpler v. Bemerly*, 39 Cal. 490; *Irvine v. McKeon*, 23 Cal. 472, 474; *Armas v.*

City of Oakland, 135 Cal.App. 411, 27 P. (2d) 666, 28 P.(2d) 422; In re Estate of Ward, 127 Cal.App. 347, 15 P.(2d) 901; Merrill v. Los Angeles Cotton Mills, 120 Cal.App. 149, 7 P.(2d) 329; Horton-Howard v. Payton, 44 Cal.App. 108, 186 P. 167; United States ex rel. Texas Portland Cement Co. v. McCord, 233 U.S. 157, 34 S. Ct. 550, 58 L.Ed. 893; Shriver v. Woodbine Sav. Bank, 285 U.S. 467, 52 S.Ct. 430, 76 L.Ed. 884; Globe Newspaper Co. v. Walker, 210 U.S. 356, 28 S.Ct. 726, 52 L.Ed. 1096; Fourth National Bank v. Francklyn, 120 U.S. 747, 756, 7 S.Ct. 757, 30 L.Ed. 825.

In the instant case it therefore becomes manifest that in attempting to realize on the judgment which they had recovered against all the defendants in the action, the plaintiffs were first required to have "recourse * * * against the property of said operator," the defendant Grace; and that until that "recourse" may be exhausted, the other defendants in the action should not be molested or disturbed in their property rights for the purpose of satisfying the judgment.

[2] Notwithstanding the fact that respondent here contends that simply by levying upon the property of the petitioners no "recourse" was had as against them or their property, it is clear that the levy that was authorized and had by the plaintiffs was the initial, the requisite, and one of the most important steps that might or could have been taken or had by the plaintiffs in their attempted "recourse" against any property, whether that of petitioners, or that of their codefendant, Grace.

In the case of Magnaud v. Traeger, 66 Cal.App. 526, 530, 226 P. 990, 992, in part it is said that, "In the enforcement of a writ of execution issued upon a common-law judgment for money the levy is the essential act by which the property is set apart for the satisfaction of the judgment."

As is indicated in the several dictionary definitions of the word "recourse," its meaning in the statute may be expressed as a "resort (to the property of defendants Cook) for the meeting of an obligation"; or "a seeking of an expedient means for an end; * * * a source of help or supply." Webster's New International Dictionary; Funk & Wagnalls' New Standard Dictionary. Thus understood, it is obvious that the significance of the stat-

utory inhibition is that for the purpose of compelling the owner of the automobile to meet the obligation imposed upon him by the judgment, the judgment creditor may not, by means of a writ of execution, first have access or resort to the automobile owner's property as "a source of help or supply," nor as an "expedient means" for attaining the desired end of satisfying the judgment.

It is ordered that the alternative writ be, and it is, made permanent, only in that the particular levy under the writ of which complaint is made, be quashed. Otherwise, and as affecting the issuance of the writ of execution, generally, the writ is discharged.

We concur: YORK, J.; DORAN, J.



12 Cal.App.2d 365

CHASE v. JONKEY.

Civ. 9627.

District Court of Appeal, Second District,
Division 1, California.

March 11, 1936.

As Modified March 30, 1936.

Hearing Denied by Supreme Court
May 7, 1936.

1. Automobiles ☞208

Motorist who waited at street intersection and then proceeded cautiously after looking in both directions *held* not contributorily negligent when struck by motorist proceeding at great rate of speed (St.1931, p. 2126, § 131).

2. Appeal and error ☞995

Appellate court cannot ignore undisputed evidence of physical facts.

3. Appeal and error ☞110

Order denying motion for new trial *held* not appealable.

HOUSER, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; William C. Schaper, Judge pro tem.

Action by Charles W. Chase against Joseph Jonkey. From a judgment for de-

fendant, and from an order denying a motion for new trial, plaintiff appeals.

Appeal from order denying motion for new trial dismissed, and judgment reversed, and cause remanded.

Hindman & Davis and J. Kingsley Chadeayne, all of Los Angeles, for appellant.

J. M. Clements and George L. Greer, both of Los Angeles, for respondent.

DORAN, Justice.

This is an action for damages resulting from an automobile accident which occurred at the intersection of Sunset boulevard and Van Ness avenue in Los Angeles. The accident happened in the month of August, about 5 o'clock in the evening. The two streets above mentioned intersect at right angles. Sunset boulevard is 80 feet wide and Van Ness avenue is 60 feet wide. Sunset boulevard is a main thoroughfare with "stop" signs posted at its entrance from Van Ness avenue for traffic traveling north and south on Van Ness.

Quoting from the reporter's transcript of the testimony, plaintiff's description of the accident is as follows: "Well, I was driving north * * * as I said. I was on the way to take dinner at a friend's house. When I came to Sunset I stopped, and I saw cars coming in bunches from the east on Sunset. I left several bunches of them go by, I don't know how many, maybe twenty, maybe twenty-five or thirty cars all told may have gone by before I started to go out. I looked to the west down Sunset, and I could see—I only saw one car, there may have been some other cars back of it, but they were quite a distance back. As I then started to go across, that is, put my car into low, and then into second, and by the time I got to center of Sunset I looked again to the right to see that no cars were coming near me, and there were none near me, and then I started to the north, turned my head, and I saw the car that must have struck me coming, let's see, how shall I describe it? Well, say going a little bit of an angle, diagonally across, apparently in front of me, on Sunset."

Plaintiff's witness, Glasburg, quoting substantially from the reporter's transcript, testified as follows: "I was driving in an easterly direction on Sunset, waiting for a possible opportunity to make a left-hand turn; we were, I would say possibly seventy-five or eighty feet from the intersection. Well, as near as I can recollect,

there was a car passed us on the right, and then this car on the left passed, because I recall it was hugging the center line on the left-hand side, hugging the center line as much as it possibly could, because it was on the wrong side of the road, which rather frightened me, because I was getting ready for a left-hand turn, and I hadn't figured on any car coming in that direction. At this time plaintiff's car was proceeding slowly across Sunset Boulevard when the car that passed me on the left, which I should say was traveling at least sixty miles per hour, struck him. The front of plaintiff's car at the time of the collision was just about the center of the intersection."

Miss Isabel Sturr, who was riding with the witness Glasburg, gave substantially the same account of the accident.

The defendant's witness, Frances Malcom, who was riding with defendant at the time of the accident, testified in part as follows:

"Q. Now, let's get this straight again. When you saw Mr. Chase's car it was just sticking its front end out into Sunset about a foot beyond this south line? A. Yes.

"Q. At that time your car was where? A. Just before the intersection, approaching the intersection."

The defendant himself testified as follows with respect to this phase of the case:

"Q. Where was Mr. Chase's car when you first saw it? A. Well, when I first saw him he was just starting up.

"Q. Whereabouts? Where was he as far as the intersection was concerned? A. Well, he was approximately even with the curb line of Sunset.

"Q. You were where at that time? A. I was just entering the intersection; approximately, I should say a little behind the curb line of Van Ness, maybe a couple or three feet."

Defendant Jonkey also testified that at the time he entered the intersection he was traveling not to exceed twenty-five miles an hour, and denied that he drove his car north of the center line of Sunset boulevard.

It is undisputed that the force of the collision swung the plaintiff's car around to the east, and when it came to rest it was pointed in a southeasterly direction with the front thereof about 15 feet from the south curb of Sunset boulevard on the east side of Van Ness.

The foregoing is not all of the evidence, but a substantial portion thereof. The court found that the defendant was guilty of negligence, but that plaintiff was guilty of contributory negligence, and gave judgment for the defendant.

Plaintiff appeals on the sole ground that there was no competent evidence upon which the court could base its finding that plaintiff was negligent and that such negligence directly and proximately contributed to his injuries and damage. This contention by plaintiff and appellant must be sustained.

The argument by respondent that there is a very sharp conflict in the evidence which the trial court resolved in favor of the defendant, and which may not be disturbed upon appeal, is unavailing.

[1] As to the conduct of the plaintiff, there is no conflict in the evidence. There is no dispute as to where the point of impact occurred, nor as to the location of the cars after the impact, when they came to rest. Plaintiff did everything that it was humanly possible for a prudent, careful, and cautious driver to do in proceeding to cross the thoroughfare, and respondent's effort to apply the rule that "One who looks and doesn't see what he could not have failed to see, is guilty of contributory negligence as a matter of law" is unimpressive.

Viewing defendant's testimony and that of his companion in its most favorable light, the defendant disregarded section 131 of the California Vehicle Act (St. 1923, p. 560, § 131, as amended by St. 1931, p. 2126).

[2] Respondent's argument that plaintiff's car struck defendant's car is definitely refuted by the undisputed evidence of the physical facts, which this court cannot ignore.

As was said in *Austin v. Newton*, 46 Cal. App. 493, 189 P. 471, 472: "Undoubtedly an appellate court, in reviewing the evidence, is bound to exercise its intelligence, and in doing so must recognize that certain facts are controlled by immutable physical laws. It cannot permit the verdict of a jury to change such facts, because, as said in *Quigley v. Naughton*, 100 App.Div. 476, 91 N.Y.S. 491, to do so would, in effect, destroy the intelligence of the court. And when the undisputed circumstances show that the story told by a litigant and his witnesses cannot by any possibility be true,

or when their testimony is inherently impossible, the appellate court should not hesitate to reverse the judgment, to the end that the cause again may be submitted to the determination of a jury or trial judge."

In *Houghton v. Loma Prieta Lumber Co.*, 152 Cal. 574, 93 P. 377, 379, the court reviewed the law as follows: "A finding against the great weight and preponderance of the evidence can be maintained on the doctrine of 'conflict' only where the alleged conflict rests upon evidence, either direct or circumstantial, which so materially contradicts the testimony on the other side, or is so radically inconsistent with it, as to leave room in a fair and reasonable mind to find the fact either way. This feature of the rule upon the 'conflict' of evidence has been heretofore declared by this court. In *Smith v. Belshaw*, supra [89 Cal. 427, 26 P. 834], the court said: 'While we will not disturb the verdict of a jury where the evidence is conflicting upon substantial matters, yet in all cases the verdict must have some meritorious support from the evidence, or be set aside and disregarded.' In *Hedge v. Williams*, 131 Cal. [455] 459, 63 P. 721, 64 P. 106, 82 Am.St. Rep. 366, the court say: 'Upon the part of respondent it is insisted that the verdict of the jury is conclusive as to the capacity in which Fontain was acting in repairing the tank. This contention can only be sound if there was a *substantial conflict of the evidence.*' The italics are ours. In *Driscoll v. Cable Ry. Co.*, 97 Cal. 553, 32 P. 591, 33 Am.St.Rep. 203, it is said: 'The rule is well established that this court will not disturb a verdict where there is a conflict of evidence on material points, and when there is evidence to support the verdict; but such conflict and such evidence must be real and substantial.'"

The evidence clearly reveals that plaintiff and appellant was at the intersection and was waiting relatively some time before the defendant and respondent arrived at the crossing. He waited patiently and then proceeded cautiously, after looking in both directions, and to find under the circumstances that he was guilty of negligence would be the equivalent of holding that an operator of an automobile, under such conditions crosses a thoroughfare at his peril.

[3] The notice of appeal seeks to effect an appeal from the order denying a motion for a new trial, which order is not appealable; such appeal from such order is dismissed.

Judgment is reversed, and cause remanded.

I concur: YORK, J.

HOUSER, Presiding Justice.

I dissent. The decisive question that has been submitted to this court, on an appeal by plaintiff from a judgment that was rendered against him, is based upon the specification of error that the evidence adduced on the hearing of the action was insufficient to justify the finding that was made by the trial court to the effect that plaintiff was guilty of contributory negligence and consequently was not entitled to recover a judgment against defendant, notwithstanding the fact that defendant also was adjudged to have been guilty of negligence in the premises.

Concededly, the negligence of defendant has nothing to do with the question here at issue. Nor should the decision by this court be at all influenced by the possible fact that, considering the entire evidence in the case it may have preponderated to the effect that plaintiff was not guilty of negligence, and, consequently, that plaintiff should have recovered a judgment against defendant. To the contrary, the only proper question with which this court should concern itself is whether the finding of fact made by the trial court was supported by any substantial evidence. And, to my mind, the affirmative answer to that question may be discovered largely in the testimony given by the plaintiff himself, as has been set forth in the main opinion herein. He testified that after having stopped his automobile at the intersection, and before he essayed the crossing thereof, he "looked to the east" (from which direction he was in no immediate danger); thereafter, and still before starting his automobile, plaintiff testified, "I looked to the west—I only saw one car; there may have been some other cars back of it, but they were quite a distance back." After that, that is to say, after thus having taken observations, plaintiff then "started to go across." As expressed by plaintiff: "I then * * * put my car into low"; all of which must have consumed an appreciable space of time. As another witness described plaintiff's conduct, plaintiff "was looking east as he started out from the boulevard stop." After getting his automobile started in "low," he changed the gear thereof into "second";—still failing to again look to the

west. Continuing with his statement, plaintiff testified: "And by the time I got about to the center of Sunset I again looked to the right" (which was to the east and not the direction from which he should have anticipated danger). And after all that, "Then I started to the north; turned my head, and I saw the car that must have struck me. * * * My car was about the center line of Sunset."

"Q. You didn't look west again after you started across the intersection, did you? A. Not turn to look to the left (west), no. There were more cars coming from the east. When I got out to the center, and I turned my head and looked again."

It thus becomes clear that plaintiff looked for an approaching automobile from the west before he placed the gear of his automobile in "low"; and that he did not again look in that direction until after his automobile had arrived at "about the center" of the intersection. In other words, according to plaintiff's own testimony, as far as exercising care was concerned, during all the time that his automobile was traveling across the first half of the intersection plaintiff might just as well have had his eyes closed.

In addition thereto, although plaintiff testified that when he saw defendant's automobile it was "30 feet, maybe," from plaintiff, he did nothing to avoid the happening of the accident. In answer to the question, "Did you do anything to avoid the accident—either put on your brakes—" plaintiff replied: "I did not have time. The man was coming like lightning." In that connection, testimony might be noted to the effect that plaintiff was traveling very slowly, from 10 to 15 miles per hour, and that defendant's automobile was traveling at the rate of about 25 miles per hour. If that evidence was believed to be true by the trial judge, it may be difficult to understand just why plaintiff did not stop his automobile, or at least make some effort to do so, and thus prevent the happening of the accident. But to the contrary, testimony given by defendant indicates that instead of trying to stop his automobile, plaintiff endeavored to drive it faster. Defendant stated: "I think (plaintiff) stepped on it, trying to get across the intersection." The evidence also shows that plaintiff's automobile ran into defendant's automobile; hence had plaintiff retarded the motion of his automobile even slightly, the accident probably would not have occurred.

Considering plaintiff's failure to see defendant's automobile at a time before he started to cross the intersection, it may be remembered that he testified that when he looked he "only saw one car; there may have been some other cars back of it, but they were quite a distance back." Of course, that in itself constitutes an admission on the part of plaintiff that at that time he actually saw other automobiles approaching the intersection; but even so, that he elected to essay the crossing without thereafter looking again in the direction from which he was threatened with danger. Moreover, on analysis of the situation at that time, the "quite-a-distance-back" of the approaching automobile from the point of the collision dwindles very appreciably. Although, as hereinbefore noted, it appears in evidence that in driving across the intersection plaintiff was traveling at from 10 to 15 miles per hour, other testimony in that regard, which also may have been believed by the trial court, fixed the speed of plaintiff's automobile at from 15 to 20 miles, or even 25 miles, per hour. Adopting as correct (as the trial court had the right to adopt) the estimate of 20 miles per hour, and taking into consideration the fact that the street was 80 feet wide, in going to "about the center," plaintiff would have traveled 40 feet, which at 20 miles per hour would have occupied a space of less than $1\frac{1}{2}$ seconds, or about $1\frac{1}{3}$ seconds. Now, if again accepting as true testimony given by defendant and the young woman who was with him in his automobile, the greatest speed which his automobile attained was 35 miles per hour. At that rate, in $1\frac{1}{2}$ seconds assumedly occupied by plaintiff from the time he started his automobile until he reached the center of the intersection where the collision occurred, defendant's automobile would be less than 78 feet from that point, which distance would be somewhat less than the width of the street which plaintiff was attempting to cross. And considering that it was broad daylight, and that plaintiff's sight was good, it readily may have been concluded by the trial judge that if plaintiff looked to the west for the approach of defendant's automobile he did so very carelessly. But even assuming that plaintiff was traveling at only 15 miles per hour and that the speed of defendant's automobile was as high as 60 miles per hour, again a compu-

tation of "speed and distance" establishes the fact that when plaintiff first looked to the west defendant's automobile was no further than 160 feet from the point of collision, which is not much greater than the depth of an ordinary city lot. Manifestly, had plaintiff looked carefully, as he was legally bound to do, not only would he have observed that defendant's automobile was approaching the intersection, but also that it was doing so at an unusually high rate of speed, and, consequently, that it would be exceedingly dangerous for plaintiff to attempt to cross its path.

Without meaning to draw a "deadly parallel," if in circumstances similar to those portrayed by plaintiff's testimony he had struck and killed a small child that had been running in the street, who would be willing to declare, as a matter of law, as against a verdict of a jury to the contrary, that plaintiff had not been guilty of negligence in the premises?

And again, with the greatest respect for the opinions of my associates (but nevertheless unable, or at least unwilling, to repress my own), to my mind, for this court to declare, contrary to the findings of fact made by the trial court, that plaintiff's conduct at the time and place in question was properly and legally expressive of that which in the conditions then existing should and would have been exercised by a person that was using ordinary care in his own behalf and for his own safety, is to substitute the opinion of this court on the facts of the case for the opinion of the trial court with reference thereto; which, as I understand the rule applicable in the premises, is not in accordance with appellate court practice.

The general rule is that ordinarily, and in proper circumstances, the trial judge has the right either to believe, or to reject as incredible or unbelievable, the whole or any part of the evidence adduced on the trial of the action; and in the instant case, assuming that he believed the facts to be in accord with the evidence to which attention hereinbefore has been directed, and that he made deductions therefrom in accord with those hereinbefore indicated, it is clear that he was warranted in drawing the conclusion that plaintiff was guilty of contributory negligence.

I conclude that the judgment should be affirmed.

12 Cal.App.2d 710

PACIFIC STATES SAVINGS & LOAN CO.
v. GREGORY.
 Civ. 9839.

District Court of Appeal, Second District,
 Division 1, California.
 March 26, 1936.

Mortgages ⇨559(2)

Action to recover balance due on notes secured by deeds of trust after sale of security held not barred because of failure to record notice of breach and election to sell property at least one year prior to sale, where both notes and deeds of trust were executed and delivered prior to enactment of statute requiring such procedure before recovery of deficiency judgment on trust deed obligation (Civ.Code, § 2924½, as added by St.1933, p. 1674, § 8).

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by the Pacific States Savings & Loan Company, a corporation, against Laura E. Gregory. From a judgment for defendant on the pleadings, plaintiff appeals.

Reversed.

John L. Mace, of Los Angeles, for appellant.

Lloyd Wright, Charles E. Millikan, and S. Earl Wright, all of Los Angeles, for respondent.

PER CURIAM.

From the transcript herein it appears that, in an action to recover the balance due upon two promissory notes secured by deeds of trust after sale of the security by the trustee thereunder, the defendant, after filing her answer, moved for judgment on the pleadings, upon the sole ground that "the complaint and each of the causes of action thereof is and are barred by the provisions of section 2924½ of the Civil Code of the State of California, as added by St. 1933, p. 1674, § 8, for the reason that said plaintiff failed to record the notices of breach and the election to sell the parcels of property referred to in the said causes of action at least one year before the dates of the sales of the said property." Said motion was granted and a judgment entered that plaintiff take nothing by its action, from which judgment this appeal is prosecuted.

Counsel for the parties hereto have stipulated that this appeal "may be submitted upon the rule of Brown v. Ferdon (Cal. Sup.) 54 P.(2d) 712." Since the notes and the deeds of trust securing the same are alleged to have been executed and delivered prior to the enactment of section 2924½ of the Civil Code, said section, under the rule in the case referred to, can have no application. The judgment is therefore reversed.



12 Cal.App.2d 537

McCRAV et al. v. TITLE INS. & TRUST CO.
 et al.
 Civ. 5447.

District Court of Appeal, Third District,
 California.
 March 19, 1936.

Hearing Denied by Supreme Court
 May 18, 1936.

1. Appeal and error ⇨1010(1)
Contracts ⇨270(1)

Whether a defrauded party has rescinded "promptly," as required by statute, will depend upon all circumstances of particular case, and question of promptness is one primarily for trial court, and its conclusion will not be set aside if it finds reasonable support in evidence (Civ.Code, § 1691).

2. Vendor and purchaser ⇨123

Evidence held to justify finding that parties contracting to purchase lot on beach were precluded from rescinding contract for fraudulent representation that maintenance of groynes along beach would increase depth of lot, on ground that they had failed to act promptly, after discovery of falsity of representation, in ascertaining their rights and in attempting to rescind (Civ.Code, § 1691).

3. Contracts ⇨270(1)

Provision in statute permitting injured party to rescind after discovering facts that such party must be aware of his right to rescind does not permit injured party to delay indefinitely in ascertaining nature of his rights arising out of such facts (Civ.Code, § 1691).

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by H. A. McCray and another against the Title Insurance & Trust Company and others, in which the named defendant filed a cross-complaint. From an adverse judgment, the plaintiffs appeal.

Affirmed.

Henry G. Bodkin and G. Stuart Silliman, both of Los Angeles, for appellants.

Chapman & Chapman, Walter E. Bennett, and Call & Murphey, all of Los Angeles, for respondents.

PER CURIAM.

This action was brought for the purposes of securing the rescission of a contract for the sale of a lot on one of the beaches of Los Angeles county, upon the ground of fraudulent representations. The trial court found for defendants on all issues, and refused to grant a rescission, and plaintiffs now appeal from the judgment.

Of the twelve points urged for reversal of the judgment, nine are based upon the insufficiency of the evidence to support the findings. Two of such points are listed under errors of law, but, in effect, they also attack the findings upon the ground of insufficiency. The other point is based upon error in giving judgment for defendants and in refusing plaintiffs' motion for new trial. It is a fair statement to say that the entire attack made upon the judgment arises out of the insufficiency of the evidence.

One of the defenses set up in the answer was that plaintiffs were barred by their laches from rescinding the transaction, and we shall first dispose of that issue of fact.

[1] Section 1691 of the Civil Code requires the party entitled to rescind "to rescind promptly, upon discovering the facts which entitle him to rescind." "Whether or not the defrauded party has rescinded 'promptly' will depend upon all the circumstances of the particular case, and is, of course, a question primarily for the trial court." *French v. Freeman*, 191 Cal. 579, 217 P. 515, 519. "As held generally, the question of the existence of laches is one to be determined primarily by and must be left largely to the trial court." *Akers v. Hufford*, 128 Cal.App. 146, 16 P.(2d) 802, 804. "The question of laches is, in the first instance, largely one for the determination of the trial court, and its conclusion will not be set aside by an appellate court if it finds reasonable support in the evidence." *McMahon v. Grimes*, 206 Cal. 526, 275 P.

440, 446, citing numerous cases. Is there sufficient evidence in the record to justify the finding that plaintiffs failed to rescind promptly? We believe that an inquiry into the factual structure of the case must lead to an affirmative answer.

[2,3] On July 10, 1929, plaintiffs and defendant Title Insurance & Trust Company entered into a written contract whereby the former agreed to purchase, and the latter agreed to sell, a lot on the beach of the Pacific Ocean in Los Angeles county. The property lies between the state highway and the beach; the rear line being bounded by the highway. The description of the lot gives a width of 30 feet. There is no definite length to the lot in number of feet; it being described as "lying between the center line of the Malibu Road * * * and the ordinary high-tide line of the Pacific Ocean." Prior to the date of the sale to plaintiffs, the owners of the tract had erected a number of groynes along the beach. According to the testimony of one of the engineers, a "groyne" is defined by the engineering department as a steel framework extending into the ocean to increase the beach and make it broader. There were four groynes along the beach where this lot is situated, varying in length from 151 feet to 202 feet. Although plaintiffs rely upon a number of representations made prior to the execution of the contract, they all arise out of the statement made by the seller as to the effect of the groynes in increasing the length of the lot. Plaintiffs testified that the seller represented to them that the effect of the groynes would be to increase the depth of the lots to between 200 and 300 feet. It may be pointed out that, when the lots were purchased, the distance from the rear line of the lot to the high-tide line was some 80 or 85 feet. Thus, if the groynes had the effect which it is contended the seller represented, the lot would increase in depth over two to three times.

The finding of fact upon laches arising out of failure to rescind promptly upon discovery of the facts which are the basis of the foregoing representation is as follows: "The court finds that plaintiffs did become fully aware of the fact that the lot which they had contracted to purchase on July 10, 1929, was not being appreciably built up or increased in depth as the result of the maintenance of said groynes or otherwise, at least within one year

from said date, but nevertheless they made no complaint and took no action toward rescinding or otherwise seeking redress for more than two years thereafter. On the contrary, the court finds that in truth and in fact while said groynes did tend to stabilize the shore, they did not have the effect of building up or adding to the depth of the lot in any appreciable degree, and the fact that they did not have that effect and would not build up said lot became evident at least within a year after plaintiffs contracted to purchase their said lot, and after knowledge of the misrepresentations of fact concerning the effect of said groynes as hereinbefore found, they affirmed said contract by making payments upon said contract and exercising acts of dominion over said property for a period of more than two years after becoming aware of any right that they may have had to rescind as hereinafter more particularly found."

We believe there is substantial evidence in the record to support the foregoing finding. Plaintiff W. D. McCray (brother of plaintiff H. A. McCray) had long been familiar with this beach property. He and his brother had been in the paving business, and had lived at the beach during several months while engaged in building roads along the shore line of the ocean. He visited the lot a number of times after the purchase was made. There is evidence to the effect that during the period of three years which elapsed from the date of contract to time of rescission these groynes did not cause the lot to be lengthened. Witness Chapman had lived on this beach and in the vicinity of this lot since 1924. He testified: "I have not observed any building up of the beach at all since the groynes were put in there. * * * The beach down there around lot 42 is in substantially the same condition that it was in July, 1929. There has not been any addition to the beach at all in building up, nor has the height of the beach been built up during that period, and as I remember the condition at both times, the beach is approximately on the same plane as it was in July 1929." The finding that there has been "a serious depression in the value of real property generally throughout the country, and which has accordingly depreciated the market value of the property involved in this case," is unchallenged. Thus the delay of over two years in rescinding was prejudicial to defend-

ants. As it is aptly stated by Black in his work on Rescission (2d Ed.) vol. 2, § 545: "Thus, for example, a purchaser of real property who might rescind the sale for fraud or other causes, and who knows his rights, cannot be allowed to wait until the land has greatly depreciated in value and then have the aid of the courts to vacate the sale." Summarizing the foregoing, it appears that plaintiffs were businessmen who had had experience in road construction, and who knew this particular beach before the date of the contract; they had visited the lot a number of times after the purchase; during all this time there had been no accretion by reason of the effect of the groynes; and this must have been known to them, as obviously apparent. The value of the lot during said period had seriously depreciated. With such facts and others in the record before us, we hold that the trial court was justified in finding that plaintiffs had waited too long to rescind, and that the right of action here asserted was barred by laches.

Assuming that there was an undue lapse of time in discovering the facts upon which the rescission is predicated, appellants earnestly contend that under section 1691 of the Civil Code this long interval is immaterial, as they did not learn from counsel that they had a right to rescind until several months prior to the commencement of the action. It is true that the statute provides that, in addition to "discovering the facts," the injured party must be "aware of his right to rescind." This does not mean, however, that, after discovering the facts, the injured party may delay indefinitely the ascertaining the nature of his rights arising out of those facts. Appellants rely upon the case of *Hannah v. Steinman*, 159 Cal. 142, 112 P. 1094. In the later case of *Bancroft v. Woodward*, 183 Cal. 99, 190 P. 445, 449, it is said, in respect to this contention: "It is at least intimated in *Ruhl v. Mott*, 120 Cal. 668, 679, 53 P. 304, and *Hannah v. Steinman*, 159 Cal. 142, 153, 112 P. 1094, that the rule is the same in regard to the time as to which [he] will be charged with knowledge of his right as it is in regard to the time as of which he will be charged with a discovery of the facts which give him the right, and the reason for this is so plain that we have no hesitation in declaring it to be the case." Again, in the *Bancroft Case*, the following

language appears: "Where, as here, a party claims to have been defrauded and to have been injured thereby very substantially any reasonable diligence at all would require of him that he proceed promptly to ascertain what his rights were." In the instant case, in view of all the facts and circumstances surrounding the transaction, and particularly of the fact that the delay was prejudicial to the seller, the trial court was justified in finding that not only was there a failure to act promptly in attempting to rescind after discovery of the facts, but also in the ascertainment of plaintiffs' rights after such discovery of the facts.

We deem it unnecessary to discuss the other points urged by appellants, as they have lost all rights they might have to any relief.

The judgment is affirmed.



12 Cal.App.2d 565

**TRANSBAY CONST. CO. v. SUPERIOR
COURT IN AND FOR CITY AND COUN-
TY OF SAN FRANCISCO et al**
Civ. 10130.

District Court of Appeal, First District, Divi-
sion 2, California.

March 20, 1936.

Hearing Denied by Supreme Court
May 18, 1936.

1. Discovery ☞97(2)

Superior court had jurisdiction to direct defendant to permit plaintiff to inspect, within county of court's jurisdiction, certain of defendant's documents, notwithstanding documents were then kept in different county (Code Civ.Proc. § 1000).

2. Discovery ☞97(2)

Order directing that defendant, a foreign corporation having its principal place of business in city within court's jurisdiction, permit plaintiff to inspect certain of its documents in such city held not abuse of discretion, notwithstanding documents were then in another part of state, where defendant had previously maintained office and kept documents in city, which was place where controversy arose, counsel had offices and trial was to be had (Code Civ.Proc. § 1000).

3. Appeal and error ☞188

Where defendant seeking to annul order adjudging it in contempt for failure to comply with order directing it to permit inspection by plaintiff of certain of its documents had actual notice of such order and had raised no point regarding alleged lack of personal service, it could not attack order upon such ground in reviewing court (Code Civ.Proc. § 1000).

Petition by the Transbay Construction Company for review of an order of the Superior Court of the State of California, in and for the City and County of San Francisco, and I. L. Harris, judge thereof, adjudging petitioner in contempt for failure to comply with an order of such court.

Order affirmed.

Heller, Ehrman, White & McAuliffe, of San Francisco, for petitioner.

Fitz-Gerald Ames, of San Francisco, for respondents.

SPENCE, Justice.

Petitioner seeks the annulment of an order of the respondent court adjudging petitioner in contempt for failure to comply with an order of said court permitting the inspection of certain documents and records.

Said orders were made in an action entitled Kent v. Transbay Construction Company, being action No. 260969 in the files of the respondent court. In said action plaintiff sued to recover wages alleged to have become due from defendant to plaintiff's assignors while working for defendant in the city and county of San Francisco on the substructure of the Bay Bridge. On September 17, 1935, and after notice duly served upon defendant, the respondent court made its order granting plaintiff's motion for such inspection and ordered defendant to permit such inspection in the city and county of San Francisco within thirty days. Defendant failed to comply with said order and an order to show cause was issued. Defendant appeared in response to said order to show cause and urged that the order for inspection was in excess of the jurisdiction of the court in that it ordered defendant to permit such inspection in the city and county of San Francisco while the documents and records referred to in said order were then kept at Hetch Hetchy, where defendant was en-

gaged in work upon the O'Shaughnessy dam. The respondent court took the position that the order for inspection was not in excess of its jurisdiction and therefore made an order on January 20, 1936, adjudging defendant in contempt of court. Said order recites the willingness of defendant to permit said inspection at Hetch Hetchy, but further recites defendant's failure and refusal to permit said inspection in the city and county of San Francisco as ordered by the court. A fine of \$500 was imposed upon defendant, but a stay of fifteen days was given, and it was provided that the trial court would entertain a motion to set aside the order of contempt in the event that defendant complied with the previous order within that time. Defendant then filed its petition in this court seeking a writ of review.

[1] In this proceeding petitioner's main contention is that the original order of September 17, 1925, was in excess of the jurisdiction of the respondent court as it indirectly required the transportation by petitioner of certain documents and records from the place where they were kept in one part of the state to another part of the state for the purpose of said inspection. In our opinion this contention may not be sustained. In this proceeding we are concerned solely with the question of whether the respondent court exceeded its jurisdiction. 4 Cal.Jur. 1022, § 4. Petitioner has cited us to no authority to sustain its claim that the trial court exceeded its jurisdiction, and we know of none. In fact there are numerous authorities upholding the right of state courts to require the production of documents and records in one state, even though the documents and records are kept at the principal place of business of the party in another state. *Hammond Packing Co. v. State of Arkansas*, 212 U.S. 322, 29 S.Ct. 370, 53 L.Ed. 530, 15 Ann. Cas. 645; *Kentucky Finance Corporation v. Paramount Auto Exchange Corporation*, 171 Wis. 586, 178 N.W. 9; *Martin v. D. B. Martin Co.*, 10 Del.Ch. 211, 88 A. 612, 102 A. 373; *State ex rel. Brumley v. Jessup & Moore Paper Co.*, 1 Boyce (24 Del.) 379, 77 A. 16, 30 L.R.A.(N.S.) 290. We therefore believe that there can be no question of the jurisdiction of the respondent court to require the production of the documents and records at the city and county of San Francisco even though said documents and records were then kept at some other place within the state.

Petitioner cites and relies upon *Richards v. Bunte*, 33 Ohio Cir.Ct.R. 37, but that case is not in point in this proceeding. It may be distinguished upon several grounds, but the main ground of distinction is that said decision was rendered upon an appeal from a judgment of dismissal following refusal to comply with the trial court's order. The court there passed upon the question of alleged error in the exercise of jurisdiction rather than upon the question of alleged excess of jurisdiction.

[2] But even if it be assumed that error such as abuse of discretion by the trial court might properly be reviewed in this proceeding, we are still of the opinion that there is no showing of an abuse of its discretion in the present case. Petitioner, a Delaware corporation, had designated San Francisco as its principal place of business in California and had appointed a resident agent in said city. San Francisco was the place where petitioner previously maintained an office in which it kept the documents and records in question, the place where the alleged work was performed by the assignors of plaintiff in the above-mentioned action, the place of trial of said action and the place where counsel for all the parties maintained their offices. It would therefore seem that San Francisco was a reasonable place for such inspection, and we find no abuse of discretion or other error on the part of the trial court in ordering petitioner to permit the inspection of said documents and records at San Francisco. While ordinarily an inspection under section 1000 of the Code of Civil Procedure should be made at the place where the documents or records are being kept by the party in possession thereof, there is nothing in said section which purports to deprive the trial court of its inherent power to make all reasonable orders regarding such inspection including an order fixing the place where the inspection shall be made.

[3] Petitioner also contends that it was not in contempt, as the order permitting the inspection had never been served upon it. It will be noted that petitioner does not claim that it did not have actual notice of the order, and the record shows that both petitioner and counsel had such notice. The record further discloses that in resisting the order to show cause, petitioner raised no point regarding the alleged lack of personal service, but raised only the question of the jurisdiction of the trial court to make the

previous order fixing the place of inspection at San Francisco. Under these circumstances, we are of the opinion that petitioner may not attack the order adjudging it guilty of contempt upon the ground that no service of the original order had been made upon it. *Shibley v. Superior Court*, 202 Cal. 738, 262 P. 332; *Foley v. Foley*, 120 Cal. 33, 52 P. 122, 65 Am.St.Rep. 147; *Golden Gate, etc., M. Co. v. Superior Court*, 65 Cal. 187, 3 P. 628; 5 Cal.Jur. 915, § 21.

The order is affirmed.

I concur: STURTEVANT, J.



12 Cal.App.2d 570

TRANSBAY CONST. CO. v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 10131.

District Court of Appeal, First District, Division 2, California.

March 20, 1936.

Hearing Denied by Supreme Court
May 18, 1936.

Discovery ☞99

Order directing defendant to permit inspection by plaintiff of certain documents in its possession *held* not so broad in its terms as to permit an unconstitutional ransacking of its books where order designated documents and counsel conceded that such documents contained material evidence and that inspection thereof was necessary to permit plaintiff to prepare his case (Const. art. 1, § 19).

Petition by the Transbay Construction Company to review an order of the Superior Court of the State of California, in and for the City and County of San Francisco, and I. L. Harris, judge thereof, permitting inspection of certain documents and records in its possession.

Order affirmed.

Heller, Ehrman, White & McAuliffe, of San Francisco, for petitioner.

Fitz-Gerald Ames, of San Francisco, for respondents.

SPENCE, Justice.

Petitioner seeks the annulment of an order of the respondent court permitting the inspection of certain documents and records in its possession.

This proceeding is closely related to proceeding No. 10130 entitled *Transbay Construction Company v. Superior Court* (Cal. App.) 55 P.(2d) 1237, the opinion in which last-mentioned proceeding has been this day filed. The order under attack here was made, however, in a second action involving the same parties entitled *Kent v. Transbay Construction Company* and being numbered 262665 in the files of the respondent court. Said action was similar to the first action but involved the claims of other assignors. In the second action, the plaintiff made a similar motion for the inspection of similar documents and records in the possession of petitioner. The record shows that this motion was resisted by petitioner solely upon the ground that the trial court had no jurisdiction to make its order requiring petitioner to produce said documents and records at the city and county of San Francisco for the purpose of said inspection.

Petitioner raises the same point in this proceeding. All that was said regarding this point in the opinion in proceeding No. 10130 is applicable here, and we need not further discuss it.

Petitioner further contends that the order under attack is so broad in its terms as "to permit a general ransacking of the books" in violation of the guarantees of article 1, § 19 of the Constitution of this state. We find no merit in this contention. The order specifically designates the documents and records to which it refers and it appears from the record that counsel conceded on the hearing that said documents and records contained material evidence relative to the allegations of the complaint in said action and that an inspection thereof was necessary in order that plaintiff might properly prepare his case for trial.

The order is affirmed.

I concur: STURTEVANT, J.

12 Cal.App.2d 485

CRAWFORD et al. v. PAYNE, County Auditor.

Civ. 10804.

District Court of Appeal, Second District,
Division 2, California.

March 17, 1936.

Hearing Denied by Supreme Court
May 14, 1936.

1. Judges ⇨22(2)

Statute reducing salaries of municipal judges in Los Angeles held authorized by constitutional provision providing that Legislature should prescribe compensation of judges of all courts of record, and not invalidated by prior constitutional provision requiring judges' compensation to be regulated in proportion to their duties (St.1933, p. 2594, § 7; Const. art. 6, § 11, as adopted in 1924; art. 11, § 5).

2. Judges ⇨22(5)

Statutes ⇨47

Amending statute providing that municipal judges in Los Angeles should receive \$3,500 payable in equal monthly installments held not so indefinite as to be ineffective, but to fix their compensation at \$6,500 per annum, where salaries of judges had been uniformly fixed on annual basis in accord with constitutional provision and had been so fixed in original act (St.1931, p. 1537, § 7; St.1933, p. 2594, § 7; Const. art. 5, § 19).

3. Statutes ⇨181(1)

Effect must be given to legislative act if legislative intent can be ascertained by reasonable interpretation.

4. Statutes ⇨184

Statute must be construed with reference to purpose intended by Legislature.

5. Statutes ⇨203

In giving effect to true legislative intention, words may be added or stricken out, and courts should not permit act to be declared invalid for uncertainty where its object can be obtained by supplying words apparently omitted through inadvertence.

Original proceeding for a writ of mandate by Maynard C. Crawford and another, as executors of the estate of Hugh J. Crawford, deceased, against Herbert A. Payne, as County Auditor of Los Angeles County.

Alternative writ dismissed.

Anne O'Keefe, William Katz, and Ralph C. Curren, by William Katz, all of Los Angeles, for petitioners.

Everett W. Mattoon, Co. Counsel, and J. H. O'Connor, Asst. Co. Counsel, both of Los Angeles, for respondent.

Isaac Pacht and Clore Warne, both of Los Angeles, amici curiæ.

WOOD, Justice.

This is an original proceeding whereby the executors of the will of Hugh J. Crawford, deceased, seek to compel the auditor of Los Angeles county to issue a warrant in a sum claimed to be due for services rendered during his lifetime by the decedent as judge of the municipal court of the city of Los Angeles. Petitioners allege that Judge Crawford received compensation at the rate of \$7,500 per year until August 23, 1933, at which time the Legislature (St. 1933, p. 2594) reduced the compensation of judges of the municipal court of Los Angeles to \$6,500 per year and left the compensation of the judges of the municipal court of the city of San Francisco at the sum of \$7,500, the amount which before that time had been paid to the judges in both cities. Petitioners claim there is due them the sum of \$1,889.61 the difference between the amount actually received and the amount which it is claimed should have been paid as compensation for services rendered between August 23, 1933, and the time of his death at the rate of \$7,500 per year.

[1] It is contended by petitioners that the amendment of 1933, by which the salaries of the Los Angeles judges were reduced, is unconstitutional in that the compensation of judges is not regulated in proportion to duties and that the amendatory act is special and local in character. Much discussion is contained in the briefs on the question whether the amendment referred to is rendered ineffective by section 5 of article 11 of the Constitution. It is clear, however, that the question must be determined adversely to petitioners' contention for the reason that the constitutional amendment adopted in 1924, article 6, section 11, providing for the establishment of municipal courts contains this provision: "The compensation of the justices or judges of all courts of record, shall be fixed and the payment thereof prescribed by the Legisla-

ture." The municipal court is a court of record. The language just quoted is simple and does not require interpretation. The Legislature has been given plenary power in the matter of the compensation to be received by the judges and all other parts of the Constitution inconsistent with this section have been superseded. Nothing is found in the amendment restricting the Legislature in its control of judicial salaries. No provision is made therein for fixing compensation in proportion to duties or population. The decision of the Supreme Court in *Sevier v. Riley*, 198 Cal. 170, 244 P. 323, 325, is contrary to the contention of petitioners and is conclusive of the question before us. In that case a judge of the superior court successfully sought by a writ of mandate to compel the state controller to issue a warrant for his full salary in accordance with a legislative enactment whereby his salary was increased during his term of office. Section 17 of article 6 of the Constitution provides that the salaries of judges in counties of the class in which Judge Sevier had been elected could not be increased or decreased during their terms of office. In granting the writ the court, referring to section 11 of article 6, said: "The framers of the recent amendment to the Constitution intended by the clause therein, above quoted, to commit the entire subject of the compensation of the justices and judges of all courts of record in this state, both as to the amount thereof and as to the time and manner of payment, to the Legislature and to abrogate whatever of the former provisions of the Constitution touching that subject were found to be inconsistent with the exercise of such plenary legislative control."

Petitioners further contend that the 1933 amendment (St.1933, p. 2594) to section 7 of the act relating to municipal courts (St. 1925, p. 651) is so indefinite and uncertain as to be ineffective. The amendment provides: "There shall be thirty judges * * * each of whom shall receive six thousand five hundred dollars, payable in equal monthly installments." It is argued that it cannot be ascertained for what period of time the sum of \$6,500 shall be paid.

[2-5] Salaries of judges of courts of record have uniformly been fixed in California on an annual basis. The Constitution provides in article 5, § 19, that the compensation of the state officers therein mentioned shall be at a given sum "per annum." Before the amendment of 1933, section 7 of

55 P.(2d)—78½

the Municipal Court Act (St.1925, p. 651, as amended by St. 1931, p. 1537) provided: "There shall be thirty judges, each of whom shall receive seven thousand five hundred dollars per annum, payable in equal monthly installments." It is evident that the words "per annum" were inadvertently omitted and that the Legislature intended that the statute should read, "six thousand five hundred per annum * * *." Since the sum specified is made payable in equal monthly installments it is manifest that it was not intended that the sum of \$6,500 should be paid monthly or for any lesser period. It is also manifest that the sum of \$6,500 was not intended as payment for services for the full term for which such judges are elected or appointed, since an elected judge serves six years and an appointed judge serves only part of a term. Effect must be given to a legislative act if by a reasonable interpretation the legislative intent can be ascertained. *Thomas v. Joplin*, 14 Cal.App. 662, 112 P. 729. The statute must be construed with reference to the purpose intended by the lawmaking body. When the true intention of the Legislature is ascertained it must be given effect, and to attain this object words may be added or stricken out in proper cases. In *re Sekuguchi*, 123 Cal. App. 537, 11 P.(2d) 655. Courts should not permit a legislative act to be declared invalid for uncertainty if the intent of the Legislature is manifest and if its object can be obtained by supplying words which apparently were omitted through inadvertence. In supplying words in proper cases the courts should, of course, ever exercise care to keep within the field of judicial interpretation. *State v. Brodigan*, 37 Nev. 245, 141 P. 988, 989; *Continental Oil Co. v. City of Santa Fe*, 25 N.M. 94, 177 P. 742, 744, 3 A.L.R. 398. "When it is obvious that there is a mistake or omission in a statute and the intention of the Legislature can be collected from the whole statute, courts will deem the proper word substituted or supplied." *Morrison-Merrill & Co. et al. v. Industrial Commission of Utah*, 81 Utah, 363, 18 P.(2d) 295, 298.

We conclude that the Legislature by the amendment of 1933 fixed the compensation of the municipal judges in Los Angeles at the sum of \$6,500 per annum.

The alternative writ is dismissed.

We concur: CRAIL, P. J.; McCOMB, Justice pro tem.

12 Cal.App.2d 730

ANDERSON v. WEILAND et al.

Civ. 1611.

District Court of Appeal, Fourth District,
California.

March 26, 1936.

Rehearing Denied April 24, 1936.

1. Adjoining landowners ⇨5

Adjoining property owners were cotenants in hedge consisting of eucalyptus trees growing between their properties as regards right of one of the property owners to remove the trees.

2. Adjoining landowners ⇨5

Property owner *held* not authorized to cut down eucalyptus trees forming hedge on line between his land and land of adjoining property owner where result would constitute partial destruction and injuriously affect trees' value as windbreak for the land of adjoining property owner for which purpose trees were planted.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by William R. Anderson against P. J. Weiland and others. From an adverse judgment, the defendants appeal.

Judgment modified, and affirmed as modified.

Edward E. Gray, of Upland, for appellants.

A. D. Mitchell, of Ontario, for respondent.

SCOVEL, Justice pro tem.

Plaintiff and defendants are the owners of adjoining citrus orchards in San Bernardino county. On the boundary line dividing the two properties there is growing a row of tall eucalyptus trees termed a "windbreak" and grown for the purpose of protecting plaintiff's orchard from damage caused by annually recurring winds of high velocity. Defendants' evidence, which was not disputed, shows that the growth of limbs extending from the line of trees over and above their lands was injuring the citrus trees growing thereon. They commenced removing the offending limbs. Plaintiff thereupon filed this action praying for an injunction restraining defendants from "injuring, damaging, cutting, burning or in any way harming the said wind-

break." From the testimony given at the trial, it appeared that the limbs already cut and removed by defendants had left large holes or openings in the hedge or "windbreak," which would permit the free passage of any damaging winds. Judgment was entered in favor of plaintiff perpetually enjoining defendants from "cutting, destroying or otherwise damaging the said windbreak." From this judgment defendants have appealed.

[1,2] It is conceded by both parties to this appeal that the hedge here involved growing on the line between their properties constituted plaintiff and defendants cotenants therein. *Scarborough v. Woodill*, 7 Cal.App. 39, at page 40, 93 P. 383, 384. The exact nature of this cotenancy is difficult to define. In *Scarborough v. Woodill*, supra, it is stated that "The tenancy in common in a 'line tree' appears to be of a peculiar nature, and may be stated to be 'that each of the landowners upon whose land any part of a trunk of a tree stands has an interest in that tree, a property in it, equal, in the first instance, to, or perhaps rather identical with, the part which is upon his land; and, in the next place, embracing the right to demand that the owner of the other portion shall so use his part as not unreasonably to injure or destroy the whole.'" *Robinson v. Clapp*, 65 Conn. 365, 32 A. 939, 942, 29 L.R.A. 582. There is some difference of opinion in the authorities where the act of one cotenant to protect himself from damage results in injury to the estate by the other cotenant. In *Scarborough v. Woodill*, supra, 7 Cal.App. 39, at page 42, 93 P. 383, 384, the rule is laid down that "an injunction will be granted to restrain one of the owners of adjoining tracts of land (tenants in common) from cutting down trees growing on the boundary line, where they serve to shelter and protect the buildings of the other, even though their presence be a damage to his land, and notwithstanding the complainant has himself cut down some of the trees." It follows that an adjoining owner should likewise be restrained from cutting or damaging "line trees" where the result would constitute a partial destruction and injuriously affect the purpose for which the trees were planted, to wit, a "windbreak."

Appellants contend, however, that a strict application of the injunction issued by the trial court might result in restrain-

ing defendants from cutting limbs from the hedge, causing them damage without in any way interfering with its use by plaintiff as a "windbreak." To avoid any such interpretation, the judgment should be modified by striking therefrom that portion thereof reading as follows: "It is therefore ordered and adjudged that the injunction heretofore granted in this action be and the same is hereby made perpetual and the said defendants, and each of them, are hereby perpetually enjoined from cutting, destroying or otherwise damaging the said windbreak," and inserting in lieu thereof the following: "It is therefore ordered and adjudged that the said defendants, and each of them, are hereby perpetually enjoined from cutting, destroying or injuring said row of eucalyptus trees, or any portion thereof, so as to in any manner affect or interfere with its use by plaintiff as a 'windbreak' to shelter and protect the citrus trees growing upon plaintiff's lands described in the amended complaint."

As so modified, the judgment is affirmed. Each party to pay his own costs on appeal.

We concur: BARNARD, P. J.; MARKS, J.



12 Cal.App.2d 616

VALENTINE v. PROVIDENT MUT. LIFE
INS. CO. OF PHILADELPHIA.
Civ. 10570.

District Court of Appeal, Second District,
Division 1, California.
March 23, 1936.

1. Appeal and error ⇨837(1)

Appellate court may consider state of evidence in determining whether assigned error is so prejudicial as to warrant reversal of judgment.

2. Evidence ⇨94

Burden of proof to establish affirmative of issue never shifts.

3. Trial ⇨295(5)

Instructions to find for plaintiff, in action on life insurance policy, if defendant's evidence "has not overcome" presumption of

death of insured, not heard from in seven years, *held* not error, in view of instructions correctly stating law when read as whole; use of word "overcome" being mere ambiguity (Code Civ.Proc. § 1963, subd. 26).

4. Death ⇨2(3)

Effect of statutory presumption of death of one not heard from in seven years is fully dispelled by evidence so offsetting, balancing, or equalizing presumption that latter cannot fairly be said to preponderate over such evidence and presumption need not be overcome by preponderating evidence (Code Civ.Proc. § 1963, subd. 26).

5. Trial ⇨296(1)

Appellate court cannot say that ambiguous instructions, cured by other instructions, amount to prejudicial error in close case, in absence of complaint that any evidence was erroneously admitted or rejected.

6. Appeal and error ⇨837(1)

Before appellate court may consider state of evidence to determine whether error is prejudicial, there must be finding of undoubted error which remains uncured.

Appeal from Superior Court, Los Angeles County; Francis J. Heney, Judge.

Action by Maude Evelyn Valentine against the Provident Mutual Life Insurance Company of Philadelphia. Judgment for plaintiff, and defendant appeals.

Affirmed.

Loeb, Walker & Loeb, of Los Angeles (Henry Duque, Harry Friedman, and Herman F. Selvin, all of Los Angeles, of counsel), for appellant.

H. Eugene Breitenbach and Clarence M. Heublein, both of Los Angeles, for respondent.

ROTH, Justice pro tem.

Plaintiff sued to recover the proceeds of an insurance policy issued on the life of her husband. The action was tried before a jury; verdict was rendered in plaintiff's favor for the full amount of the policy, and judgment entered thereon against defendant. Defendant appeals from the judgment.

[1] It was alleged by plaintiff that her husband disappeared in 1924, and proof of death was predicated upon the presumption prescribed by subdivision 26 of section 1963 of the Code of Civil Procedure, which pro-

vides: "That a person not heard from in seven years is dead." Defendant concedes that the verdict of the jury is supported by the evidence and that such verdict cannot be disturbed by an appellate court by reason, alone, of the insufficiency of the evidence to support it. It urges that the trial court erroneously instructed the jury on the subject of burden of proof, which alleged error, taken in connection with the closeness of the evidence in this case, constitutes prejudicial error which warrants a reversal of the judgment. Pithily stated, defendant asserts that error which may be immaterial in one case may be prejudicial in another. The proposition is conceded, for there is no doubt that an appellate court may consider the state of the evidence in order to determine whether an assigned error is of a character so prejudicial as to warrant a reversal. *Hirshfeld v. Dana*, 193 Cal. 142, 150, 223 P. 451; *Bollinger v. Bollinger*, 153 Cal. 190, 194, 195, 94 P. 770; *Adkins v. Brett*, 184 Cal. 252, 261, 262, 193 P. 251; *Robinson v. Wada* (Cal.App.) 51 P.(2d) 171, 173; *Umemoto v. McDonald* (Cal.App.) 50 P.(2d) 68, 69.

[2] Both parties admit that the burden of proof to establish death by a preponderance of evidence rested at all times upon the plaintiff. *Rogers v. Manhattan Life Ins. Co.*, 138 Cal. 285, 288, 71 P. 348; *Valente v. Sierra R. Co.*, 151 Cal. 534, 538, 540, 91 P. 481; *Patterson v. San Francisco, etc., R. Co.*, 147 Cal. 178, 183, 184, 81 P. 531; Code Civ.Proc. §§ 1981 and 2061 (5). It is also conceded that a presumption is evidence (*Smellie v. Southern Pacific Co.*, 212 Cal. 540, 299 P. 529), and that when sufficient facts are established to invoke the application of a presumption, a *prima facie* case has been established which shifts the burden of going forward with the evidence to the other side. It is not contended by either litigant that the burden of proof to establish the affirmative of an issue ever shifts. This is, of course, the law. *Asadoorian v. Kludjian*, 210 Cal. 564, 565, 292 P. 644; *Scarborough v. Urgo*, 191 Cal. 341, 346, 347, 216 P. 584; *Manufacturers' Finance Corporation v. Pacific Wholesale Radio, Inc.*, 130 Cal.App. 239, 244, 19 P.(2d) 1013.

[3] In the case at bar, as already stated, the error complained of consists of alleged erroneous instructions. The trial court correctly instructed the jury that plaintiff was charged with the burden of proof, i. e., that plaintiff was charged with such burden, which meant that plaintiff was required to establish its case by a preponderance of the

evidence; and the trial court correctly defined what was meant by preponderance of evidence. In a number of instructions, however, the court when referring to the presumption of death; the fact that such presumption was evidence; and the effect thereof when considered with other evidence; said substantially: "And if you find that the evidence of the defendant *has not overcome* this presumption of death, your verdict should be for the plaintiff. * * *" (Italics ours.) Defendant asserts that this language was error, because there is no duty of defendant to "*overcome*" the presumption of death; that under the law defendant was chargeable only with "the burden of doing anything more than producing evidence enough to *offset* the effect of the plaintiff's showing." (Italics ours.) *Valente v. Sierra R. Co.*, 151 Cal. 534, 539, 540, 91 P. 481, 483.

An analysis of all the instructions, however, discloses a mere ambiguity not amounting to error. The instructions given by the trial court when read as a whole correctly stated the law. One of the instructions given by the court and requested by defendant, said in part: "The burden of proving the death of John A. Valentine is upon the plaintiff herein. You are therefore instructed that if, after considering the evidence, you find it to be evenly balanced on the question of whether or not John A. Valentine is dead, then plaintiff has failed to sustain her burden of proof and *your verdict must be in favor of defendant*. * * *" Another instruction was to this effect: "If you find from the evidence that the disappearance of the said John A. Valentine is explainable upon some hypothesis other than death, and his failure to communicate with his family can be accounted for on some theory other than death, then you are *entitled* to render your verdict in favor of the defendant." Another instruction was in part as follows: "* * * Unless you find a preponderance thereof to point to the presumable death of John A. Valentine, your verdict *must* be in favor of defendant." (Italics ours.) It will be noted from the excerpts set out that the court in at least two instructions decisively stated the law using the word *must*. In another the court used the word *entitled*. This word is inapt, but taken in connection with the other two, its ambiguous import, as well as the ambiguity incident to the loose use of the word "*overcome*" is, in our opinion, cleared up.

That the use of the word "*overcome*" is not prejudicial error is squarely answered

by authority. In the case of *Anderson v. Southern Pacific Co.*, 129 Cal.App. 206, 18 P.(2d) 703 (petition for hearing denied by the Supreme Court), the court gave the following instruction, 129 Cal.App. 206, at page 212, 18 P.(2d) 703, 706: "You are instructed that there is a legal presumption that the defendant discharged its duties to the plaintiff's intestate, and the burden is upon the plaintiff to *overcome* such presumption by a *preponderance* of the evidence." (Italics ours.) It will be observed that the above instruction, in addition to the use of the word "overcome" adds the phrase "by a preponderance of the evidence." The court said, 129 Cal.App. 206, at page 213, 18 P.(2d) 703, 706, speaking with reference to such instruction, and a factual situation comparable to that of the case at bar:

"The instruction here given perhaps goes beyond the strict rule, in that it requires the presumption to be overcome by a preponderance of the evidence, whereas in fact evidence sufficient only to *balance* the presumption need be introduced to overcome it.

"We do not believe the giving of this instruction as thus submitted constituted prejudicial error. We have examined such of the instructions as the record brings to us, and, construing them as a whole, we find the law bearing upon the evidence fairly presented to the jury.

"In determining whether a jury has been properly instructed as to the law, the instructions taken as a whole must be considered; * * * and *questionable instructions are not ground for reversal where the rights of appellant are clearly stated to the jury in other instructions.*' * * *

"It devolves upon appellant to point out that the error complained of was prejudicial to her rights under the facts in evidence; this does not appear, nor does it appear that the error resulted in miscarriage of justice."

[4-6] It must be conceded that there is an undoubted looseness in the use of the word "overcome" in the charge to the jury, with reference to the effect of a presumption as evidence. The law is clear that a party against whom the presumption is invoked fully dispels the effect of the same, when he has produced evidence to so offset, balance or equalize such presumption as to leave the evidence in such a state that it cannot be fairly said that the presumption preponderates over the testimony offered to disprove it. There is no obligation to overcome a presumption by preponderating evi-

dence. What is meant in the use of the word is that a presumption *is overcome* when the evidence opposed to it is sufficient to offset, equalize or balance it. *Anderson v. Southern Pacific Co.*, 129 Cal.App. 206, 213, 18 P.(2d) 703. We are satisfied that any ambiguity which may have existed in the language of some of the instructions was definitely cured. The situation in this case is different from that which existed in the case of *Adkins v. Brett*, 184 Cal. 252, 193 P. 251. In the *Brett* Case, cited by defendant, there was error which was *not cured* by any adequate instruction. The error in that case, as in all cases cited by defendant, was on the subject of admitting or rejecting evidence. The instruction complained of in that case was an *oral* one given to the jury upon the admission of evidence which could only be received for a limited purpose. The oral instruction was defective and the defect was not cured by any of the final written instructions. No such error is complained of here. When the stuff of which evidence is made is in such conflict as to be in near equal balance, the minutest fraction (which may be the look of a witness) on one side or the other may create the fair preponderance of evidence required by law. There is no complaint in this case that any evidence was erroneously admitted or rejected, and since we have concluded that the instructions as a whole did state the law, defendant's proposition resolves itself into an assertion that, because the jury might have been misled by the ambiguous language of some instructions divorced from the entire charge, this court in a close case has the right to say that such ambiguities which are cured by other instructions, amount to prejudicial error in a close case. We do not understand that we have any such right. The cases originally cited undoubtedly give to an appellate court the right to hold that error is prejudicial error in a close case, when there would be no warrant for doing so in a one-sided case, but an analysis of these cases demonstrates that the rules, which compel an appellate court to read instructions as a whole, have never been impaired. In each of the cases cited, a clear error was first found, and in each of said cases, such error was predicated on the failure of the trial court to admit or reject evidence, which might easily have changed the result. In each case the closeness of the evidence was of value in so far as it furnished reason for the appellate court to determine whether such error was so material as to impel a reversal. In the case of *Adkins v.*

Erett, *supra*, as already pointed out, an inadequate instruction was given to cure prejudice suffered by reason of the admission of evidence which could only be received for a limited purpose. That case impliedly holds that if an adequate instruction had been given, the claimed error would have been cured. In the case at bar, we are of the opinion that the questionable instructions were made certain by others. The case of *Anderson v. Southern Pacific Co.*, *supra*, emphatically so holds. In short, before the state of the evidence may be considered by an appellate court to determine whether error is prejudicial error, there must first be a finding of undoubted error *which remains uncured*. There being no such error in this case, it follows that the judgment must be, and it is, affirmed.

We concur: YORK, Acting P. J.; DORAN, J.



12 Cal.App.2d 489

BARR v. HALL et al.

Civ. 1390.

District Court of Appeal, Fourth District,
California.

March 17, 1936.

1. Trial $\hookrightarrow$ 296(7)

Instruction that law presumed that both motorists in intersectional collision were driving at careful speed *held* not reversible error, although parties had testified to facts, in view of direct and positive evidence of defendant's negligence and instruction precluding recovery unless defendant was guilty of negligence and plaintiff was not contributorily negligent (Const. art. 6, § 4½).

2. Trial $\hookrightarrow$ 252(8), 296(3)

In intersectional automobile collision case, refused instruction on unavoidable accident *held* unwarranted by evidence and sufficiently covered by instructions defining negligence and precluding recovery unless defendant was guilty of negligence proximately causing accident.

Appeal from Superior Court, Fresno County; Arthur Allyn, Judge.

Action by Phyllis Barr against J. Allan Hall and another. Judgment for plaintiff, and named defendant appeals.

Affirmed.

See, also (Cal.App.) 49 P.(2d) 1124.

J. Hampton Hoge, of San Francisco, and Chester O. Hansen, of Fresno, for appellant.

Claude Minard, and Ray W. Hays, both of Fresno, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a judgment in favor of the plaintiff for injuries sustained in an automobile collision. The sufficiency of the evidence is not attacked, for obvious reasons; but error is assigned in the giving of one instruction and in the refusal of another, in connection with which the appellant points out certain evidence which will be briefly summarized.

The accident occurred at the intersection of Clinton and Thorne avenues, on the outskirts of Fresno. The appellant was driving a coupé west on Clinton, and the respondent driving a sedan south on Thorne, and the cars came together at the southwest corner of the intersection. The respondent testified that she had been driving at 35 or 40 miles an hour but had slowed down further north on Thorne; that as she approached the intersection in question she did not have her foot on the accelerator and was "rather coasting along"; that she looked to her left, the direction from which the appellant was coming, but was unable to see very far because of certain obstructions at that corner; and that just after she entered the intersection she saw the appellant's car which was then beyond a certain house and approaching at a very fast speed. It appears from other evidence that this house is about 130 feet from the intersection. She then testified that the appellant gave no indication of having seen her so she put her foot on the accelerator and speeded up.

The appellant testified that as he came over a rise some 400 feet east of this intersection, he was traveling at from 35 to 40 miles an hour; that when he was opposite the east side of the house above referred to he observed the respondent's car coming south on Thorne; that he continued to watch it until both cars were about at the intersection from which time he did not see it until just as he collided with it; and

that during the interim he was looking south on Thorne trying to make a turn and get his car parallel with the respondent's car in order to avoid an accident. He further testified that he applied his brakes when he first saw the respondent, at a point which other evidence shows to be about 130 feet from the east line of Thorne avenue; that at that time he applied his brakes without using much force and proceeded in that manner for a distance of 65 feet; that at that point he thought that an accident was possible and applied his brakes with the definite purpose of stopping as soon as possible; that when he had gone about half of the remaining distance to the beginning of the intersection, the brake locked his wheels; that the locked wheels left skid marks for about 60 feet from there to the point of collision; that when he thus entered the intersection he was going about 25 miles an hour; that he did not see which car entered the intersection first; and that he struck the respondent's car when it was practically through the intersection, the rear thereof being approximately on the south line of Clinton avenue.

A disinterested eyewitness testified that the respondent's car entered the intersection first and that the rear wheels of the respondent's car were just going out of the intersection on the south when it was struck near its left rear wheel by the appellant's car.

[1] The appellant's first point is that the court erred in giving an instruction reading as follows: "It is a presumption of law that both the plaintiff (and) defendant J. Allan Hall were operating their automobiles at the time and place involved in the accident complained of at a careful and prudent speed, not greater than was reasonable and proper, having due regard to the traffic, surface and width of the highway, and that each of them was not operating their automobiles at such a speed or in such a manner as to endanger the life, limb or property of the plaintiff, and unless this presumption has been controverted by other evidence, direct or indirect, you are bound to find according to the presumption."

The main contention seems to be that such an instruction should not be given where the facts have been testified to by the parties. It would appear that this fact alone is not always conclusive on such a question. *DeLannoy v. Grammatikos*, 126 Cal.App. 79, 14 P.(2d) 542. In so far as the testimony of the respondent is called

to our attention, she did not testify as to what was done by either party from the time she was just entering the intersection, when she saw the appellant's car some distance up the road, until the time the collision occurred. The instruction applied the presumption alike to both parties and the record is silent as to which party offered it. However, the question as to whether the instruction should have been given need not be decided under the circumstances here appearing. The evidence of negligence on the part of the appellant is direct and positive, as shown by his own testimony, and the jury was fully instructed that it could not find for the respondent unless it found that the appellant was guilty of negligence and unless it further found that the respondent was not guilty of negligence which proximately contributed to the accident. In the face of the evidence and the other instructions, it is unreasonable to suppose that the jury could have been misled by this instruction or that it placed any reliance on this presumption, in view of the evidence which was before it. The error, if any, could not be held to be sufficiently prejudicial to justify a reversal in view of article 6, § 4½ of the Constitution. *Rogers v. Interstate Transit Co.*, 212 Cal. 36, 297 P. 884.

[2] The appellant pleaded unavoidable accident as one defense and it is next urged that the court erred in refusing to give an instruction to the effect that if the jury found that in the accident in question the appellant was guilty of no fault or wrong and that the respondent's injury was the result of an unavoidable accident, no recovery could be had.

The facts as testified to by the appellant himself did not justify the giving of this instruction, *Scandalis v. Jenny*, 132 Cal.App. 307, 22 P.(2d) 545, and other evidence is even more unfavorable to him. Moreover, the main purport of this instruction is sufficiently covered by other instructions in which the court clearly defined the matter of negligence and told the jury that the appellant could not be held guilty of negligence unless he did something that an ordinarily prudent person would not have done or failed to do something that an ordinarily prudent person would have done, and that the verdict must be in his favor unless the plaintiff had established, by a preponderance of the evidence, that he was guilty of negligence which proximately caused the accident. The appellant argues that this

is an exceedingly close case and that, under such circumstances, an instruction to this effect should be given. The evidence neither justifies the conclusion that this was a close case nor supports the plea of unavoidable accident.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.



12 Cal.App.2d 576

FULLER v. NELLE et al.

Civ. 10063.

District Court of Appeal, First District,
Division 2, California.

March 21, 1936.

Rehearing Denied April 20, 1936.

Hearing Denied by Supreme Court
May 18, 1936.

1. Wills ⇨58(2)

Evidence *held* to sustain finding of agreement between husband and wife that mutual will should not be revoked by wife at husband's death as regards whether trust should be established in favor of beneficiaries under mutual will, where wife revoked such will.

2. Judgment ⇨545

Judgment in probate proceedings was *res judicata* as to those issues over which probate court had jurisdiction.

3. Courts ⇨24

Jurisdiction of subject-matter may not be conferred by stipulation of parties.

4. Wills ⇨423

Decree of probate court in proceedings admitting to probate holographic will which was allegedly executed in violation of agreement with testatrix' husband not to revoke mutual will *held* not *res judicata*, in later action to establish trust in favor of beneficiaries under mutual will, on issue of whether there was contract not to revoke mutual will, notwithstanding such issue was pleaded and found in probate court.

5. Wills ⇨66

Testatrix who orally agreed with husband not to revoke mutual will and who upon husband's death received and accepted husband's estate could not transfer assets of the two spouses in violation of terms of

agreement with her husband (Civ.Code, § 1624, subd. 6; Code Civ.Proc. § 1973, subd. 6).

Appeal from Superior Court, Los Angeles County; Francis J. Heney, Judge.

Action by Mary Fuller against Frances R. Nelle, as administratrix with the will annexed of the estate of Harriet N. Fuller, deceased, and others. From an adverse judgment, the defendants appeal.

Affirmed.

Rehearing denied; NOURSE, P. J., dissents.

Walter E. Dorn and L. W. Lovey, both of San Francisco, Walter H. Robinson, of Los Angeles, and Clifford W. Nelle, of Oakland, for appellants.

Kemper Campbell, Charles L. Nichols, and Litta Belle Campbell, all of Los Angeles, for respondent.

STURTEVANT, Justice.

In an action brought to establish a trust, the trial court made findings in favor of the plaintiff, and from the judgment entered thereon the defendants have appealed.

On the 2d day of July, 1926, Clifford A. Fuller and Harriet H. Fuller, his wife, agreed to make a mutual will. Before doing so they entered into a contract with their adopted daughter, Frances R. Nelle, one of the defendants, by and under the terms of which they conveyed to the latter certain parcels of property in consideration of the promise made by Mrs. Nelle that she would not thereafter interfere in any respect whatever with the carrying out of the provisions of any transfer her parents might make of their other properties. Having made said written contract with their daughter, Mr. and Mrs. Fuller thereafter made and executed a mutual will. Later, Mr. Fuller died. The mutual will was admitted to probate, and his interest in the properties mentioned in said mutual will was, pursuant to the terms of said will, distributed to his widow. On the 7th day of April, 1927, Mrs. Fuller executed an holographic will, and a little later, on May 9, 1927, she executed a written revocation of the mutual will. On February 9, 1931, Mrs. Fuller died. After due proceedings had, the superior court of the state of California, in and for the county of Contra Costa, made an order admitting the holographic will to probate. Thereafter all of the beneficiaries named in the mutual will appeared and filed a contest in which

they alleged that the holographic will was not executed by the decedent in the manner or form required by law; but that it was executed as a direct result of duress, menace, fraud, and undue influence exercised by Frances R. Nelle. They also alleged the execution of the mutual will, that it had not been revoked, and that under its provisions it was agreed between Mr. and Mrs. Fuller that the property of both should not be disposed of by either of them except as therein provided. Continuing, they set forth facts which, if true, would have sustained an order revoking the probate of the holographic will and admitting to probate the mutual will. The defendants in this case appeared and answered said petition by alleging that the holographic will was executed in the form required by law; that it was not executed by duress, menace, fraud, or undue influence exercised by Frances R. Nelle or any one else. They denied that under the provisions of the mutual will Mr. and Mrs. Fuller agreed in effect or otherwise that the property of both should not be disposed of by either of them except as therein provided. They also denied that the mutual will was the last will of Mrs. Fuller and alleged affirmatively that said will was revoked on May 9, 1927. To that pleading the beneficiaries under the mutual will filed an answer in which they alleged that the purported revocation was a forged instrument, and they further alleged that said forged instrument was obtained by the exercise of undue influence by Frances R. Nelle upon the will and mind of Mrs. Fuller. The probate court made findings in favor of these defendants on all of the issues. The pleadings were very broad, and the findings with great care found upon every issue made by the pleadings.

The findings in the probate proceeding were filed on April 1, 1932. A notice of appeal was filed June 13, 1932. The instant case was commenced in the superior court of the state of California, in and for the county of Los Angeles, by the filing of the complaint on May 31, 1932.

[1] In the trial court these defendants contended, and in this court they now contend, that there was no agreement between Mr. and Mrs. Fuller that the mutual will should not be revoked. That contention is based, in part, on the fact that no writing was produced evidencing such an agreement and that a writing is indispensable evidence. Civ.Code, § 1624, subd. 6; Code Civ.Proc. § 1973, subd. 6. In reply, the

plaintiff contends that under the facts these defendants are estopped from pleading the statute of frauds because Mrs. Fuller accepted the benefits of said agreement and thereafter retained the same. Notten v. Mensing, 3 Cal.(2d) 469, 45 P.(2d) 193. To that contention these defendants reply that Mrs. Fuller did not obtain title to all of the property in suit through the estate of her deceased husband. However, they concede that Mrs. Fuller received substantial sums from his estate. Not waiving their contention that any agreement not to revoke should have been in writing, the defendants earnestly contend that there was no evidence, written or oral, showing that Mr. and Mrs. Fuller agreed that neither would revoke the mutual will. We think there was substantial evidence on that subject. That with meticulous care a mutual will was drawn for and executed by both Mr. and Mrs. Fuller is not controverted. There is not a particle of evidence that down to the date of the death of Mr. Fuller either one was dissatisfied with any single part thereof. Mr. Fuller never for a moment considered a revocation of any part of the will, but down to his dying hour the matter of carrying out the terms of the will was the one thought foremost in his mind. Three or four days before Mr. Fuller died Mr. Thomas A. Hanna, assistant manager of investments for the Southern California Edison Company, called. He was an acquaintance of ten years or more and a business advisor of Mr. Fuller. The latter was in bed suffering from his last illness. Mrs. Fuller was sitting on the bedside. Mr. Hanna testified that Mr. Fuller asked him to advise Mrs. Fuller from time to time, and then Mr. Fuller said: "I don't expect that I will be here much longer, but I want to feel that she can always come to you if she wishes or you to come to her. * * * This is a matter between my wife and myself and I can depend upon my wife to carry out our mutual wishes. You know what those wishes are; those wishes are expressed in this will." * * * Mrs. Fuller did not say anything." That testimony was not broken down in any respect by the direct examination or cross-examination of Mr. Hanna nor disputed by any other witness. If we examine the meaning of the words used, it is to the effect that Mrs. Fuller will not revoke. Indeed, it means more, she will not default, but will actively cause the will to be executed as written. Certain declarations by Mrs. Fuller were to the same effect.

[2-4] The defendants assert that the plaintiff is barred by the above-mentioned decrees in probate. As we recited the facts, it will be noted that, when the instant case was commenced, the decree in probate had not become final, and therefore could not be pleaded. The appeal was not decided until December 18, 1933. At that time this court filed a decision affirming the probate decrees. In *re* Estate of Fuller, 135 Cal.App. 781, 28 P.(2d) 399. The remittitur went down February 17, 1934. These defendants now claim that the judgment in the probate proceedings was a bar on all issues presented in the instant case. That contention is too broad. As to every issue of which the probate court had jurisdiction, the contention of the defendants is sound. *Clapp v. Vatcher*, 9 Cal.App. 462, 466, 99 P. 549. However, the gravamen of the plaintiff's claim in the instant case is the contract which she claims was made by Mr. and Mrs. Fuller in behalf of this plaintiff and the beneficiaries represented by her. That entire subject-matter is one of which a probate court may not take jurisdiction but under a long line of cases a court of equity may take jurisdiction. In *re* Estate of Rolls, 193 Cal. 594, at page 599, 226 P. 608, 610, the court said: "The grounds of objection are that she agreed and contracted with her husband not to execute a will that would in anywise change the disposition of the property made by the conjoint will. Whatever there may be of merit in this claim, we are satisfied that the question cannot be litigated in a probate court, but that relief in such cases must be sought in a court of equity. The remedy of a person injured by the violation of a contract to make testamentary provision for another must be pursued in a court of equity and not in a court of probate. Courts of equity will interfere in the administration of estates where the powers of the courts of probate and their modes of procedure preclude them from doing complete justice and then only for the purpose of rendering indispensable aid to courts of probate, remitting their decrees to that court to be carried into effect." Following the doctrine of that case, in *re* Estate of Carpentier, 104 Cal.App. 33, at page 34, 285 P. 348, this court said: "The court's action was correct. A will, though it may be irrevocable as a contract, is none the less revocable as a will, and in case such a will is revoked, the injured party cannot contest the later

will in the probate court on that ground or insist on the probate of the earlier will, but is remitted to an independent action at law or in equity to enforce whatever rights he may have. *Estate of Rolls*, 193 Cal. 594, 226 P. 608; *Estate of Berry*, 195 Cal. 354, 233 P. 330." True it is that in the probate court the issue of contract or no contract was pleaded, tried out, and found upon. However, it is settled law that jurisdiction of the subject-matter may not be conferred by the stipulation of the parties. In the litigation involving the estate of Frank D. Silva, a set of facts almost parallel arose. After his death, a will was admitted to probate, and thereafter an application to revoke the probate of the will was made. All parties apparently appeared and presented their respective claims to the court. The court made an order refusing to revoke the probate of the will, and from that order an appeal was taken. The order was affirmed. In *re* Estate of Silva, 169 Cal. 116, 145 P. 1015. Brazil, one of the defeated heirs, commenced an action to impress a trust. In that case, as in this case, it was asserted that the decree in probate was a bar. However, in reply to that contention the court said: "It was held that the facts now presented by the complaint and then presented by way of contest were not a ground for refusing probate of the will, and could not be considered, and that if the present plaintiffs were entitled to any relief it would have to be sought outside of the probate proceedings. It follows that plaintiffs are not concluded by the order admitting the will to probate." *Brazil v. Silva*, 181 Cal. 490, 493, 185 P. 174, 175.

[5] In view of what has been said above we think it is clear that it becomes wholly immaterial that the probate court found that the purported written revocation was valid, the purported holographic will was valid, and that the defendant Mrs. Nelle was not guilty of duress, fraud, menace, or undue influence. No one of those facts eliminates, or tends to eliminate, the contention that, after Mrs. Fuller had received and accepted the estate of her deceased husband, she was in no position to then transfer the assets of the two spouses in violation of the terms of her agreement with her husband.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

12 Cal.App.2d 726

UKHTOMSKI et al. v. TIOGA MUT. WATER
CO. et al.
Civ. 1615.

District Court of Appeal, Fourth District,
California.

March 26, 1936.

Hearing Denied by Supreme Court

May 25, 1936.

1. Injunction ☞1

Court may in exercise of sound discretion refuse to grant injunction, where its issuance will work inequitable burden upon defendant and injured party may be adequately compensated in damages.

2. Injunction ☞24

Fact that injury will result to public from granting of injunction justifies refusal to grant injunctive relief.

3. Injunction ☞50

Plaintiffs *held* not entitled to restrain water company from maintaining reservoir, which with its appurtenances constituted sole source of water supply for 500 people, which had been inadvertently constructed so as to encroach upon .15 of an acre of plaintiffs' unimproved land, since plaintiffs could be fully compensated by damages.

4. Injunction ☞199

Court of equity, which had denied injunction and assessed damages sustained by plaintiffs because of encroachment upon their land of reservoir which was part of water system, *held* authorized to grant water company easement to maintain such reservoir on plaintiffs' land.

5. Pleading ☞345(2)

Denial by defendants of each and every other allegation contained in certain paragraph of plaintiffs' complaint, after admitting portion of allegations of such paragraph, *held* sufficient denial under statute to preclude entry of judgment for plaintiffs on pleadings (Code Civ.Proc. § 437, as amended by St.1927, p. 529).

Appeal from Superior Court, San Bernardino County; Chas. L. Allison, Judge.

Action by Alexander S. Ukhtomski and another against the Tioga Mutual Water Company and others. From an adverse judgment, plaintiffs appeal.

Affirmed.

Norman A. Obrand and Vernon Cruickshank, both of Los Angeles, for appellants.

Dryer, Castle & Richards and William A. Page, all of Los Angeles, for respondents.

SCOVEL, Justice pro tem.

In 1929 and 1930 plaintiffs acquired under contract of sale approximately 3 acres of land in San Bernardino county, being part of a larger tract containing some 600 acres known as the College Heights tract. Plaintiffs' land is covered with sagebrush and rock, and the value thereof was testified to by one J. B. Baile, Federal Land Bank appraiser of San Bernardino county, as being \$150 per acre.

In 1932, defendant Tioga Mutual Water Company erected, at a cost of some \$7,000, a concrete reservoir with the necessary outlets, pipe lines, etc., for the purpose of supplying water to the persons, some 500 in number, residing in the College Heights tract. Through inadvertence and mistake a portion of the reservoir was constructed and pipe lines leading therefrom were laid upon a portion of plaintiffs' lands, the amount so taken consisting of about .15 of an acre. The reservoir and its appurtenances now constitute the sole source of water, both for domestic and irrigation purposes, for these residents in College Heights tract. After completion of the reservoir, plaintiffs brought this action, seeking damages for trespass to their lands and a permanent injunction restraining defendants from using and maintaining the reservoir. The trial court gave judgment in favor of plaintiffs for damages sustained by the trespass in the sum of \$762.41, refused to issue an injunction and gave to defendants an easement to maintain the reservoir and pipe lines on plaintiffs' land. From this judgment plaintiffs appeal, contending that a permanent injunction should be granted restraining the continuing trespass and maintaining that the trial court was without power to grant defendants the easement for maintenance as set forth in the judgment. Respondents admit that the reservoir and pipe lines were constructed without plaintiffs' consent and that the same constitute a continuing trespass, further conceding that in case of a continuing trespass a court of equity may enjoin the same, asserting, however, that the issuance of such an injunction is discretionary and that it should be refused where from the facts its issuance does not appeal to equity and good conscience.

[1-3] The remedy of injunction is a drastic one, and where its issuance will work an

inequitable burden upon the defendant, the court may, in the exercise of a sound discretion, refuse to grant it where the injured party may be adequately compensated in damages. *Heilbron v. Canal Company*, 75 Cal. 426, 17 P. 535, 7 Am.St.Rep. 183. The principle is aptly illustrated in the so-called "encroachment cases" where one party builds his wall partly on the land of his neighbor. It being shown that the injury suffered by such encroachment is small and the harm to be suffered by compelling its removal great, the courts have uniformly refused to issue an injunction, leaving the complaining party to his action for damages. *Rothaermel v. Amerige*, 55 Cal.App. 273, 203 P. 833; *Blackfield v. Thomas Allec Corporation*, 128 Cal.App. 348, 17 P.(2d) 165; *McKean v. Alliance Land Company*, 200 Cal. 396, 253 P. 134. It is true, as pointed out by appellants, that the amount of land taken in the decisions cited, *supra*, is considerably less than that here involved. This difference is merely one of fact, however, and does not change the legal principle involved that an injunction should not issue where its issuance would cause serious harm to the defendant and the injury caused by his inadvertence and mistake can be fully compensated by damages. In the case here involved an additional element is also involved. If an injunction should be issued as asked by plaintiffs, some 500 persons would be cut off from their only water supply. Where injury will result to the public, an additional reason arises for the refusal to grant injunctive relief. *Newport v. Temescal Water Company*, 149 Cal. 531, 87 P. 372, 6 L.R.A.(N.S.) 1098. We are of the opinion that the issuance of an injunction was properly refused.

[4] As heretofore stated, the trial court granted to defendants an easement over that portion of plaintiffs' land occupied by the reservoir and pipe lines for maintenance thereof, to which plaintiffs raise objection. The controversy here was wholly equitable in nature. The defendants in their answer admitted that through their inadvertence and mistake plaintiffs had suffered a legal wrong, offered to do equity and asked the court to settle the controversy fairly to all parties. It is our opinion that the court properly denied an injunction and assessed damages against the defendants to compensate plaintiffs for the injury sustained by defendants' continuing trespass. Was this

the extent of its equitable power? Having refused to prohibit defendants' use of the reservoir and pipe lines and compelled them to pay for such use, could it not make such a decree as would insure defendants the use thereof for which they have been compelled to pay and thereby fully and completely end the litigation and finally settle the controversy? No decisions from this state have been cited on the question.

In *Oregon Railroad & Navigation Co. v. McDonald et al.*, 58 Or. 228, 112 P. 413, 32 L.R.A.(N.S.) 117, where plaintiff railroad had without right been constructed on plaintiff's land, the court decreed the railroad company to be the owner thereof upon paying plaintiff its value. If a court of equity has power to give the whole title, surely it can give something less—an easement. We do not believe the inherent power of a court of equity to decree an easement to the defendants under the circumstances here involved to protect them in the enjoyment of the use of the reservoir and pipe lines for which they have been compelled to pay can be questioned.

[5] Plaintiffs finally contend that their motion for judgment on the pleadings made in the lower court should have been granted because there was no specific denial of the allegation of damages alleged in the complaint. Plaintiffs' allegation of damages is contained in paragraph IV of the complaint, wherein the entry upon plaintiffs' lands and construction of the reservoir and pipe lines is alleged and their claim of damages sustained thereby asserted. Defendants in their answer expressly admitted the entry and construction of the reservoir and pipe lines and then denied "each and every other allegation contained in said paragraph IV." Section 437 of the Code of Civil Procedure, as amended in 1927 (St.1927, p. 529), expressly provides for so pleading a denial as follows: "The denials of the allegations controverted may be stated by reference to specific paragraphs or parts of the complaint; or by express admission of certain allegations of the complaint with a general denial of all the allegations not so admitted." Defendants' denial of the damages alleged sufficiently complies with these requirements.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

12 Cal.App.2d 523

PACIFIC EMPLOYERS INS. CO. et al. v.
INDUSTRIAL ACCIDENT COMMISSION et al.
Civ. 10776.

District Court of Appeal, Second District,
Division 2, California.

March 18, 1936.

As Modified on Denial of Rehearing
April 15, 1936.

Master and servant ☞419

Industrial Accident Commission, making no finding that injury to employee was permanent, held without authority to award compensation, where application was filed more than 6 months after injury and date of payment of compensation or furnishing of medical treatment (St.1931, p. 2372, § 11(c).

Proceeding under the Workmen's Compensation Act by Jim Dudov, employee, opposed by the Rohl-Connolly Company, employer, and the Pacific Employers Insurance Company, insurer. To review an order of the Industrial Accident Commission awarding compensation, the employer and insurer petition for writ of review.

Award annulled.

F. Britton McConnell, of Los Angeles, for petitioners.

Everett A. Corten, of San Francisco, for respondent Industrial Accident Commission.

Hiram T. Kellogg, of Los Angeles, for respondent Jim Dudov.

WOOD, Justice.

Petitioners seek to annul an award of the Industrial Accident Commission. Jim Dudov was employed by Rohl-Connolly Company as a miner at Avalon, Cal., and on November 3, 1934, sustained an injury arising out of and occurring in the course of his employment. The injury caused total temporary disability commencing November 6, 1934, and ending November 23, 1934, at which time Dudov returned to

work and worked continuously until January 10, 1935. Since then he has been unable to work. During the period between November 6, 1934, and November 23, 1934, the insurance carrier furnished medical treatment and paid Dudov the sum of \$24.26 as compensation for disability during that period. Dudov filed his claim for adjustment with the commission on June 10, 1935. The commission filed its findings on November 6, 1935, in which it found: "Said injury caused temporary total disability continuing from November 6, 1934, to and including November 23, 1934, and from January 10, 1935, to and including October 16, 1935, and indefinitely thereafter." The commission awarded the sum of \$15.44 weekly beginning November 14, 1934, and ending November 23, 1934, and rebeginning January 11, 1935, and continuing through October 16, 1935, and indefinitely thereafter until the termination of disability or the further order of the commission.

Petitioners contend that the commission was without authority to make the award, since the application was filed more than 6 months after the injury and the date of the payment of compensation or the furnishing of medical treatment. Respondents contend that there is a "new and further disability" and that the jurisdiction of the commission continues for a period of 245 weeks in accordance with section 11(c) of the Workmen's Compensation Act (St. 1917, p. 841, § 11(c), as amended by St. 1931, p. 2372).

The commission made no finding that Dudov's "original injury has caused a new and further disability." The award should therefore be annulled. Standard Oil Co. v. Ind. Acc. Comm., 137 Cal.App. 455, 31 P.(2d) 457. The award is annulled and the proceedings remanded to the Industrial Accident Commission, without prejudice to further proceedings.

The award is annulled.

We concur: CRAIN, P. J.; GOULD, Justice, pro tem.

12 Cal.App.2d 676

GOLD et al. v. ARIZONA REALTY & MORTGAGE CO. OF ARIZONA et al.

Civ. 10763.

District Court of Appeal, Second District,
Division 2, California.

March 25, 1936.

1. Negligence ⇨121(3)

In action for injuries sustained by plaintiff in fall down stairway of apartment building upon feeling foreign substance on sole of shoe, doctrine of *res ipsa loquitur* did not apply.

2. Negligence ⇨134(5,7)

Owner of apartment building held not liable to plaintiff who fell down stairway upon feeling foreign substance on sole of shoe, where it was not shown that substance had been on stairway any length of time or that it had been left there by an agent of owner.

3. New trial ⇨70

Where there is no substantial conflict in testimony on material issues and the evidence as a whole would be insufficient as a matter of law to support a verdict for the moving party, order granting new trial cannot be sustained.

Appeal from Superior Court, Los Angeles County; Francis J. Heney, Judge.

Action by Eugene A. Gold and Mildred Gold against the Arizona Realty & Mortgage Company of Arizona. From an order granting plaintiffs' motion for a new trial, defendant appeals.

Reversed.

C. A. Pinkham, of Los Angeles, for appellants.

Arthur J. Manley and George Halverson, both of Los Angeles, for respondents.

WOOD, Justice.

Plaintiff sued to recover damages suffered when she slipped in walking down a stairway of defendant's apartment house. The case was tried before the court without a jury and judgment rendered for defendant. A motion for a new trial was granted, and defendant appeals from the order granting the new trial.

[1,2] Defendant contends that the evidence, viewed in the light most favorable

to plaintiff, is insufficient to justify a judgment in plaintiff's favor, and for that reason the order should be reversed. The evidence upon which plaintiff must rely to support a judgment in her favor comes from her own testimony and that of the manager of the apartment house. Plaintiff testified that as she went down the stairway she "felt some sort of foreign substance under the sole of my foot, and with that my weight just went from under me." When asked what she found on the sole of her shoe, plaintiff stated: "It was a wet spot, and it looked slick on the sole of my shoe, so I rubbed my finger on it, and I put it to my nose to see if I could determine what it was, and it was a soapy or waxy substance of some sort." The manager of the apartment house testified that the janitors frequently washed the stairway with soap and water. The janitors were not called as witnesses. The record fails to disclose sufficient evidence as a matter of law to charge defendant with responsibility for plaintiff's accident. The doctrine of *res ipsa loquitur* is not applicable to the facts shown in evidence. The mere fact that plaintiff tripped and fell downstairs does not of itself create a situation in which the doctrine can be invoked. *Finch v. Willmot*, 107 Cal.App. 662, 290 P. 660. It was not shown that the "substance" which caused plaintiff's fall had been on the stairway any length of time or that it had been left there by an agent of defendant. *Marpie v. Manspeaker*, 88 Cal.App. 682, 263 P. 1022. To determine how the "substance" became attached to plaintiff's shoe one must enter the field of conjecture. It may have been picked up from the street as she entered the apartment house or it may have been dropped on the stairway by some one not in defendant's employ.

[3] The rule applicable to this appeal is clearly stated in *Moss v. Stubbs*, 111 Cal. App. 359, 295 P. 572, 573, 296 P. 86: "But it is equally well settled that, where there is no substantial conflict in the testimony on material issues, and the evidence as a whole would be insufficient as a matter of law to support a verdict in favor of the moving party, an order granting a new trial cannot be sustained." *Empire Investment Co. v. Mort*, 169 Cal. 732, 147 P. 960; *Estate of Sexton*, 199 Cal. 759, 251 P. 778; *Seth v. Lew Hing*, 125 Cal.App. 729, 14 P. 537, 15 P.(2d) 190. In the case before us

the evidence as a whole is not sufficient as a matter of law to support a judgment in favor of plaintiff.

The order granting a new trial is reversed.

We concur: CRAIL, P. J.; GOULD, Justice pro tem.



pealed from the judgment of dismissal thereafter entered. Counsel have stipulated that this appeal "may be submitted upon the rule in Brown v. Ferdon (Cal.Sup.) 54 P.(2d) 712." Under the rule in that case the note and deed of trust here in question, having been executed and delivered prior to the effective date of section 2924½ of the Civil Code, as added by St.1933, p. 1674, § 8, are not subject to the provisions of said section.

The judgment is therefore reversed.



12 Cal.App.2d 711

PACIFIC STATES SAVINGS & LOAN CO.
v. VOGEL et al.
Civ. 10526.

District Court of Appeal, Second District,
Division 1, California.
March 26, 1936.

Mortgages 559(2)

Statute, precluding deficiency judgment on trust deed obligation unless notice of breach and election to sell was recorded one year prior to sale, was not applicable where note and deed of trust were executed and delivered prior to enactment of statute (Civ. Code, § 2924½, as added by St.1933, p. 1674, § 8).

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by the Pacific States Savings & Loan Company, a corporation, against August Vogel and another. From judgment of dismissal after demurrer sustained, plaintiff appeals.

Reversed.

John L. Mace, of Los Angeles, for appellant.

R. Lee Heath, of Los Angeles, for respondents.

PER CURIAM.

The record herein discloses that in an action to recover a deficiency existing after a trustee's foreclosure sale of real estate under a deed of trust securing a promissory note, a general demurrer was sustained to the complaint; and the plaintiff has ap-

13 Cal.App.2d 7

GAUCHET v. McGINNIS.
Civ. 5517.

District Court of Appeal, Third District,
California.

March 30, 1936.

1. Reformation of instruments 19(1)

A mistake which will authorize reformation of a written instrument must be either a mutual mistake of both parties or one which is known to one party and suspected by the other (Civ.Code, § 3399).

2. Reformation of instruments 45(3)

Evidence held to sustain finding, authorizing reformation of land contract, that by mutual mistake parties had omitted clause to effect that purchaser agreed to give note, secured by trust deed, to secure balance of indebtedness as condition precedent entitling her to deed upon payment of half of purchase price (Civ.Code, § 3399).

3. Evidence 21

It is common knowledge that both a mortgage and a trust deed are customarily given to secure a promissory note representing amount and terms of the indebtedness.

4. Reformation of instruments 46

Finding, as basis for judgment directing reformation of land contract by insertion of omitted clause, that purchaser had agreed to

give note, secured by trust deed to secure balance of indebtedness as condition precedent entitling her to deed upon payment of half of purchase price, although vendor had said nothing about note in testifying, *held* not a fatal variance, since agreement to give note would be inferred (Civ.Code, § 3399).

Appeal from Superior Court, Los Angeles County; J. T. B. Warne, Judge.

Action by Geneva N. Gauchet against Olive L. McGinnis, in which the defendant filed a cross-complaint. From an adverse judgment, plaintiff appeals.

Affirmed.

Holbrook, Taylor, Tarr & Reed and Joseph D. Taylor, all of Los Angeles, for appellant.

John J. Craig, of Los Angeles, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiff has appealed from a judgment which was rendered against her in a suit for the return of money paid on a contract to purchase real property on the ground that the agreement was breached by refusal of the vendor to execute and deliver a deed of conveyance upon payment of one-half of the purchase price therefor. The defendant denied the alleged breach, and in a cross-complaint asked to reform the contract by inserting therein a clause which was omitted by mutual mistake to the effect that the vendee agreed to execute and deliver to the vendor a trust deed to secure the balance of the indebtedness as a condition precedent entitling her to the deed of conveyance upon the payment of one-half of the purchase price of the property.

It is asserted the findings and judgment are not supported by the evidence, for the reason that it does not appear that a mutual mistake of both parties occurred with respect to the omitted clause of the contract, and that there is a fatal variance between the allegations of the cross-complaint and the findings and decree authorizing the reformation of the agreement.

The defendant owns lot 4, tract 677, of Los Angeles county, according to the map

thereof recorded in Book 15 at page 159 of Maps of that county. May 18, 1928, the defendant contracted in writing to sell that lot to the plaintiff for \$12,500. The instrument provided for the payment of \$3,500 cash and \$100 each month thereafter until the purchase price was fully paid, together with 7 per cent. interest on deferred payments. The proposed agreement as it was originally prepared provided that upon full payment of the purchase price the vendor would execute and deliver a good and sufficient deed of conveyance to the property. Before the contract was signed by the respective parties, by mutual agreement it was changed so as to read that, when one-half of the purchase price had been paid pursuant to the terms of the agreement, the vendor would execute and deliver to the purchaser a good and sufficient deed of conveyance therefor together with a guaranty certificate of clear title. This change was made at the request of the purchaser. The defendant testified in that regard:

"Q. Now, calling your attention to the change made on the second page of the contract, 'on receiving payment for one-half of amount of contract,' do you remember that being inserted in there? A. Yes, I do.

"Q. And was there any conversation prior to the time that particular thing was inserted? A. Yes, there was.

"Q. Between yourself and Mrs. Gauchet? A. Yes, there was.

"Q. What was that, please? * * * A. Mr. Bell and Mrs. Gauchet came into the office and stated that she thought it was a long time to wait * * * for a deed until she had fully paid for the house, and that they thought that she ought to have the deed * * * when she had paid one-half. * * * And I inserted it that way, and we discussed at that time, before the change was made, * * * *that we were to have a trust deed for the balance that would be due.*

"Q. You mean for the remaining one-half? A. Yes.

"Q. In other words, when you gave her a deed she was to give you back a trust deed as security? A. That is it, yes. * * *

"Q. How did you happen to leave that [provision regarding the trust deed] out of the paper? A. I just didn't read over the

printed matter here, and *it was an oversight*, that is all."

There is some conflict of evidence regarding the agreement for the execution of a trust deed to secure the balance of the purchase price when one-half of the property had been paid for.

When one-half of the purchase price of the property had been paid pursuant to the terms of the contract, with the exception of \$1,814.28, the last-mentioned sum was tendered to the defendant, with a demand for a deed of conveyance of the property to the purchaser and a certificate of clear title thereto. The defendant thereupon executed her deed to the property and procured the certificate of title and deposited them in escrow in a Los Angeles bank to be delivered to the plaintiff upon execution and delivery to her of the sum of \$1,814.28 and a promissory note secured by a trust deed on the property for the balance of the remaining one-half of the purchase price. Contending that there was no agreement to execute a promissory note or trust deed for the security of the unpaid one-half of the purchase price, and that she was entitled to a deed of conveyance to the property free from all encumbrance upon payment of one-half of the purchase price, the plaintiff demanded of the defendant a deed of conveyance March 8, 1930, without tendering the trust deed securing the unpaid portion. This demand was refused by the defendant. Suit was then commenced based upon an alleged breach of the contract and demanding reimbursement of the money which had been paid on the purchase price of the property. The defendant answered, denying the material allegations of the complaint. She also filed a cross-complaint praying for reformation of the contract by inserting therein the provision that, upon payment of one-half of the purchase price and the receipt of a duly executed trust deed "securing the balance of the purchase price upon the same terms and conditions as set forth in the agreement," the vendor would be entitled to a deed of conveyance to the property. Upon trial the court adopted findings favorable to the defendant, among which is the following determination: "By mutual mistake of the parties hereto * * * [they] omitted to provide in the agreement as changed 'that upon the payment of one-half of the purchase price by the plaintiff, defendant should give a deed to the plaintiff, and

plaintiff in turn to secure the remainder of the purchase price by the giving of the note therefor secured by a deed of trust upon the property in question upon the same terms and conditions relative to payment and interest as was provided for by the contract."

Thereupon judgment was rendered directing the reformation of the contract to conform to the preceding finding and denying the relief sought by the plaintiff.

[1, 2] The findings and judgment are adequately supported by the evidence. There is no fatal variance between the pleadings and the judgment.

It is true that a mistake which will authorize the reformation of a written instrument must be either a mutual mistake of both parties or one which is known to one party and suspected by the other party. Section 3399, Civ.Code; 22 Cal.Jur. 716, § 8. In the present case there is evidence to support the finding that the omission was the result of a mutual mistake of both parties. Mrs. McGinnis testified that: "We [both parties to the contract] discussed at that time before the change was made * * * that we were to have a trust deed for the balance that would be due. * * * It [the omission] was an oversight."

[3, 4] There is no merit in the contention that there is a fatal variance between the evidence or the pleadings and the findings and judgment with respect to the omission of the clause regarding the trust deed because Mrs. McGinnis did not specifically say that the trust deed was to be accompanied by a promissory note for the balance of the purchase price of the property which it was to secure. That would necessarily be inferred. It was specifically said the trust deed was to secure the *unpaid* balance of the purchase price. A trust deed is understood to be substantially a mortgage on real property to secure an indebtedness, with the power of sale for default of the terms thereof. 25 Cal.Jur., p. 15, §§ 3-6. It is common knowledge that both a mortgage and a trust deed are customarily given to secure a promissory note representing the amount and terms of the indebtedness. It is unreasonable, in conflict with common business practice, and absurd to contend that a written contract with a stranger to purchase valuable real property which entitles the vendee to a clear deed of conveyance upon the payment of the entire purchase price would be voluntarily

changed to require the vendor to convey clear title thereto upon the payment of one-half of the purchase price without any security for the payment of the balance of the purchase price. It does not constitute the making of a new and different contract from that in which it was agreed the vendee should deliver a deed of trust to secure the unpaid balance of the purchase price to merely infer from the evidence to that effect that a promissory note was also to be given as a basis for the amount of indebtedness and the terms to be secured by that trust deed. That inference necessarily follows.

There is nothing in the cases of *Mabb v. Merriam*, 129 Cal. 663, 62 P. 212, and *Beal v. United Properties Co.*, 46 Cal.App. 287, 189 P. 346, upon which the appellant relies, in conflict with what we have heretofore said regarding the reformation of a contract.

The judgment is affirmed.

We concur: PULLEN, P. J., TUTTLE, Justice pro tem.



12 Cal.App.2d 449

HARGETT v. GULF INS. CO. OF DALLAS, TEX.

SAME v. FIREMEN'S INS. CO. OF NEWARK, N. J.

SAME v. MONARCH FIRE INS. CO. OF CLEVELAND, OHIO.

Civ. 9659.

District Court of Appeal, Second District,
Division 1, California.

March 13, 1936.

1. Insurance ⇨330(1)

Where fire policies provided that insurers would not be liable for loss of insured's property if later encumbered by chattel mortgage without insurers' written consent, notice to soliciting agent that chattel mortgage

had been executed *held* not binding on insurers, and hence insured could not recover on such policies.

2. Insurance ⇨378(3)

Even if soliciting agent were a general agent, notice to agent that chattel mortgage had been executed on insured's property would not be binding on insurers, where fire policies provided that no agent or officer had authority to waive any provisions thereof without written indorsement thereon.

3. Insurance ⇨90

Provisions limiting authority of officer or agent of insurer are valid and must be enforced as other provision of policy.

4. Insurance ⇨330(1)

Execution of chattel mortgage upon insured's property without insurers' consent *held* to cause temporary suspension of insurance and not forfeiture of policies, and hence insurers' retention of premiums did not estop insurers from relying upon breach where insured suffered fire loss.

5. Insurance ⇨330(1)

Where fire policies were breached by execution of chattel mortgage on insured property without insurers' consent, insurance did not continue so as to cover fire loss, where insured failed to notify insurers of mortgage or request indorsements of policies or exact promise that policies would continue in force without indorsements.

6. Insurance ⇨392(6)

Where fire policy had been breached by insured before fire loss, acceptance of premium after fire loss *held* not to estop insurer from setting up breach, since rights of parties were fixed when loss occurred, and insured was not prejudiced by insurer's acceptance of premium (Civ.Code, §§ 2616, 2618).

7. Insurance ⇨371

"Estoppel" of insurer to deny liability on policy arises when insured, because of insurer's conduct, has been dissuaded from obtaining other insurance upon property and relies upon validity of policies he holds.

[Ed. Note.—For other definitions of "Estoppel," see Words & Phrases.]

8. Courts ⇨169(4)

Demands falling within statute defining interest must be excluded in determining jurisdiction of municipal court (Code Civ.Proc. § 89, as added by St.1933, p. 1811; Civ.Code, § 1915).

9. Courts ⇐ 121 (5)

Where insured, in actions on fire policies for \$2,000 each, was entitled to interest upon any amount recovered on policies as compensation for detention of money, interest could not be included in each demand, and hence actions were within exclusive jurisdiction of municipal court and could not be brought in the superior court (Code Civ.Proc. § 89, as added by St.1933, p. 1811; Civ.Code, §§ 1915, 3287; Const. art. 6, § 5).

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Consolidated actions by G. M. Hargett against Gulf Insurance Company of Dallas, Texas, against the Fireman's Insurance Company of Newark, New Jersey, and against the Monarch Fire Insurance Company of Cleveland, Ohio. From judgments for plaintiff, defendants appeal.

Reversed.

Hindman & Davis, of Los Angeles, for appellants.

Carlos S. Hardy, of Los Angeles, for respondent.

SHINN, Justice pro tem.

Plaintiff brought separate actions upon three policies of fire insurance, and upon a trial in which the actions were consolidated, recovered judgment for the amount of each policy. Defendants Gulf Insurance Company, Firemen's Insurance Company, and Monarch Insurance Company appeal from separate judgments entered against them.

The insured property which was destroyed by fire consisted of certain incubators, which were separately insured by the defendant companies under separate policies, which provided that the insurer would not be liable for loss or damage to any of the insured property while encumbered by chattel mortgage unless written consent of the insurer was endorsed thereon or attached thereto. At the time the policies were issued the property was not encumbered by chattel mortgage, but at a later date it was so encumbered to Farmers & Merchants Bank of Watts. Plaintiff, while admitting his failure to procure written assent of the companies to the chattel mortgage, relies upon alleged waivers of the provisions which required written consent. The court found in each case that before

and at the time the chattel mortgage was given, plaintiff gave notice to the insuring company of the execution of the mortgage, and that each company had knowledge thereof and failed, refused, and neglected to make any indorsement with respect to said mortgage on plaintiff's policy of insurance. Upon these findings, the court held the companies had waived compliance with said provisions of the policies. The sufficiency of the evidence to support these findings is challenged by appellants.

One E. H. Rose was an insurance agent at Watts. The policies in question were procured through him, and the premiums were paid to him. Premiums upon the Firemen's and Gulf policies were paid before the property was destroyed. The premium on the Monarch policy was paid to Rose shortly after the fire and was transmitted by him to an agent at Alhambra, Cal., who had countersigned the policy. The note and chattel mortgage were executed and delivered on or about January 21, 1933, long after the policies were issued. On January 13, 1933, the agent Rose, having come to plaintiff's office upon business other than that of defendant companies, was informed by plaintiff that he had given a chattel mortgage on the incubators and would take the policies to the mortgagee bank. Nothing further was said about the policies, no request was made by plaintiff that any indorsements should be made thereon, and Rose said nothing whatever on the subject. Rose did not report the matter to any of the companies nor to any of the representatives thereof. Within two or three days after this conversation plaintiff took the policies to the bank, where they remained until after the fire, which occurred on February 14, 1933.

[1] The foregoing is all of the evidence which tends in any manner to support the findings in question. This evidence was not sufficient to warrant the findings. Plaintiff's evidence did not establish notice to the companies of the execution of the mortgage. It was not shown that Rose received information as to the chattel mortgage within the scope of his authority as agent for any of the defendant companies. The court found inferentially but not directly that Rose received the information within the scope of his authority. It appears that Rose held a license authorizing

ing him to act as agent for each company and that he received his appointments, as agent, through others who were the general agents of the companies in the district. No evidence was introduced as to any written authority conferred upon Rose by any of the companies or by any of their general agents. He appears to have acted as a mere local agent who accepted applications for insurance, procured the issuance of policies, delivered them and collected premiums thereon. He was not a general agent, which is to say that he did not possess general powers to effect contracts of insurance, to fix rates of premiums, to consent to changes, to make indorsements or to cancel policies. As a local agent he was without power to consent to the chattel mortgage and thereby continue the insurance in force notwithstanding the mortgage. *Sharman v. Continental Insurance Co.*, 167 Cal. 117, 138 P. 708, 52 L. R.A.(N.S.) 670; *Madsen v. Maryland Casualty Co.*, 168 Cal. 204, 142 P. 51. Neither actual nor ostensible authority to make or to waive indorsements upon the policies was shown. There was no evidence that Rose had ever made indorsements upon policies or waived the conditions of policies with reference thereto. He did not represent himself as having such authority, nor was there evidence that plaintiff believed him to be so authorized. The mere fact that he had been appointed agent for the companies at Watts and had procured insurance for his customers through the companies' general agents was not sufficient to show ostensible authority to act in matters arising after the policies were issued. As Rose was not shown to be more than a local agent whose duties ended with the delivery of the policies and the collection of premiums, and as he was not shown to have had ostensible authority to do more than this, the information given to him concerning the chattel mortgage was not received by him within the scope of his employment; it was not notice to the companies, and therefore the finding that the companies had knowledge of the mortgage is not supported by the evidence.

[2, 3] Even though it had been established that Rose was a general agent, the evidence would still be insufficient to show that the companies waived compliance with the conditions of the policies. By the terms of the policies no officer or agent had authority to waive any provision or condition of the policies except by writing in-

dorsed thereon or attached thereto. These provisions may not be ignored. They are valid and must be given effect the same as any other provisions. *Fidelity & Casualty Co. v. Fresno Flume, etc., Co.*, 161 Cal. 466, 119 P. 646, 37 L.R.A.(N.S.) 322; *Westerfeld v. New York Life Insurance Co.*, 129 Cal. 68, 58 P. 92, 61 P. 667; *Iverson v. Metropolitan Life Insurance Co.*, 151 Cal. 746, 91 P. 609, 13 L.R.A.(N.S.) 866; *Madsen v. Maryland Casualty Co.*, supra. The rule relied upon by plaintiff and supported by the great weight of authority is, that after a breach has occurred which would avoid or forfeit a policy, unless consented to by the company and a proper officer has knowledge thereof and with such knowledge the company leads the assured to rely upon his policy as a valid policy, it will not be heard to allege such breach against a claim for subsequent loss occurring at a time when, from the conduct of the company, the assured had every right to believe that his property was protected by the policy. *Arnold v. American Insurance Co.*, 148 Cal. 660, 84 P. 182, 25 L. R.A.(N.S.) 6; *West Coast Lumber Co. v. State Inv. & Ins. Co.*, 98 Cal. 502, 33 P. 258; *Murray v. Home Benefit Life Ass'n.*, 90 Cal. 402, 27 P. 309, 25 Am.St.Rep. 133; *Fishbeck v. Phenix Ins. Co.*, 54 Cal. 422; *Farrar v. Policy Holders Life Ins. Ass'n.*, 3 Cal.App.(2d) 87, 39 P.(2d) 229. The principle of these cases is that the breach terminates the liability of the insurance company and creates an obligation to return to the insured the unearned portion of the premium which the company has not the right to retain, thus imposing upon the company having knowledge of the breach a positive duty to elect between cancellation of the policy and waiver of the breach. If the company remains silent and fails to cancel or rescind the policy and the assured is actually misled thereby into believing that his policy is valid and in force, the company is estopped to rely upon the breach. The rule would be applicable here if the breach had been one which avoided or forfeited the policies. Such, however, is not the case.

[4] Upon the giving of the chattel mortgage, the policies did not become void nor were they forfeited. There was a mere suspension of insurance coverage as to such of the insured property as was encumbered by the chattel mortgage and while it was so encumbered. This suspension was temporary and the coverage would have

been restored upon satisfaction of the debt or release of the property from the lien and it would have been restored as to any portion of the property that might have been released from the lien. The policy itself remained in force. There was no obligation on the part of the companies to return any of the premiums; in fact the policies provided that suspension of insurance would not entitle the assured to the return of any part of the premiums, nor were the companies under the duty of giving notice to the assured that the insurance had been suspended. He must be presumed to have known that. The circumstances were not such as to call upon the companies or any agent of the companies to take any action whatever of their own, nor were they under the duty to suggest to plaintiff any action which he should take in the premises. The essential elements of estoppel are entirely wanting. In remaining silent and retaining the premiums paid, the companies did not fail in any duty they owed the assured under the contracts or otherwise.

The facts of this case bring it directly within the holding of the Supreme Court in *Steil v. Sun Insurance Office*, 171 Cal. 795, 155 P. 72, 74. In that case goods were insured while contained in the Chronicle building and not elsewhere. Some of them were removed to another building, thus suspending the insurance as to the removed portion, without annulling the policy. It was said as to this situation: "There being no condition or covenant against removal, the result would be that while such removal would, for the time being, terminate the risk incurred by the company, it would not avoid the policy. If the goods were subsequently returned, the company would be liable, as before, for a loss occurring to them while in the building. In order to continue the insurance upon the goods, or, in other words, to carry it to the goods in the new location, something more was required than a mere notification by the insured to the insurer of the fact that the goods were, or were about to be, removed. That fact alone would only suspend the insurance risk. The insurer must be informed, or be given good cause to believe, that the party insured desired to have the insurance on the goods continued in the new place, that he wished a modification of the policy to make it cover the goods in the new location, and must then, by positive act, or by failure to act,

cause the insured to believe that the insurer consented to such transfer or modification, and that the goods were covered by the policy. Something in the nature of a new agreement, either express, or implied from conduct or words, or created by estoppel, was necessary."

[5] No distinction may be drawn between temporary suspension of insurance by reason of the removal of the assured goods, and a temporary suspension by reason of the encumbrance of the property by chattel mortgage. In neither case is the policy terminated or avoided. If the plaintiff had desired to have the insurance continue, notwithstanding the chattel mortgage, it was his duty to notify the companies of the mortgage, to request the indorsements of his policies, and to exact some assurance that indorsements would be made or that the insurance would be continued in force without them. The evidence fails to show that plaintiff met any of these requirements.

[6,7] The fact that the premium was paid to and accepted by the Monarch Company within a few days after the fire and was not returned in whole or in part to plaintiff is not important and has no tendency to affect the rights of that company in the present litigation. The rights of the parties were fixed at the time of the loss. The insurance was not then in force, but it had been in force before the chattel mortgage was given, and the company was entitled to the premium. Civ.Code §§ 2616 and 2618, then in force; *Gilmore v. Eureka Casualty Co.*, 123 Cal.App. 20, 10 P.(2d) 810. Even though at the time the premium was paid to the Monarch Company the company had actual knowledge of the existence of the chattel mortgage, which fact does not appear to have been established, the property had already been destroyed. Plaintiff must rely entirely upon the doctrine of estoppel to foreclose the defenses interposed by this company; obviously no estoppel could have arisen after the destruction of the property. An estoppel arises when the assured, because of some act or conduct of the insurer, has been dissuaded from obtaining other insurance upon the property and has proceeded to rely upon the validity of the policies he holds. Plaintiff was not, nor could he have been, prejudiced in any way by the acceptance and retention of the premium by the Monarch Company after the destruction of the property. The evidence of plaintiff in the par-

ticulars we have pointed out falls far short of establishing an estoppel against any of the companies to rely upon the provisions of the policies, under which the property destroyed by the fire was not at the time covered by insurance.

[8,9] As to the cases of the Gulf Company and Monarch Company, a question of jurisdiction is involved. Each policy was for \$2,000 and the prayer of each complaint was for that sum, together with interest at 7 per cent. per annum from March 23, 1933, the date proofs of loss were presented to the companies. If the demands for interest are to be disregarded, then the municipal court had exclusive jurisdiction of each of these actions under the provisions of section 89 of the Code of Civil Procedure (as added by St.1933, p. 1811), which fix the jurisdiction of the municipal court at demands of \$2,000 or less, exclusive of interest, or where the value of the property in controversy is \$2,000 or less. It is contended by plaintiff that the demands for interest must be included because compensation for the detention of money where not allowed by statute can be allowed as damages but not as interest. This theory, while supported by authorities cited from other jurisdictions, cannot be held applicable to the present case in view of the statutory law of this state. Interest is defined by section 1915 of the Civil Code as follows: "Interest is the compensation allowed by law or fixed by the parties for the use, or forbearance, or detention of money." Demands falling within this definition must be excluded in determining questions of jurisdiction of the municipal court. Plaintiff's claims are for compensation for the detention of money after it fell due. No amount was fixed by the parties. Such compensation may be recovered as interest if it is allowed by law. Plaintiff had a right to receive interest upon any amounts to which he may have been entitled under the policies, as compensation allowed by law for the detention of money. Civ.Code, § 3287; *Coulter v. Howard*, 113 Cal.App. 208, 298 P. 140; *Pacific Coast Adjustment Bureau v. Indemnity Insurance Co.*, 115 Cal.App. 583, 2 P.(2d) 218; *Jacobs v. Farmers' Mutual Fire Insurance Co.*, 5 Cal.App.(2d) 1, 41 P.(2d) 1960. Therefore the interest demanded must be excluded from the amount of the demand in each case and when that is

done the amounts fall within the exclusive jurisdiction of the municipal court. Article 6, § 5, Constitution of California; *Larson v. Du Bain*, 135 Cal.App. 433, 27 P.(2d) 393.

While it was alleged in the complaint in each of these actions that the value of the property destroyed was largely in excess of \$2,000, and that fact was denied, nevertheless the issue to be tried related entirely to the amount of the loss, and it therefore cannot be said that property of the value of more than \$2,000 was in controversy. The municipal court had exclusive jurisdiction of the actions against Gulf Company and Monarch Company and they were improperly brought in the superior court.

The judgments are reversed as to all of the appellant companies.

I concur: DORAN, J.

I concur in the judgment: HOUSER, P. J.



12 Cal.App.2d 546

KELLER v. CLEAVER.

Civ. 1622.

District Court of Appeal, Fourth District,
California.

March 19, 1936.

As Modified March 26, 1936.

1. Appeal and error ⇐671(2)

Party appealing from order or purported order should furnish appellate court with duly authenticated copy of order or purported order from which appeal is taken (Code Civ.Proc. §§ 952, 953a).

2. Appeal and error ⇐801(4)

Motion to dismiss appeal from, or affirm, alleged order granting new trial was denied, where it was uncertain whether document under attack on appeal was in fact an order granting new trial, since such question should be determined on merits after all briefs were filed (Code Civ.Proc. §§ 952, 953a; Rule 5, § 3, of the Rules of the Supreme Court and District Courts of Appeal).

Appeal from Superior Court, Orange County; J. O. Moncur, Judge.

Action by Esther Keller against Arthur W. Cleaver. Judgment for defendant, plaintiff's motion for a new trial was granted, and defendant appeals. On motion to dismiss appeals or affirm order granting new trial.

Motion denied.

Drumm, Tucker, Martell & Drumm, of Santa Ana, for appellant.

Joe Wapner, of Los Angeles, and McFadden & Holden, of Anaheim, for respondent.

MARKS, Justice.

This is a motion to dismiss appeals or affirm an order granting a new trial under the provisions of section three of rule V of the Rules of the Supreme Court and District Courts of Appeal.

The case was tried before the Honorable H. G. Ames, judge of the superior court of Orange county. A judgment for defendant dated April 10, 1935, was filed and recorded May 10th. On May 28th the plaintiff filed her notice of intention to move for a new trial on all statutory grounds. The motion came on for hearing before the Honorable J. O. Moncur, then sitting in Orange county. It was argued and submitted on that date. Under date of July 23, 1935, plaintiff gave notice to defendant that the court "did, on the 12th day of July, 1935, make and enter its order granting to the plaintiff a new trial." On July 31, 1935, defendant gave his notice of appeal from this order and on the same day filed a request for the transcript under the provisions of section 953a of the Code of Civil Procedure. Among the things he requested was the incorporation in the transcript of "all proceedings taken on motion for a new trial and all matters to which the same relate, also all papers and affidavits filed by either said plaintiff or said defendant above named, or used by either of said parties on the hearing of said motion for a new trial, and any opinion and any order rendered, entered or filed on or after said hearing of said motion for a new trial, and all minute entries effecting, relating or pertaining either to said trial or the hearing on said motion for a new trial or the granting of said motion."

By an order dated August 26th, and filed August 29, 1935, the Honorable J. O. Moncur made the following order:

"Whereas, a motion for a new trial was made by plaintiff in the above entitled case on or about July 11, 1935, and

"Whereas, the matter was duly argued by counsel for the respective parties hereto and submitted to the Court for its decision, and

"Whereas, the court on or about July 12th, 1935, decided the same, and

"Whereas, through an inadvertence a formal order on the hearing of said motion was not made or entered, it is therefore, ordered, adjudged and decreed, that the following order be entered by the clerk of the above entitled court non pro tunc as of July 12th, 1935, to-wit:

"It is hereby ordered, that the motion for a new trial heretofore made by plaintiff be, and the same is hereby granted on the grounds that the evidence adduced at the trial of the cause was insufficient to justify the judgment."

Defendant appealed from this order and requested the preparation of the record under the provisions of section 953a of the Code of Civil Procedure.

By order of this court, the two appeals will be heard on a single record.

We have searched the clerk's and the reporter's transcripts, filed in the office of the clerk of this court on October 3, 1935, and can find no copy of a written or minute order granting a new trial on July 12, 1935. However, there is among the files a document designated "Supplement of Clerk's Transcript," filed here on January 6, 1936, which contains a certified copy of what is entitled an "Opinion" and which is dated and was filed on July 12, 1935, and is signed by the Honorable J. O. Moncur. There is neither a stipulation of counsel nor order of this court for a diminution of the record.

[1, 2] Where a party appeals from an order, or a purported order, he should furnish the appellate court with a duly authenticated copy of the order or purported order from which the appeal is taken. Sections 952 and 953a, Code Civ.Proc.; Timmons v. Coonley, 39 Cal.App. 35, 179 P. 429; Mailhes v. Investors Syndicate, 220 Cal. 735, 32 P.(2d) 610. There has been no motion to strike the so-called supplement of clerk's transcript from the record. As this so-called "opinion" is the only action taken by the trial court in this case between July 11 and August 26, 1935, and as it was clearly specified for inclusion in the record by appellant's request for the transcript, and as it is admittedly the document under at-

tack in the first appeal, and as appellant should furnish this court with a copy of the purported order granting a new trial, under attack in the first appeal, we will assume, without holding, and for the purpose of this proceeding only, that the so-called "opinion" is properly before us.

This "opinion" is vague and indefinite in its terms and its legal effect is open to grave doubts. We are entitled to all the assistance counsel for plaintiff can give us if they hope to have us conclude that it was in fact an order granting a new trial. This question should be decided on the merits after all briefs are filed, and not on a motion to dismiss or affirm.

One of the counsel for plaintiff frankly conceded in his argument that the nunc pro tunc order filed on August 29, 1935, purporting to grant a new trial as of the date of July 12, 1935, has no legal effect for the reason that it was filed too late.

The motion is denied.

We concur: BARNARD, P. J.; JENNINGS, J.



12 Cal.App.2d 530

A. F. ANDERSON ESTATE, Inc., et al. v.

PAYNE, County Auditor, et al.

Civ. 10855.

District Court of Appeal, Second District,
Division 2, California.

March 19, 1936.

Rehearing Denied April 1, 1936.

Hearing Denied by Supreme Court
May 18, 1936.

Taxation Ⓒ497

Petition against county auditor and county tax collector for writ of mandate to compel modification of assessments and to have lower valuations substituted *held* demurrable where evidence taken at hearings of board of equalization, which was made part of petition, failed to show that rules prescribed and methods pursued by assessor were so unlawful, discriminatory, and inequitable as to constitute constructive fraud.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Proceeding by the A. F. Anderson Estate, Incorporated, against H. A. Payne, county auditor of the county of Los Angeles, and another, for a writ of mandate. From a judgment for defendants on an order sustaining a demurrer to the petition without leave to amend, plaintiff appeals.

Affirmed.

Holbrook, Taylor, Tarr & Reed, Dana C. Smith, and W. Sumner Holbrook, Jr., all of Los Angeles, for appellants.

Everett W. Mattoon, Co. Counsel, and Gordon Boller, Deputy Co. Counsel, both of Los Angeles, for respondents.

CRAIL, Presiding Justice.

This case was transferred to us by the Supreme Court. The plaintiffs petitioned the superior court for a writ of mandate to compel the modification of the assessor's 1933 assessments of certain property in the county of Los Angeles and to have lower valuations substituted therefor. The county auditor and county tax collector were made defendants, and the prayer of the petition was that they be directed to enter valuations different from those certified to them by the board of equalization. A full and complete transcript of the hearings before the board of equalization containing 652 pages was made a part of the plaintiffs' petition for a writ. It is the plaintiffs' claim that the action of the board of equalization in denying their applications when presented to that body amounted to constructive fraud, and therefore it would become the duty of the tax collector, as soon as such should be determined to be the case by the court, to act in accordance with the legal effect of the evidence before the board of review.

The appeal is from a judgment of the superior court entered against the plaintiffs upon an order sustaining a demurrer without leave to amend. It is the contention of the plaintiffs that the questions of fact presented to the board of equalization are undisputed, that the evidence is uncontradicted and subject to only one reasonable interpretation, which interpretation they contend is favorable to plaintiffs. By reason of the peculiar turn which the petition took, arising out of the fact that all the evidence which was taken at the hearings of the board of equalization was made a part of the petition, we have the anomalous situation before us of reviewing the legal effect of a mass of evidence in order to de-

termine the correctness of a ruling upon demurrer.

The same situation arose in the case of *Rittersbacher v. Board of Supervisors*, 220 Cal. 535, 32 P.(2d) 135, which case was almost on all fours with the case herein. The chief difference between that case and this is that whereas we have the full testimony of the county assessor in this case as a part of the petition, in that case the court had before it all the testimony of plaintiffs' witnesses, but only a written report of the county assessor. This is a distinction without a difference, except that the testimony of the assessor in the instant case is probably more contradictory to plaintiffs' contentions. In any event, it contains substantial contradictions thereto. In that case the court said: "On the appeal from the judgment it is contended that the petition for the writ of mandamus, together with the exhibits attached thereto, shows that the uncontradicted evidence before the board of equalization, at the time the petitions for equalization were denied, proved that the assessor had willfully adopted and deliberately pursued an erroneous and discriminatory and inequitable method of assessing different classes of property which resulted in excessively inequitable valuations of the property of the plaintiffs, and therefore that the peremptory writ should have been granted."

The court further said: "If the plaintiffs were to prevail in this consolidated proceeding, the result would be to invalidate practically the entire assessment roll of Los Angeles county for the year 1933. Such a result may not lightly be contemplated and should not be adjudged except upon a clear showing of 'fraud or something equivalent of fraud' on the part of the assessing authorities such as appearing in *Mahoney v. City of San Diego*, 198 Cal. 388, 245 P. 189, and *Southern Pac. Land Co. v. San Diego County*, 183 Cal. 543, 191 P. 931. No actual fraud or improper motives on the part of the assessing authorities is charged or intimated. If the plaintiffs are to succeed, they must make a showing of action on the part of the assessor such as would constitute an arbitrary and willful disregard of the law intended for his guidance and be a constructive fraud upon them. [Citing cases.] The allegations of the petition are not in themselves sufficient if there is attached to and made a part of the petitions documentary evidence which would counteract and destroy the effect of the allegations."

In that case the court examined the plaintiffs' petition, including the evidence which was made a part thereof, and decided that the allegations of the petition were not sustained by the evidence which was made a part thereof, and thereupon treated the pleaders' allegations and conclusions as mere surplusage.

We have examined the record before the board of equalization in this case and find, as the Supreme Court said in the *Rittersbacher Case*, that we are not justified in declaring "that the rules prescribed and methods pursued by the assessor were so unlawful, discriminatory, and inequitable as to constitute a constructive fraud on the owners of real estate." We conclude that the demurrers were properly sustained.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, Justice pro tem.



12 Cal.App.2d 648
EMERSON v. EMERSON et al. (two cases).
Civ. 10878.

District Court of Appeal, Second District,
Division 2, California.
March 24, 1936.

Rehearing Denied April 10, 1936.

Hearing Denied by Supreme Court
May 21, 1936.

1. Divorce ☞134

Evidence held to justify judgment denying husband divorce for wife's adultery on ground of husband's connivance (Civ.Code, §§ 111, 112).

2. Appeal and error ☞931(1)

On appeal, all conflicts in testimony will be resolved in favor of trial court's judgment.

3. Appeal and error ☞1010(1)

Reviewing court cannot disturb findings which are supported by substantial evidence.

4. Divorce ☞11

Action for divorce is equitable, and hence trial court which represents state must guard against fraud, collusion, or imposition when either party seeks divorce (Civ.Code, §§ 111, 112).

Appeal from Superior Court, Los Angeles County; Ben B. Lindsey, Judge.

Divorce suit by Walter W. Emerson against Jane N. Emerson, wherein Barton Sewell was named as correspondent, and wherein defendant filed a cross-complaint for similar relief, naming Leah C. Sewell as correspondent. From a judgment denying relief to either party, plaintiff appeals.

Affirmed.

Milton M. Cohen and Milton M. Cohen, Jr., both of Los Angeles, for appellant.

W. I. Gilbert, of Los Angeles, for respondent Jane Emerson.

GOULD, Justice pro tem.

Plaintiff husband sued for divorce upon the ground of adultery, naming a mutual friend as correspondent; defendant wife countered with a cross-complaint for divorce upon the same ground, naming the wife of the mutual friend as correspondent and also charging extreme cruelty. After a protracted trial, divorce was denied the husband upon the ground that, although the wife's adultery was proved and even admitted, nevertheless it was found that the husband connived at his wife's illicit conduct; and divorce was also denied the wife upon the ground that her charges were not sustained by the evidence.

The husband alone appeals. But one question is presented: Is there evidence sufficient to support the trial court's finding that appellant was guilty of conniving at respondent's adulterous relationship with her correspondent?

[1] It is sufficient to point to the incidents and the inferences reasonably to be deduced therefrom of the night of November 3-4, 1934, at an Ocean Park cottage, when appellant and the wife of the correspondent lay upon a couch in the room adjoining that in which respondent and the correspondent occupied a bed, the door being open between the two rooms, to the testimony of respondent that she and appellant had frankly discussed the situation and he had told her to "lead your own life," to the testimony of the correspondent as to his conversations with appellant, to the continued evidences of friendship between appellant and correspondent in spite of the former's knowledge of the relations between his wife and said correspondent, to the testimony of the maid in appellant's home, and to numerous other items in the voluminous record in this case, to discover substantial evidence to support the trial court's conclusion that appellant connived at his wife's conduct and

that the relations between respondent and correspondent were "acquiesced in and known to" him.

[2] It is true that equally ample evidence in the record would support a different conclusion than that reached on the hearing of this case, but the weight of the evidence and the credibility of witnesses are with the trial court, and all conflicts in testimony are to be resolved on appeal in favor of the judgment of the lower tribunal. With its conclusions as to matters of fact we may not interfere if, as here, there is substantial evidence to support its findings.

[3] Appellant stresses the point that, even assuming connivance on the part of appellant as to some of the acts of adultery, there is, in any event, no showing that he was guilty of connivance as to all of them, especially the matters complained of in the supplemental complaint. We do not think that the various episodes of the relationships of these parties can be segregated into separate categories. The circumstances constituting the connivance extended over a considerable period of time, and the acquiescence of appellant was to the entire course of respondent's conduct, the court found. This finding was based upon substantial evidence.

[4] An action for divorce is one in equity (9 Cal.Jur. 775), and it is the duty of the court, representing the state, "to guard strictly against fraud, collusion, or imposition when the husband or wife seeks to dissolve the bonds that bind them together." *Reh fuss v. Reh fuss*, 169 Cal. 86, 145 P. 1020, 1022. Connivance is expressly made a ground requiring denial of a divorce. Civ. Code, §§ 111, 112. Connivance, it has been held, can usually be proved only by proving facts from which it may be inferred (*Morrison v. Morrison*, 136 Mass. 310); and in *Delaney v. Delaney*, 71 N.J.Eq., 246, 256, 65 A. 217, 219, it is said that, if the husband's conduct "indicates an intent, or even a willingness, that the act of adultery may take place, or even culpable negligence in not preventing it, * * * the decree will be denied." We feel that in the case before us for consideration the conclusions reached by the trial court and supported, as we have indicated, by substantial evidence, warranted and compelled a denial of the divorce decree sought by appellant.

Judgment affirmed.

We concur: CRAIL, P. J.; WOOD, J.

12 Cal.App.2d 75

JACOBSON et al. v. MEAD et al.

Civ. 9121.

District Court of Appeal, Second District,
Division 2, California.

March 17, 1936.

1. Executors and administrators ⇨431(2)

Where vendees sued administratrix of deceased vendor for rescission, filing of claim against deceased's estate *held* not condition to money judgment against administratrix personally, notwithstanding administratrix was not party to contract and received none of purchase money in her personal capacity.

2. Limitation of actions ⇨157(4)

Payments allegedly made within two years of bringing of action by vendees for rescission *held* insufficient to remove limitations against action for money judgment, where payments allegedly made prior to and during two-year period were not segregated.

3. Vendor and purchaser ⇨334(1)

Establishment of right to rescission of original contract *held* condition to vendees' recovery of payments on trust deed note.

4. Executors and administrators ⇨431(2)

Action to recover payments made to administratrix of deceased vendor after vendees' rescission *held* maintainable against administratrix personally and not as administratrix, and hence claim for such payments need not be filed against vendor's estate.

5. Executors and administrators ⇨222(1)

Where money judgment is sought against estate, claim therefor must be filed against estate, since such judgment would deplete assets of estate.

Appeal from Superior Court, Los Angeles County; Thomas P. White, Judge.

On petition for rehearing.

Rehearing denied.

For prior opinion, see 55 P.(2d) 285.

Jess E. Stephens, of Los Angeles, for appellants.

Benjamin & Benjamin and Aaron Elmore, all of Los Angeles, for respondents.

PER CURIAM.

[1] The plaintiffs contend that we should have made it appear more clearly in the original opinion that it was not necessary

to file a claim against the estate of William Mead, deceased, in order to obtain a money judgment against Nella Wilde Mead personally. We assume that this is so apparent that it needs no statement by us, but if we make such statement now, we should also say that Nella Wilde Mead was not a party to the contract which the plaintiffs seek to rescind. Furthermore, there was no allegation in the complaint that any of the moneys which were sought to be recovered were paid by plaintiffs to Nella Wilde Mead in her personal capacity; on the contrary, both the allegation and the findings are that the money was paid by plaintiffs "to William Mead and to defendant Nella Wilde Mead, as administratrix of his estate, etc."

[2,3] Plaintiffs contend also that the action for a money judgment was not barred by the statute of limitations as to the moneys paid within two years prior to the commencement of the action. The trouble with this contention is that the judgment does not segregate those moneys which were paid within the two-year period and those paid before that period. In this connection it should also be kept in mind that plaintiffs are seeking to rescind a contract made with them by William Mead during his lifetime and such rescission is attempted 5½ years after the contract was made, February 8, 1927. Before the plaintiffs may recover for moneys paid upon the trust deed note, they must first successfully establish their right to a rescission of the original contract.

[4] Plaintiffs also contend that it is not necessary to file a claim against the estate for moneys paid after William Mead's death. In a situation such as here presented, where money is paid to a representative of the estate upon a contract which is rescinded and therefore void, such money is no longer held as estate funds and the liability, if any, of the representative, being upon an implied promise to pay, is personal. While it is true that it is not necessary to file a claim for such funds against the estate of decedent, it is also true that an action to recover such funds should properly be brought, not against the representative of the estate as such, but against him personally. See cases collected under 11b Cal.Jur. 286, §§ 872, 873, 868, 869.

[5] It would not be necessary, of course, to file a claim against the estate in order to bring a quiet title action against the trust

deed or to enforce a lien upon specific property if such lien exists, but plaintiffs herein are seeking a money judgment, the effect of which would be to deplete the general assets of the estate. The judgment, even as to the nonpecuniary part of it, must be reversed for the reasons stated in the original opinion.

Petition for rehearing denied.



13 Cal.App.2d 1

**SCHWAB et al. v. SCHWAB-WILSON
MACH. CORPORATION, Limited,
et al.**

Civ. 10887.

District Court of Appeal, Second District,
Division 2, California.

March 30, 1936.

1. Corporations ⇨307

Corporate director acts in fiduciary capacity not only toward corporation, but also towards stockholders.

2. Corporations ⇨158

Stockholders, although having no preemptive right to subscribe to new issue, have right to demand that directors and officers do not use their positions for their own personal advantage, to discriminate between stockholders, or to cause stock to be issued so as to make profit for themselves, or to obtain or retain control of corporation (Civ.Code, § 287).

3. Corporations ⇨158

In action by director and stockholder against remaining directors, who, without notice to such director, while he was ill, secured permission from state commissioner to issue additional stock which was purchased by one of such directors in sufficient amount to convert him from minority to majority stockholder, granting of defendants' motion for nonsuit held error, since plaintiffs were entitled to have equitable determination of respective rights of litigant shareholders (Civ. Code, § 287).

Appeal from Superior Court, Ventura County; Atwell Westwick, Judge.

Action by Henry Schwab and another against the Schwab-Wilson Machine Cor-

poration, Limited, and others. Judgment for defendants, and plaintiffs appeal.

Reversed.

Sheridan, Orr, Drapeau & Bates, of Ventura, and Haight, Trippet & Syvertson, of Los Angeles, for appellants.

Don R. Holt and James C. Hollingsworth, both of Ventura, for respondents.

GOULD, Justice pro tem.

Plaintiff Schwab, defendant Wilson and one Williams constituted the board of directors of defendant corporation, the stock of which was so distributed among the three directors and plaintiff Seifert that no one stockholder owned sufficient to exercise voting control. In this action it is alleged that while plaintiff Schwab was suffering from an extended illness, the other two directors, without notice of any kind to him, secured permission from the state commissioner of corporations to issue additional stock, and that defendant Wilson thereupon, and without allowing plaintiffs or any other stockholder to purchase any of the new stock, bought sufficient to give him a total amount exceeding by one share the combined total of all other stock authorized, both issued and unissued. In other words, it is charged by the complaint that defendant Wilson, by the acts complained of, converted his position from that of a minority to that of a majority stockholder. Williams, the director acting with defendant Wilson, was the owner of only a single share of stock. Some two months after Wilson purchased the new stock he transferred it to defendant Higgins, his brother-in-law, residing in his home.

At the trial both plaintiffs testified as to their willingness, desire, and ability to purchase and pay for a part of the new stock proportionate to their former holdings in the corporation. Evidence also was received to the effect that the book value of the stock at the time of the new issue was in excess of par, at which it was sold to defendants. The trial court, at the conclusion of plaintiffs' case, granted defendants' motion for nonsuit, and judgment was entered accordingly. Plaintiffs appeal.

[1,2] From the corporate entity arise a group of contractual relationships between the corporation, its stockholders, directors, and officers. A corporate director acts in a fiduciary capacity, not only towards the corporation itself (Cal.Jur., vol. 6a, p. 1100), but also towards the stock-

holders. As expressed in *Wickersham v. Crittenden*, 93 Cal. 17, 28, 28 P. 788, 790: "The directors of a corporation hold a fiduciary relation to the stockholders, and have been intrusted by them with the management of the corporate property for the common benefit and advantage of each and every stockholder, and by their acceptance of this office they preclude themselves from doing any act, or engaging in any transaction, in which their private interest will conflict with the duty they owe to the stockholders, and from making any use of their power or of the corporate property for their own advantage." While stockholders have no pre-emptive right to subscribe to new issues of stock (Civ.Code, § 287), nevertheless they have the right to demand that directors and officers of the corporation do not use their positions for their own personal advantage, or to discriminate between stockholders, or to so cause stock to be issued as to make a profit for themselves or to obtain or retain control of the corporation. *Fletcher, Private Corporations*, vol. 11, p. 217.

Courts generally have frowned upon the practice alleged by plaintiffs in this action. A typical judicial expression is found in *Dunlay v. Avenue M Garage & Repair Co.*, 253 N.Y. 274, 170 N.E. 917, 919, as follows: "One formula of fair dealing is universally recognized; i. e., directors may not authorize the issue of unissued stock to themselves for the primary purpose of converting them from minority to majority stockholders." See, also, *Hammer v. Werner*, 239 App.Div. 38, 265 N.Y.S. 172, *Elliott v. Baker*, 194 Mass. 518, 80 N.E. 450, and *Luther v. C. J. Luther Co.*, 118 Wis. 112, 94 N.W. 69, 99 Am.St.Rep. 977, where the same doctrine is approved.

Appellants have a further argument in their favor in that the application to the commissioner of corporations contained the statement that the corporation proposed to issue additional stock "to its present stockholders," and the permit for issuance of stock authorized the sale to the stockholders, designating them, including plaintiff Schwab, by name.

There is no point in respondents' contention that appellants may not be heard to complain for the reason that the stock was sold for value and without fraud as against the corporation. The essence of this case is not fraud against the corporation, but fraud of one director against his fellow directors and fellow stockholders.

[3] The facts of this case are such that in our opinion it was error for the court to grant defendants' motion for nonsuit. A situation was disclosed calling for the exercise of the court's equitable cognizance, and inasmuch as evidence of a substantial character favorable to plaintiffs and tending to establish the averments of the complaint was before the court, defendants should have been compelled to present such defenses as they might have, to the end that the court could equitably determine the respective rights of the litigant shareholders.

Judgment reversed.

We concur: CRAIL, P. J.; WOOD, J.



12 Cal.App.2d 665

PEOPLE v. JOERGER et al.

Civ. 5419.

District Court of Appeal, Third District,
California.

March 24, 1936.

Rehearing Denied April 23, 1936.

Hearing Denied by Supreme Court
May 21, 1936.

1. Eminent domain ⇨ 152(1)

Compensation generally must be paid to person who owned property at time it was condemned (Const. art. 1, § 14).

2. Eminent domain ⇨ 154

Where after state's institution of proceeding to condemn right of way and entering into possession of realty, but before determination of compensation, property was sold at trustee's sale under trust deed, owner at time state took possession and not owner at time of award held entitled to compensation, since "taking" took place at time state acquired possession (Const. art. 1, § 14).

[Ed. Note.—For other definitions of "Taking (In Eminent Domain)," see Words & Phrases.]

Appeal from Superior Court, Shasta County; C. A. Paulsen, Judge.

Condemnation proceeding by the People of the State of California, acting by and through the Department of Public Works, against Louis P. Joerger, the Bank of America National Trust & Savings Asso-

ciation and others. From judgment ordering award to be paid to the Bank of America National Trust & Savings Association, Louis P. Joerger and others appeal.

Judgment reversed, with directions.

Calkins, Hagar, Hall & Linforth and Jesse W. Carter, all of San Francisco, for appellants.

Louis Ferrari, of San Francisco, and Chenoweth & Leininger, of Redding, for respondent.

TUTTLE, Justice pro tem, delivered the opinion of the court.

This is an action to condemn a right of way for highway purposes. The only controversy is over the award, which was paid into court by plaintiff. The trial court adjudged that such award was owned by, and should be paid to, respondent bank, and ordered the clerk of the court to pay the same to respondent. The appeal is from the judgment.

The agreed statement of facts discloses the following situation: On January 25, 1932, plaintiffs commenced an action to condemn a right of way for highway purposes over and across certain real property owned by appellants, Louis P. Joerger and Beth M. Joerger. On the following day the trial court made an order, under the provisions of section 14, article 1 of the Constitution of California, to the effect that plaintiff could immediately enter upon possession of the real property sought to be condemned, immediately remove all obstacles from said land and construct said highway thereon. In accordance with said order, plaintiff deposited the sum of \$5,994.50 to secure payment of the just compensation to be thereafter determined in said action. Thereafter, plaintiff took possession of said real property, and, prior to the trustees' sale hereafter mentioned, cut the brush thereon; cut and removed more than two hundred trees, with a diameter of between two and three feet; excavated, cut, graded, and filled, to the extent that 41,634 yards of dirt was removed and deposited in gulches and low places; brought on the land 4,228 yards of rock, and deposited the same, and commenced the construction of culverts and fences. It was agreed by the parties that by reason of such work, the physical character of the land was so changed that it would have been impossible to restore said land to its original condition.

It also appears that at the time this action was commenced, respondent, Bank of America, was the owner of a deed of trust covering real property belonging to the Joergers, of which the right of way sought to be condemned was a part, and that on August 24, 1932, all of said property, including the land here involved, was sold at a trustees' sale pursuant to the terms of said trust deed, and for an amount equal to the full amount of the indebtedness due thereunder, and on August 25, 1932, said lands were conveyed by trustees' deed to Bank of America, purchaser at the sale, and respondents herein. On December 9, 1933, a final order of condemnation was made and entered in said proceeding. This order provided that the amount of the award, \$7,500, should remain on deposit until the further order of the court. The court finally ordered said amount to be paid over to respondent bank. The Joergers, former owners of the land, claimed ownership of the award, and they now appeal from that judgment.

The present Constitution of California has always contained a provision to the effect that "Private property shall not be taken or damaged for public use without just compensation having been first made to or paid into court, for the owner, and no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law." Const. art. 1, § 14. In fact, this language was the entire text of the section as originally adopted. In 1911 the section was amended in a respect which is not of moment in the present litigation. In 1918 a second amendment was adopted. This amendment opens with the original text as above set forth, the time-honored language being followed immediately by these provisions: "Provided, that in an action in eminent domain brought by the state, or a county, or a municipal corporation, or a drainage, irrigation, levee, or reclamation district, the aforesaid state or political subdivision thereof or district may take immediate possession and use of any right of way required for a public use whether the fee thereof or an easement therefor be sought upon first commencing eminent do-

main proceedings according to law in a court of competent jurisdiction and thereupon giving such security in the way of money deposits as the court in which such proceedings are pending may direct, and in such amounts as the court may determine to be reasonably adequate to secure to the owner of the property sought to be taken immediate payment of just compensation for such taking and any damage incident thereto, including damages sustained by reason of an adjudication that there is no necessity for taking the property, as soon as the same can be ascertained according to law. The court may, upon motion of any party to said eminent domain proceedings, after such notice to the other parties as the court may prescribe, alter the amount of such security so required in such proceedings." The section now stands as it was amended in 1918.

It is contended by appellants that the action of the state under the order of January 26, 1932, was a "taking" of their real property at a time when they were the owners thereof, and that they are entitled to the award. Respondent contends that there was no "taking," and no compensation due until the final order of condemnation, and as it was the legal owner when such final order was entered, it was the owner of the money deposited with the court.

[1,2] It is undoubtedly the rule that "compensation in general must be paid to the person who owned the property at the time it was taken or injured." 20 C.J. p. 847, § 286. It follows that if entry into possession by plaintiff under the order mentioned, and the various acts of ownership performed by plaintiff constitute a "taking," then appellants were entitled to the compensation. Our Supreme Court has decided very definitely that the act of the state in entering into possession of the property and proceeding to construct the highway was a "taking" of the property as that term is used in the provisions of the Constitution above quoted. In 1897 the Legislature of California (St.1897, p. 186, § 1) attempted to place in the Code of Civil Procedure by an amendment to section 1254, a law which is almost identical to the amendment of section 14, article 1 of our Constitution, adopted in 1918. The constitutionality of section 1254 was challenged in the case of *Steinhart v. Superior Court*, 137 Cal. 575, 70 P. 629, 59 L.R.A. 404, 92 Am.St.Rep. 183. The court there states,

137 Cal. 575, on page 577, 70 P. 629, 630, 59 L.R.A. 404, 92 Am.St.Rep. 183, that the most important proposition is whether or not taking possession and using the property during the pendency of the condemnation proceeding is a taking, within the meaning of the Constitution. In disposing of the matter, the court says: "To hold that possession of land may be given to a person seeking to acquire a right of way by condemnation, during the pendency of the proceeding, and before the amount of compensation has been determined and paid to the owner, or into court for him, would be to hold that this so-called temporary possession is not a taking of private property for a public use. But both on authority and reason it is so." The section was held unconstitutional, and the trial court was prohibited from making any order for possession thereunder. Once before the precise point came up in the Supreme Court. In 1863 the Legislature attempted to give the railroads this same power of possession, pending an action in condemnation. In the case of *Davis v. San Lorenzo R. Co.*, 47 Cal. 517, the enactment was held unconstitutional, and we find the following language pertinent to the question here involved: "However the rule may be in respect to the time at which the entire title and estate of the owner will be deemed to have been taken for public use, it is indisputable that the qualified estate which the corporation acquires when it enters under the authority of the Court must be deemed a taking pro tanto, from the time of the entry." These cases follow the general rule. "It may be stated as a general rule that there is a taking where the grantee of the power of eminent domain enters upon the land, not for the mere purpose of examination or survey, and does some act evidencing an intention to appropriate it." 20 C.J., p. 723, § 182. The evidence of an intent upon the part of the plaintiff in the instant case to "appropriate" the property of appellants is overwhelming and beyond dispute.

Respondent makes no attempt to distinguish these unqualified pronouncements of the Supreme Court, although appellants quote extensively from them in their opening brief. Respondent, on this point, relies entirely upon the case of *Marblehead Land Co. v. Superior Court*, 60 Cal.App. 644, 213 P. 718, 721. In that case a condemnation proceeding was started and an order made allowing the state to enter the property under the constitutional provision in ques-

tion. After possession was taken, the owner of the land secured from the District Court of Appeal a writ of review which stayed all proceedings in the original action. It appears that the officers of the highway commission refused to cease construction of a highway over the property, and they were cited for contempt of court. The opinion does not make clear the precise issues involved. It appears, however, that the court discussed at length several legal questions, and particularly the amendment to the Constitution adopted in 1918, and in so doing used the following language: "That there was by the amendment of 1918 no attempt to authorize a taking for public use prior to condemnation decree. * * * The organic law merely allows to a would-be condemnor the 'possession' and 'use' of the land or right of way sought to be taken finally by the decree of condemnation." No reference was made to the two decisions of the Supreme Court which hold exactly to the contrary in construing identical statutes, nor are any authorities whatever cited. It may be added that the order made in the above case adjudging the parties guilty of contempt was annulled by the Supreme Court in the case of *Fletcher v. District Court of Appeal*, 191 Cal. 711, 218 P. 391. If the *Marblehead Case* can be said to uphold the contention of respondents, we take the view that it is not only contrary to the opinions of the Supreme Court cited, but also to the weight of authority, and we consequently are unable to follow it.

It is no doubt the rule, as respondents contend, that in any ordinary condemnation proceeding, where property is purchased which is subject to such pending proceedings, and the deed conveying said property is silent as to the award money to be paid in said proceedings, the money belongs to the purchaser. This is the rule in California. *Security Co. v. Rice*, 215 Cal. 263, 9 P.(2d) 817, 82 A.L.R. 1059. In the ordinary proceeding the property is not "taken" until the final decree is entered. Code Civ.Proc. § 1253. It is the divesting of the title of the owner and the vesting of the title in the condemnor which constitutes the "taking" in such cases. But where, as under our Constitution, provision is made for a "taking" prior to the divestiture of title, the party who owns the property at the time of such "taking" is entitled to the compensation, under the uni-

versal rule found in *Corpus Juris*, and to which we have referred.

It thus appears that where there is no prior physical "taking," the property is deemed to have been "taken" when title is divested, as possession follows the title. Where there has been a prior physical "taking," the subsequent divestiture of title is merely a confirmation of the original "taking." The effect of the constitutional amendment was merely to accelerate the "taking." To hold otherwise would, in effect, nullify that provision of the Constitution which provides that "private property shall not be taken or damaged for public use without just compensation having been first made or paid into court for the owner." As appellants were the owners of the property when it was so "taken," they are entitled to the award.

The judgment is reversed, with directions to the trial court to enter a judgment declaring appellants to be the owners of award, and ordering the clerk to deliver to appellants the compensation deposited with him by plaintiffs in said action.

We concur: PULLEN, P. J.;
THOMPSON, J.



13 Cal.App.2d 21

THAYER v. MAGILL et al.

Civ. 1610.

District Court of Appeal, Fourth District,
California.

March 30, 1936.

I. Pleading $\S$ 8(7), 19

In action for rescission of contract of sale of orange grove under which contract trustee was required to pay taxes out of proceeds of fruit sold, complaint which did not allege that balance remaining in hands of trustee exceeded amount of taxes held demurrable as creating ambiguity which was not cured by allegation that certain sum was "applicable to the reimbursement" of purchasers; such averment being mere conclusion of law and limited by facts pleaded.

2. Vendor and purchaser ☞116

Rescission cannot be effected without offer to restore, except where vendee has received nothing of value (Civ.Code, § 1691).

3. Vendor and purchaser ☞123

In action for rescission of contract of sale of orange grove on ground of vendors' failure to deposit deed in escrow as agreed, complaint *held* demurrable for failure to allege purchasers' offer to restore things of value received by them, notwithstanding vendors' failure to execute deed might have been sufficient ground for rescission (Civ.Code, § 1691).

4. Pleading ☞8(7)

In action to rescind contract of sale of orange grove, bare allegation that "vendors voluntarily placed it out of their power to perform" *held* mere conclusion.

5. Vendor and purchaser ☞112(1)

Purchasers *held* not entitled to rescission of contract of sale of orange grove on ground that vendors rescinded contract by conveying grove to others where such conveyance was made subject to purchasers' contract and no facts were alleged showing why vendors would not be able to perform when time for performance arrived (Civ.Code, § 1691).

6. Pleading ☞8(7)

Allegation, in action for rescission of contract of sale of orange grove, that all parties "consented and acquiesced" in rescission claimed by plaintiffs, *held* insufficient to sustain complaint, since bare allegation of "consent" and "acquiescence" was mere conclusion, and no facts were alleged showing how or in what manner consent and acquiescence were shown.

7. Vendor and purchaser ☞123

Complaint in action for rescission of contract of sale of orange grove *held* demurrable, where it could not be ascertained whether rescission was claimed upon defaults of vendors or upon mutual consent or upon notice of rescission pleaded by plaintiffs.

8. Pleading ☞225(1)

Demurrer to complaint in action for rescission of contract of sale of orange grove *held* properly sustained without leave to amend, where complaint had been amended five times without plaintiffs having been able to state cause of action.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by Lucretia Thayer, individually and as executrix of the estate of Will J. Thayer, deceased, against Arthur H. Magill and others. From a judgment for defendants after sustaining their demurrer without leave to amend, plaintiff appeals.

Affirmed.

John F. Poole, of Los Angeles, for appellant.

Fred A. Wilson, of San Bernardino, and A. D. Mitchell, of Ontario, for respondents.

SCOVEL, Justice pro tem.

This is an action for rescission of a contract of sale of a 20-acre orange grove situated in San Bernardino county. In their fifth amended complaint plaintiffs allege the due execution of the contract wherein defendants Magill agreed to sell and plaintiffs agreed to buy 20 acres of oranges therein described, together with all pots and heating equipment on said land and 167 shares of water stock for the total purchase price of \$55,000, payable \$1,000 in cash, \$7,200 represented by a house and lot with the furnishings therein owned by plaintiffs and the balance payable out of moneys derived from the sale of fruit raised on said land. Such fruit was to be sold through a packing house and the net proceeds received therefrom paid to defendant Arthur H. Magill, as trustee, he to disburse the same as follows: First, to pay all legal taxes and assessments against said grove; second, to pay all moneys which the vendors should have expended in caring for said grove; third, to pay vendees all moneys expended by them in the care of said grove; and, fourth, the balance to be applied upon the unpaid purchase price. It is alleged that the vendees thereupon entered into possession of said property and duly performed all the conditions of said contract on their part to be performed, and thereafter, to and including September 1, 1932, expended in the care and operation of said grove the sum of \$5,746.89. That during said period of time said trustee received the sum of \$6,136.03 from the proceeds of the sale of fruit grown on said grove and paid to the vendors \$467.65 for taxes and expenses of the grove between November 1, 1930, and April 1, 1931, leaving a balance of \$5,668.38 "applicable to the reimburse-

ment of plaintiffs for their expenditures in the care and operation of said grove," but that said trustee only paid to plaintiffs the sum of \$4,317.70, leaving the sum of \$1,350.68 "applicable to the reimbursement of plaintiffs for their expenses in the care and operation of said grove after payment to said vendors of all sums expended by them" under the provisions numbered first and second above set forth. Demand by plaintiffs upon said defendants for payment of said sum and their refusal is alleged.

It is further alleged that in said contract it was agreed that the vendors would upon request place in escrow with a bank or trust company agreeable to the parties a deed for said property with the vendors as grantors and the vendees as grantees, to be delivered to the latter when the property had been fully paid for, and that in August, 1932, vendees made such demand but that vendors refused to comply. The complaint further alleges that during the month of May, 1932, "said vendors voluntarily placed it out of their power to perform their contract in respect to said deed and contract by executing and delivering to defendants Mehl a deed to said grove with themselves as grantors by which the legal title to said grove was conveyed to said defendants Mehl, in which deed it was stated that it was given subject to said contract of July 29, 1930."

It is then alleged that on September 2, 1932, plaintiffs served upon defendants a notice of rescission, that by reason of the aforesaid nonpayment to plaintiffs of the moneys due them and by reason of the refusal to place in escrow the above-mentioned deed, they rescinded the contract. It is nowhere alleged, however, that in the notice of rescission plaintiffs ever offered to restore anything of value received by them. Plaintiffs next alleged that upon service of said notice of rescission on September 2, 1932, "all said defendants accepted and acquiesced in the same." That prior thereto, in the month of May, 1932, defendants rescinded the contract by said Mehls entering into actual possession of the grove. The complaint then concludes by an allegation that the contract was rescinded by vendees on September 2, 1932, and prays judgment declaring that the contract of sale was rescinded on September 2, 1932, and that they be given judgment for all amounts theretofore paid by them on the contract. To this fifth amended complaint defendants filed a general demurrer and various special demurrers. The demurrer was sustained

without leave to amend and plaintiffs have appealed.

[1] A fair reading of the complaint discloses that the cause of action upon which plaintiffs rely is based upon their notice of rescission served on September 2, 1932; at considerable length the alleged default of defendants for failure to pay plaintiffs moneys due them from the sale of fruit grown thereon is alleged, together with failure of defendants Magill to escrow and deliver in escrow the deed hereinbefore referred to. Plaintiffs' computation of the expenditures made from such moneys received by defendant Magill as trustee includes expenditures made for taxes upon the grove for the 1930-31 taxes, but is silent as to any payment for the 1931-32 taxes. If the amount of these taxes exceeds the balance remaining as alleged by plaintiffs, to wit, \$1,350.68, then there would in fact be no moneys left applicable to the reimbursement of vendees for any expenditures incurred by them. If such taxes were not paid, then the trustee, under the contract, must have retained an amount sufficient for their payment, since he was obligated to pay all taxes, and while his failure to pay the same might constitute a breach of the contract, still plaintiffs would have no right of reimbursement from funds retained for that purpose. This at least constituted an ambiguity which was not cured by the allegation that said sum of \$1,350.68 was "applicable to the reimbursement" of vendees, such averment being a mere conclusion of law and limited by the facts pleaded. *Burke v. Board of Trustees*, 4 Cal.App. 235, 87 P. 421. Defendants' demurrer on this ground was properly sustained, and it not definitely appearing that any moneys were due plaintiffs, no ground for rescission on this basis was shown.

[2,3] The second ground of rescission set forth in the notice of rescission served by plaintiffs was the failure on the part of defendants Magill to deposit in escrow the deed hereinbefore mentioned. As heretofore noted, however, it is not alleged that plaintiffs ever offered to restore anything of value received by them, although under the contract they received the pots and heating equipment upon the property, together with the use of 167 shares of water stock. It is well settled that rescission cannot be effected without an offer to restore (*Civ.Code*, § 1691; *Los Molinos Land Co. v. MacKay*, 175 Cal. 305, 165 P. 926; *Kelley v. Owens*, 120 Cal. 502, 47 P. 369, 52 P. 797), the only exception to this rule being

where the vendee has received nothing of value. Defendants having failed to plead such offer, the general demurrer was properly sustained, even though the failure of defendants Magill to execute and deliver the deed might have been sufficient ground for rescission.

[4, 5] Plaintiffs further contend that the facts pleaded show a rescission of the contract on the part of the defendants themselves by virtue of the conveyance by the vendors Magill to defendants Mehl, they thereby having voluntarily placed it out of the vendors' power to convey. The bare allegation, however, that the "vendors voluntarily placed it out of their power to perform" is a mere conclusion. Garberino v. Roberts, 109 Cal. 125, 41 P. 857. In Brimmer v. Salisbury, 167 Cal. 522, 140 P. 30, 34, it is held that "a vendor will not have breached his contract if he shall have conveyed the property subject to or under circumstances such as do protect the rights of his vendee." Plaintiffs herein allege that the conveyance from Magills to Mehls was given subject to plaintiffs' contract. No facts are alleged showing why the vendors would not be able to perform when the time for performance arrived.

[6] It is further contended, however, that plaintiffs' allegation that all parties "consented and acquiesced" in the rescission claimed by plaintiffs on September 2, 1932, is sufficient to sustain the complaint. The bare allegation, however, of "consent" and "acquiescence" is but another conclusion. No facts are alleged showing how or in what manner such consent and acquiescence was shown.

[7, 8] Although the theory upon which plaintiffs' complaint is based shows clearly that rescission is claimed upon the notice of rescission served by them on defendants on September 2, 1932, and the relief prayed for based on such theory, they now maintain that voluntary rescission on the part of defendants is shown by the allegations to the effect that Mehls entered into actual possession of the property in May, 1932. Whether or not this contention is sound need not be determined since, if true, it constituted another ambiguity in the pleading and subject to defendants' demurrer on the ground that it could not be ascertained whether rescission was claimed upon defaults of vendors or upon mutual consent or upon the notice of rescission pleaded by plaintiffs. We are of the opinion that the

ruling on demurrer was proper, and that the complaint having been amended five times without plaintiffs having been able to state a cause of action that was not demurrable, the court properly sustained the demurrer without leave to amend.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.



12 Cal.App.2d 739

**HARTFORD ACCIDENT & INDEMNITY
CO. v. INDUSTRIAL ACCIDENT COM-
MISSION OF CALIFORNIA et al.**

Civ. 10625.

District Court of Appeal, Second District,
Division 1, California.

March 26, 1936.

1. Master and servant ⇨416

Findings of Industrial Commission held not fatally defective for failure to specify that injury sustained occurred in course of and arose out of employment, where finding was made that employee was injured when attacked by elephant at time when he was employed to assist in care and training of elephant and was exercising elephant (St.1917, p. 850, § 20).

2. Master and servant ⇨405(2)

In compensation case arising out of injury to elephant hand employed by moving picture company to assist in care of elephant hired from circus, evidence held insufficient to sustain award against circus' insurance carrier on theory that elephant hand was in joint employ of circus, although elephant hand was injured while exercising other elephants belonging to circus along with elephant in his charge.

Proceeding under the Workmen's Compensation Act by James Taylor and others, claimants opposed by the Hartford Accident & Indemnity Company, insurance carrier. To review an order of the Industrial Accident Commission awarding compensation against it, the insurance carrier brings certiorari.

Award annulled.

Donald E. Ruppe, of Los Angeles, for petitioner.

Everett A. Corten, of San Francisco, for respondent Commission.

DESMOND, Justice pro tem.

The validity of an award of the Industrial Accident Commission is before us on certiorari.

On May 20, 1935, one Joe Reed died within an hour after he had been trampled and gored by Prince, one of a herd of seven elephants, which he and a man named Schubert were exercising in a ring at winter quarters of Al G. Barnes Circus, located at Baldwin Park. The deceased left no known dependents, and the only claims presented or allowed on account of his injury and death were for surgical and hospital expenses \$30; for burial expenses \$150. The referee, who heard the case, found that deceased was in the joint employment of two organizations, Metro-Goldwyn-Mayer Studios, and Al G. Barnes Circus, and that both were jointly liable for the sums mentioned; accordingly, he ordered their insurance carriers to pay the claims. Petitioner in this case is insurance carrier for Al G. Barnes Circus.

[1] The findings and award are attacked on two grounds: Insufficiency of evidence to establish the joint employment; and failure to find specifically that the injury sustained by deceased "occurred in the course of, and arose out of, the employment." Considering the second objection first, we refer to that portion of the finding reading as follows: "Joe Reed was injured when attacked by an elephant on May 20, 1935, the injury proximately causing his death on the same date. On this date he was on the payroll of Metro-Goldwyn-Mayer Studios and was employed by said studio for the purpose of assisting in the care and training of an elephant named 'Queen.' At the time of his injury he was engaged in exercising the elephant 'Queen' and six other elephants, all elephants being the property of Al G. Barnes Circus. The care and attention being given the elephants other than the elephant 'Queen' was for the use and benefit of the Al G. Barnes Circus, and was rendered with the approval of the said Al G. Barnes Circus. The said Joe Reed was, at the time of his injury, in the joint employ of Metro-Goldwyn-Mayer Studios and Al G. Barnes Circus at Baldwin Park, California."

We believe there is a definite implication, if not a direct finding, in this statement that the fatal injury was suffered by deceased while employed and arising from that employment, material facts in issue (section 20, Workmen's Compensation Act of 1917, p. 850); consequently we are of the opinion that the findings are not, as claimed, fatally defective in this respect. *Ethel D. Co. v. Industrial Acc. Comm.*, 219 Cal. 699, 709, 28 P.(2d) 919; *Armstrong v. Industrial Acc. Comm.*, 219 Cal. 673, 676, 28 P.(2d) 672.

[2] However, we believe that the other objection raised by petitioner is sound. Reviewing the facts as they come before us, it appears that George Emerson, an animal trainer, representing Metro-Goldwyn-Mayer Studios, contracted with the Barnes Circus for the services of Queen. One of the scenes in a picture known as "O'Shaughnessy's Boy" called for an elephant that would permit a tiger to ride upon its back and Queen was selected for the part. Paul Eagles, local representative of Al G. Barnes Circus, made the contract with Mr. Emerson. It was necessary to train the elephant for her part in the picture and, to assist him in handling and caring for the beast, Emerson hired two elephant hands, Dewey and Schubert, both of whom had been working for the circus. A few days later Dewey quit, and in his stead, Mr. Emerson hired the deceased, Joe Reed, an experienced elephant hand at \$5 per day. Mr. Emerson described his duties in relation to the elephant as follows: "Well, the one thing he had to take care of her, feeding, cleaning and taking care of her, and to help me to saddle her and things like that. We had a howdah we put on her, and to help probably on everything in general like the act we were breaking, and assist in every way he could." Emerson and Reed, on the morning of May 20th, had Queen out on the lot, walking her around, "to see if she would carry a howdah" (an elephant saddle in the shape of a platform). Shortly before noon, she was chained in the barn. At approximately one o'clock, after Emerson, Reed, and Schubert had lunched together, Emerson went to a part of the lot where a steel arena was located. Without any knowledge on his part, Reed and Schubert took the herd of elephants, among them Queen and Prince, out of the barn for exercise upon another part of the lot. There the accident in which this unfortunate man

lost his life occurred, the noise of the elephants then for the first time attracting Emerson's attention to the fact that they were in the exercising ring.

Mr. Eagles testified: "I told him (Reed) he was employed by M-G-M, that George Emerson was his boss, took him right over there and had a definite understanding." Mr. Emerson also testified that he personally hired Joe Reed. So far as the evidence discloses, no one instructed Reed or Schubert to exercise Queen or any of the other elephants on the afternoon of May 20th, and no caretaker, supervisor, or other employee of the circus knew that they contemplated doing such a thing or that they were so engaged. Schubert testified: "He (Reed) was unchaining a couple of elephants and he was going; he asked me to get a hook and help him out." The fact that Queen was in the herd and that she was the special charge of Reed as an employee of Metro-Goldwyn-Mayer Studios supports the finding that he was in the employ of that organization when exercising her, especially in view of Mr. Eagle's testimony that under the contract the Studios were "to have 'Queen,' and assume all risks, feed, water and care for her." Since, in exercising Queen, Reed with his partner Schubert undertook voluntarily to exercise six other elephants, did that make either or both of them employees of the circus that owned the animals? We do not think so. That they were employees of Metro-Goldwyn-Mayer Studios, we believe, was sufficiently proven, but that they were also special employees of Al G. Barnes Circus within the rule of *Stacey Bros. Gas Const. Co. v. Industrial Acc. Comm.*, 197 Cal. 164, 239 P. 1072, cited by respondent commission, was not established, in our opinion. For nothing was developed at the hearing to indicate that "the employee of the alleged independent contractor came under the control and direction of the other party to the contract and suffered injury as the result of such direction and control." In fact, all the evidence relating to the contract between the studios and the circus seemed to indicate that, except for housing Queen when she was not being used by the picture company, the circus had nothing whatever to do with her or her attendants during the period of hiring, and certainly it cannot be said that by the contract the employees of Metro-Goldwyn-Mayer were

called upon to exercise the six elephants, other than Queen. We have not overlooked the fact that, at one time, Reed had been in the employ of the circus; but "around the first of the year was the last time he worked for us," according to the uncontradicted testimony of the witness Eagles.

It will be noted that the referee found that "the care and attention being given the elephants other than 'Queen' was for the use and benefit of the Al G. Barnes Circus, and was rendered with the approval of the said Al G. Barnes Circus." So far as the record goes there is nothing to indicate that the work done for these six elephants, at least so far as Reed was concerned, was known to, authorized by, or approved by the circus or any of its officers, employees, or agents.

The award against petitioner is ordered annulled.

We concur: HOUSER, P. J.; YORK, J.



12 Cal.App.2d 752

PEOPLE v. QUINN.

Cr. 2828.

District Court of Appeal, Second District,
Division 1, California.

March 30, 1936.

1. Infants ⇌ 20

In prosecution for committing lascivious acts upon child, testimony of child, which contained inconsistencies as to commission of offense but contained no inconsistencies as to nature of lascivious acts, held not inherently improbable so as to require reversal of conviction (*Code Civ.Proc.* §§ 1847, 2061; *Pen. Code*, §§ 288, 288a; *Const. art. 6, § 4½*).

2. Infants ⇌ 20

In prosecution for committing lascivious acts upon child, jury could reject testimony contrary to that of child and could disbelieve accused's testimony and accept that of child, even though child's testimony may have appeared weak in places and was sharply conflicting with that of other witnesses (*Pen.*

Code, §§ 288, 288a; Code Civ.Proc. §§ 1847, 2061).

3. Infants ⇨20

Whether accused committed lascivious acts upon child *held* for jury (Pen.Code, §§ 288, 288a).

4. Infants ⇨20

Jury could base conviction of accused, for committing lascivious acts upon child on particular testimony of child, even though they might have regarded statements of child on other points as of doubtful verity (Pen. Code, §§ 288, 288a; Code Civ.Proc. §§ 1847, 2061).

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Edward Quinn was convicted of committing lascivious acts upon a child, and he appeals.

Affirmed.

J. Harvey Hearn, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

WHITE, Justice pro tem.

Appellant was charged by an information in three counts with violation of sections 288 and 288a of the Penal Code. He was acquitted of the offenses charged in counts 2 and 3, and convicted by the jury as to count 1, which charged a violation of section 288 of the Penal Code. From the order denying his motion for a new trial and from the judgment pronounced against him, appellant prosecutes this appeal.

A reversal is urged upon the single ground of the insufficiency of the evidence to support the verdict. The victim of defendant's alleged felonious assault was a girl of the age of six years and three months, living at home with her mother near the home of defendant. No claim is made that the testimony of the child, if capable of belief, is not alone sufficient to support the verdict, but in this behalf it is earnestly urged that her testimony, when considered in the light of contradictions appearing therein and conflict with the testimony of other witnesses, must be held by this court to be so inherently incredible as to be no evidence at all.

Defendant's contention that the little girl's testimony was manifestly false and inherently improbable grows out of a num-

ber of apparent inconsistencies developed by the cross-examination of the witness. For instance, the child testified that when she went into appellant's home he locked the door, while the witness Mrs. Marie Fassetta testified that when she went to defendant's apartment the door was open and the screen unlocked. At one time the child testified that Mrs. Fassetta did not knock on the door when the latter came to defendant's apartment, and, again, the girl stated that the lady did knock on the door. Further, the child testified she told no one except her mother what defendant had done with her, and later contradicted this by saying she also told Mrs. Fassetta. The girl also testified that the lewd acts complained of were committed upon her in the morning, while the testimony of Mrs. Fassetta and the child's mother would indicate that the assault was committed between 3 and 5 o'clock in the afternoon. Notwithstanding an extremely long cross-examination, the child stated and restated the nature of the lascivious acts which she contended the defendant had committed upon her.

[1, 2] While the alleged variances or inconsistencies apparent in the child's testimony and the contradictions referred to undoubtedly afforded opportunity for a persuasive argument to the jury against the reliability of her testimony, we find nothing in them from which a reviewing court could justly conclude that her entire testimony is per se unbelievable, and that it was therefore the jury's duty not only to disregard it, but to accept the defendant's denial of any wrongdoing on his part. Reviewing judges are, obviously, in no position to determine the credit which should be accorded to witnesses or to weigh their testimony. Undoubtedly for that reason our Constitution (art. 6, § 4½) provides that the appellate courts are not authorized to review evidence, except where, on its face, it may justly be held that it is insufficient to support the ultimate issue involved, in which case it is not a review of a question of fact, but purely one of law. *People v. Haydon*, 18 Cal.App. 543, 553, 123 P. 1102, 1114. Carrying out the spirit and intent of this constitutional provision, the Legislature has ordained that the jury are the exclusive judges of the credibility of witnesses (Code Civ.Proc. § 1847), and are the judges of the effect and value of evidence addressed to them, except in those instances where it is declared by law that it shall be conclusive. Code Civ.Proc. § 2061. It necessarily follows from the rules just noted that the jury

in this case were authorized, if they conscientiously felt warranted in so doing, after full and fair consideration thereof, to reject any testimony which might have been contradictory to that of the child witness (People v. Phelan, 123 Cal. 551, 557, 56 P. 424; People v. Wright, 4 Cal.App. 704, 706, 89 P. 364; People v. Turpin, 10 Cal. App. 526, 530, 102 P. 680; Clark v. Tulare L. D. Co., 14 Cal.App. 414, 432, 112 P. 564), and, therefore, to disbelieve the testimony of the defendant and accept that of the child as to the immediate circumstances of the alleged felonious assault and the actions constituting the same, however weak in places the latter's testimony may have been made to appear, or however sharply her testimony on other important points might have conflicted with the testimony of other witnesses.

In addition thereto, we must remember that a motion for a new trial was made in this case and denied by the trial court. The judge of that tribunal had the witnesses before him, was fortified with an opportunity to observe their manner and demeanor on the stand and apparent candor or lack of the same, and the reasonableness or unreasonableness of the stories they told; and unless he believed the testimony of the child and disbelieved the evidence given by the defendant, it not only was his privilege but his duty to grant a new trial. In denying the motion for a new trial the lower court concurred in the action of the jury, which rejected defendant's denial and accepted the testimony of the child witness concerning the lewd and lascivious acts claimed by her to have been committed upon her by the defendant.

It might also be here observed that the child's testimony finds some support and corroboration in the conduct of the defendant at the time of and subsequent to his arrest. Shortly after the defendant was taken into custody he was confronted with the child victim, and the latter was asked by a police officer whether the defendant was the man that had "bothered her," to which the girl answered, "Yes," and appellant remained silent at the time of this conversation. Prior to this the defendant, outside the presence of the child, it is true, denied to the police that he had "bothered" the child. Subsequently, according to the testimony of the police officers, appellant told them he would neither admit nor deny the the accusations made by the girl against him.

In the case of People v. Haydon, supra, the court in 18 Cal.App. 543, on page 555,

123 P. 1102, 1108, said: "A statement, to bear upon its face the brand of improbability, or which may be said to be unbelievable per se, must involve, we think, a claim that something has been done that it would not seem possible could be done under the circumstances described, or involve conduct that no one but a person of a seriously cal-entured mentality would be likely to do."

[3,4] Even if it be conceded that the child was mistaken or even told an untruth when she said the offense against her was committed in the morning; that she was again mistaken or told an untruth when she said the defendant locked the door of his apartment when she entered; and that she was mistaken or told an untruth when she said she told no one but her mother, or when she said that she also told Mrs. Fassetta, of defendant's conduct towards her; yet these untruths, if untruths they were, and discrepancies between the child's testimony at the trial and that previously given, cannot justly be said to stamp the story of the witness as to the immediate circumstances of the alleged assault and the conduct of the defendant in the commission thereof as improbable or inherently unbelievable. The matters referred to were, as stated above, for the jury to consider in their determination of the ultimate question submitted for their decision, viz., whether or not the defendant committed the felonious assault charged against him. If, therefore, the jury, as manifestly they did, believed the testimony of the child in the main, or if they believed only that portion of her testimony bearing upon the immediate circumstances of the alleged assault, and thus became satisfied beyond a reasonable doubt of the defendant's guilt, it was, of course, within their province to base their verdict upon that particular portion of her testimony, although they might have regarded the statements of the child on other points as of doubtful verity. People v. Haydon, supra. We have examined the transcript of the testimony in this case, and are unable to say that the testimony given by this child is manifestly false or inherently improbable. Consequently the verdict returned by the jury against the defendant is conclusive on appeal.

For the foregoing reasons, the judgment and the order denying defendant's motion for a new trial are affirmed.

We concur: YORK, Acting P. J.; DOR-AN, J.

HARTMAN RANCH CO. v. ASSOCIATED OIL CO. et al. *

Civ. 10860.

District Court of Appeal, Second District,
Division 2, California.

March 27, 1936.

Hearing Granted by Supreme Court
May 25, 1936.**1. Mines and minerals ⇨74**

Where oil lessee reserves right of re-entry on failure of his transferee to pay rent or on violation of covenants, lessee does not part with his entire term or estate, and retention of such contingent reversionary interests creates "subtenancy," as regards original lessor's right against transferee.

2. Mines and minerals ⇨74

Where instrument was designated a sublease, provided for new causes of forfeiture and for re-entry by original oil lessees on breach of conditions and provided for higher rental to original lessees than rental in original lease, instrument constituted "sublease" and not "assignment," and original lessor could not maintain action against sublessee for breach of original lease.

[Ed. Note.—For other definitions of "Assignment" and "Sublease," see Words & Phrases.]

3. Mines and minerals ⇨74

Sublessee who expressly agrees to perform original oil lease is not liable to original lessor for breach of implied covenant in original lease to protect leased premises from drainage by wells on adjacent property, in absence of contractual stipulation between original lessor and sublessee.

4. Mines and minerals ⇨74

Original oil lessor could not recover from sublessee on theory that sublease was contract expressly made for benefit of third party, in absence of distinct pleading that original lessor was entitled to judgment on that theory under statute (Civ.Code, § 1559).

5. Appeal and error ⇨193(9)

Objection that complaint does not state cause of action or that there is total absence of substantial evidence relative to essential element of plaintiff's cause of action may be urged for first time on appeal (Code Civ.Proc. § 434).

6. Appeal and error ⇨193(9)

Objection that agreement constituted sublease and that original lessor could not

maintain action against sublessees for breach of original lease could be urged for first time on appeal (Code Civ.Proc. § 434).

Appeal from Superior Court, Ventura County; H. G. Ames, Judge.

Action by Hartman Ranch Company against the Associated Oil Company and others. Judgment for plaintiff, and the named defendant appeals.

Reversed.

Robert M. Searls, of San Francisco, Harrison Guio, of Los Angeles, and Sloss, Turner & Finney, of San Francisco (William F. Humphrey, of San Francisco, of counsel), for appellant.

James C. Hollingsworth, of Ventura, and Robert M. Clarke and Don G. Bowker, both of Los Angeles, for respondent.

McCOMB, Justice pro tem.

This is an appeal by defendant from a judgment in favor of plaintiff in an action for damages predicated upon defendant's failure to perform an implied covenant to protect leased premises from drainage by wells located on adjacent property. The jury fixed the damage in the sum of \$593,700.

The conceded facts are:

On October 18, 1913, plaintiff's vendor leased certain real property situated in the county of Ventura, state of California, to Joseph B. Dabney for the purpose of developing and taking therefrom oil, petroleum, and kindred substances. Thereafter Joseph B. Dabney assigned interests in said lease to Ralph B. Lloyd, E. J. Miley, and A. M. Buley. This lease, as modified by mutual agreement of the parties October 13, 1919, expressly required the drilling of ten wells upon the leased premises within a stated period of time. This was done. January 20, 1925, Joseph B. Dabney and his co-owners of the leasehold interest by written instrument gave defendant the right to drill for oil and petroleum on the premises leased from plaintiff's vendor. By this instrument the defendant expressly assumed and agreed to perform all obligations and covenants of the parent lease and any modifications thereof. During the four-year period embraced in the complaint, defendant, also lessee of adjacent property, produced from said contiguous premises a vast amount of oil and gas, which for the pur-

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 73 P.2d 1163.

pose of this appeal only it is assumed had the effect of draining oil and gas from under the property owned by plaintiff. Defendant did nothing to prevent this drainage.

Defendant relies for reversal of the judgment on these propositions:

First: The agreement by which defendant acquired its rights to drill on the premises from Lloyd and his associates was a sublease and not an assignment of the lessee's interest.

Second: A lessor may not maintain an action against a sublessee for breach of covenants in the parent lease.

Third: The sublessee who expressly assumes and agrees in the sublease to perform all of the terms, covenants, and conditions of the parent lease is not liable to the head lessor for breach of an implied covenant in the parent lease.

Fourth: The foregoing propositions may be urged on appeal for the first time, since they are directed to the total absence of an essential element in plaintiff's cause of action.

As to the first proposition, Mr. Chief Justice Myers, in determining whether an instrument was a sublease or an assignment, says (*Barkhaus v. Producers' Fruit Co.*, 192 Cal. 200, 205, 219 P. 435, 437):

"It is elementary that a sublease, in order to operate as an assignment, must transfer to the sublessee the entire term of the original lessee in the whole or some part of the demised premises. * * * 'To constitute an assignment of a leasehold interest, the assignee must take precisely the same estate in the whole or in a part of the leased premises which his assignor had therein. He must not only take for the whole of the unexpired time, but he must take the whole estate, or, in other words, the whole term. * * * *If by the terms of the conveyance, be it in the form of a lease or an assignment, new conditions with a right of entry, or new causes of forfeiture are created, then the tenant holds by different tenure, and a new leasehold interest arises, which cannot be treated as an assignment or a continuation to him of the original term.*'"

(Italics ours.)

[1] Where the lessee reserves the right of re-entry upon failure of his transferee to pay rent or upon violation of covenants, the lessee does not part with his entire term or estate, and the retention of such contingent reversionary interests creates a

subtenancy. *Backus v. Duffy*, 103 Cal.App. 775, 779, 284 P. 954; *Kendis v. Cohn*, 90 Cal.App. 41, 58, 265 P. 844.

[2] In the case before us the document under which defendant took possession of the property owned by plaintiff (a) was designated as a sublease by the parties to it; (b) provided for surrender of the premises to Dabney and his associates by defendant upon certain conditions; (c) *provided for new conditions and new causes of forfeiture other than those set forth in the parent lease and re-entry by Dabney and his associates on breach of any condition contained therein*; (d) reserved a higher rental to Dabney and his associates than the rental in the original lease, i. e., the parent lease called for one-eighth royalty, while this instrument reserved a one-fifth royalty; and (e) contained a new provision relative to receiving the royalty in kind and storing it.

It is therefore clear this document was a sublease and did not constitute an assignment of the parent lease.

The defendant's second postulate is tenable. There is neither privity of contract nor privity of estate between the original lessor and a sublessee. Hence the original lessor may not successfully maintain a suit for breach of a covenant in the parent lease against a sublessee. The rule is clearly expressed in *Thornton's Law of Oil and Gas* (4th Ed.) vol. I, § 244, p. 652, as follows: "Unlike the assignee of a lease, there is no privity of estate between the original lessor and a sublessee, and the latter is not liable to the former for any part of rent due him, nor for the performance of the covenants in the original lease."

The law is stated by Mr. Justice McKinstry in *Bailey v. Richardson*, 66 Cal. 416 421, 5 P. 910, 913, thus: "There is no privity of estate or contract between an original lessor and a subtenant, and such privity would not be created merely by the surrender of the original tenant,—a matter between him and his lessor."

This principle has been uniformly followed in California. See *Handleman v. Pickerrill*, 84 Cal.App. 214, 218, 257 P. 890; *Webb v. Jones*, 88 Cal.App. 20, 28, 263 P. 538; 15 Cal.Jur. 766, *Landlord and Tenant*, § 180.

[3] Relative to defendant's third contention, a sublessee who by the sublease expressly assumes and agrees to perform all of the terms, covenants, and conditions of the parent lease is not liable to the lessor

for breach of an implied covenant in the parent lease in the absence of a contractual stipulation between the original lessor and sublessees. It is not sufficient that the sublessee has promised his immediate lessor to perform the covenants of the parent lease. 15 Cal.Jur. 753, Landlord and Tenant, § 168.

In *Bonetti v. Treat*, 91 Cal. 223, at page 229, 27 P. 612, 613, 14 L.R.A. 151, an action by a lessor against his lessee's assignee for rent, our Supreme Court said: "Porter's covenant, contained in the assignment to him, 'to pay all rent that may fall due from time to time by virtue of the provisions of the lease,' and his entry into possession as assignee under the assignment, created the relation of landlord and tenant between him and the lessor, and his holding was by privity of estate, and not by privity of contract, as claimed by respondent. The lessor was not a party to, nor was he in any way benefited by, the contract of assignment. The liability of Porter to the lessor was, therefore, created solely by the covenant of the lease to pay the rent, which is a covenant running with the land, and not by the contract of assignment, the non-performance of which is enforceable only by the lessee." (Italics ours.)

In *Baker v. Maier & Zobelein Brewery*, 140 Cal. 530, at page 534, 74 P. 22, 23, our Supreme Court reaffirmed this rule, remarking: "The principle stated in the case cited [*Bonetti v. Treat*, supra] is that the assignee is liable to the lessor by the covenant of the lease to pay the rent, which is a covenant running with the land, and not by the contract of assignment, the non-performance of which is enforceable only by the lessee." (Italics ours.)

Mr. Justice Curtis, speaking for our Supreme Court, quotes with approval from 15 California Jurisprudence, page 753, in *Treff v. Gulko*, 214 Cal. 591, 600, 7 P.(2d) 697, 701:

"The appellant did not sign the original lease or any acceptance of such lease and entered into no new agreement to assume the obligations of the lease or to pay the rent.

"In the absence of fresh contractual stipulations, there is no privity of contract between the assignee of the lessee and the landlord (*Farber v. Greenberg*, 98 Cal.App 675, 277 P. 534), and when a tenant holds under a mere naked assignment of a lease, his liability is, as to the landlord, limited to his occupancy of the premises and ter-

minates with his abandonment of possession. *Chase v. Oehlke*, 43 Cal.App. 435, 185 P. 425. The subject is carefully discussed in 15 California Jurisprudence at page 753, where it is said: 'Privity of contract between landlord and lessee, however, is not affected by the latter's assignment, but continues until the end of the term notwithstanding he is no longer in possession of the premises. In the absence of fresh contractual stipulation, there is no privity of contract between the assignee and the landlord. But the assignee may, by express stipulation to be bound by the covenants of the lease, create a privity of contract between himself and the landlord, which will also enure till the term expires. By virtue of such an agreement the assignee becomes liable upon and entitled to the benefit of all the covenants of the lease as such. *It seems, however, that to establish privity of contract between landlord and assignee, the necessary agreement must be made between them themselves.*'

"See, also, *Bush v. Bastian et al.*, 112 Cal.App. 644, 297 P. 976, decided March 17, 1931, in this court, wherein it was held that, under the allegations of a complaint in which it was alleged in substance that a lessee assigned a certain lease to the appellant with the express stipulation that the lessee would continue to be bound by all of the terms of the lease, and that pursuant to such assignment the appellant went into possession and occupation of certain premises, the liability of the appellant assignee to the lessor was limited to the rentals accruing prior to the assignee's abandonment of the possession of the leased premises." (Italics ours.)

In the instant case there was only a sublease between the plaintiff and defendant. It contained, among others, this provision, "* * *" and said lessee hereby expressly assumes and agrees to perform all obligations and covenants provided for in said parent lease and said modification thereof to be performed by the lessee in said parent lease or said modifications." However, since there was no new contractual stipulation between the head lessor and the sublessee, defendant was not liable by privity of contract for breach of a covenant in the parent lease. As we have already stated, there was no privity of estate between the lessor and the sublessee.

[4] It is unnecessary for us to consider plaintiff's claim that the present suit can be maintained on the theory of a contract

expressly made for the benefit of a third party, for, in order to recover on such a theory it is necessary for the plaintiff to distinctly plead that it is entitled to a judgment according to the provisions of section 1559 of the Civil Code. *Ericksen v. Rhee*, 181 Cal. 562, 565, 185 P. 847. This plaintiff did not do.

Mr. Justice Melvin, in passing upon this question in *Ericksen v. Rhee*, supra, 181 Cal. 562, at page 565, 185 P. 847, 848, says: "It is now contended by plaintiff, however, that by setting up the contract between Rhee and the other defendants in the answer they stood squarely upon its terms, and that if it be an agreement made for plaintiff's benefit, he is entitled to judgment against all of the parties to it. The obvious answer to this contention is that by their pleading defendants were bound to set up the contract as indicating that there was no privity between Siller Bros. and the original lessor. They did not seek to establish by it any claim against Ericksen, nor to confess any obligation to him. *If plaintiff, on being apprised of the full text of the agreement, believed that he was entitled to judgment under its terms according to the provisions of section 1559, Civil Code, as a third person for whose benefit it was expressly made, he should have put that matter in issue by a pleading distinctly demanding judgment based upon that contract interpreted according to said section.* This he did not do. The cause was tried upon the theory of the liability of Siller Bros. under the original lease. There was no allegation that the contract between Rhee and the copartners, Siller Bros., was not rescinded by the parties thereto before the complaint in this action was filed. There was no allegation that the Sillers ever marketed any rice or converted any portion of it to their own use. In short, there was nothing to put in issue the contention that plaintiff might have recovered upon the farming agreement as one made for his benefit. It is therefore not necessary to discuss the very interesting question whether that agreement was in its essence such a contract as under section 1559 of the Civil Code permits a third person to take advantage of it, or was one in which the covenant as to rent in the agreement was merely incidentally for the benefit of plaintiff, and therefore not one which he might enforce because falling under the rule announced in such cases as *Chung Kee v. Davidson*, 73 Cal. 522, 15 P. 100, and

Lake Ontario Shore R. Co. v. Curtiss, 80 N. Y. 219." (Italics ours.)

[5, 6] Defendant's final claim is correct. An objection that a complaint does not state a cause of action or that there is a total absence of substantial evidence relative to an essential element of plaintiff's cause of action may be urged for the first time on appeal. Code Civ. Proc. § 434; *Hentsch v. Porter*, 10 Cal. 555, 562; *Ryan v. Holliday*, 110 Cal. 335, 337, 42 P. 891; *Prichard v. Kimball*, 190 Cal. 757, 765, 214 P. 863.

In view of the foregoing conclusions, it is unnecessary for us to consider the other questions ably presented by counsel in their briefs.

The judgment appealed from is reversed.

We concur: CRAIL, P. J.; WOOD, J.



12 Cal.App.2d 582

SOARES v. BARSON.

DUARTE v. SAME.

Civ. 5381, 5382.

District Court of Appeal, Third District,
California.

March 21, 1936.

Rehearing Denied April 20, 1936.

Hearing Denied by Supreme Court
May 18, 1936.

1. Trial ☞260(1)

Refusal to give defendants' requested instructions which were sufficiently covered by given instructions *held* proper.

2. Trial ☞238

Instruction that defendants by pleading contributory negligence in effect confessed their own negligence, and pleaded by way of avoidance that plaintiff's alleged negligence helped produce his injuries, *held* erroneous.

3. Trial ☞296(7)

Erroneous instruction that contributory negligence was in effect a plea of confession and avoidance *held* not so prejudicial as to require reversal, in view of other instructions properly placing burden of proof, and preponderance of evidence on plaintiffs and defining contributory negligence (Const. art. 6, § 4½).

4. Trial ~~C~~296(1)

Case will not be reversed because of erroneous instruction where correct rules of law are so specifically stated and restated to jury that correct instructions must have preponderated in consideration of jury and must have controlled verdict (Const. art. 6, § 4½).

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Actions by A. A. Soares and by Manuel Duarte against Charles Barson. From adverse judgments, the defendant appeals.

Affirmed.

Cooley, Crowley & Supple, of San Francisco, and Edward L. Webber, of Napa, for appellant.

Christopher M. Bradley, of San Francisco, and Lawton D. Champion, of Paso Robles, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

These two actions consolidated for trial were brought by plaintiffs for damages on account of personal injuries sustained by them by reason of being struck by the automobile of defendant.

In some particulars the evidence was conflicting, but in view of the verdict of the jury we may fairly infer the following to have been the facts:

Plaintiffs, who were riding in the car of Soares, were proceeding northerly along the highway between Napa and St. Helena, about 10 o'clock on the evening of May 29, 1934. At this time and place plaintiffs discovered a flat tire on the left rear wheel and drove to the side of the road, parking their car approximately eighteen inches off the concrete or main traveled portion of the road on the shoulder of the highway. Immediately before the accident Soares was squatting on his heels against the left rear wheel and between the wheel and the pavement with his right arm around the rear of the wheel holding the jack in position. Duarte was at the rear of the car on his left knee, also supporting the jack and operating the lever thereof. While in these positions, Mr. and Mrs. Barson, proceeding northerly along the highway at a speed of approximately eighteen or twenty miles an hour, struck plaintiffs, causing the injuries complained of. It also appears that the car was parked beneath some over-

hanging trees along the highway, and as Barson was approaching the car of plaintiffs, a car proceeding southerly with bright headlights somewhat interfered with his vision. The only damage to the Barson car was a slight scratch on the right front fender, and the hub cap of the right front wheel was knocked off. On the parked car was found an imprint of a blow apparently by the hub cap on the under facing of the rear left fender where it turned down to connect with the running board. As is usual in a case of this kind, there are numerous conflicts in the testimony. Several witnesses testified the only light on the parked car was a spotlight directed downward over the rear wheel. Other witnesses testified all of the lights were burning, including two red rear lights. The position of the car was also variously fixed as being from eighteen inches on the pavement to eighteen inches off the pavement. At the point of collision the concrete pavement was eighteen feet wide with shoulders on both sides approximately eight to ten feet in width.

[1] One of appellants' grounds for reversal was based upon the failure of the court to give six instructions requested by them, having to do with the concurring negligence and lack of care upon the part of plaintiffs, but we have examined these refused instructions, but do not here set them forth, as it would unduly extend this opinion, and the instructions given, and believe they were justifiably rejected because the principles therein contained were all given elsewhere to the jury.

The principal point urged for reversal, however, and advanced most ably and strenuously by counsel for appellants, is the alleged error in giving the following instruction:

"You are instructed that contributory negligence is in this state an affirmative defense, by way of confession and avoidance. By pleading it, the defendants, in effect, confessed their own negligence and plead by way of avoidance thereof that plaintiff's alleged negligence helped produce his injuries. In this defense, the burden is upon the defendant to prove two things by a preponderance of the evidence:

"First, that the plaintiff was negligent, and

"Second, that such negligence was a proximate cause of the injuries complained of.

"If they failed to prove either of these things by a preponderance of evidence, this entire defense fails."

[2] It must be conceded at the outset that this instruction is not an accurate statement of the law. The assertion that contributory negligence is a plea of confession and avoidance was directly overruled as a principle of California jurisprudence by Mr. Justice Thompson in the case of *Hoffman v. Southern Pacific Company*, 84 Cal.App. 337, 258 P. 397. Since then other cases have likewise held that such is not the law in California. *Sheets v. Southern Pacific Company*, 212 Cal. 509, 299 P. 71; *Peppercorn v. Stewart*, 114 Cal.App. 101, 299 P. 762; *Hughes v. Atchison, Topeka, etc., Railway Co.*, 121 Cal.App. 271, 8 P.(2d) 853; *Friddle v. Southern Pacific Company*, 126 Cal.App. 388, 14 P.(2d) 568; *Biddlecomb v. Haydon*, 4 Cal.App.(2d) 361, 40 P.(2d) 873.

[3] It is the contention of appellant that the giving of this instruction was a fundamental error, and although other instructions were given stating the true rule, claims in a case where the evidence was so sharply in conflict as here, an appellate court is unable to know upon which of the two conflicting theories of law the jury acted, and a reversal is inescapable.

In defense of the questioned instruction, respondents call our attention first to article 6 of section 4½ which lays down the mandate that "No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury * * * unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

Plaintiffs also rely upon various cases, principally *Gett v. Pacific Gas & Electric Co.*, 192 Cal. 621, 221 P. 376, where the court defined contributory negligence in practically the language used in the questioned instruction. However, this language was not used in an instruction in the *Gett* Case, and as was said in *McGeorge v. Charles Nelson Co.*, 107 Cal.App. 148, 290 P. 75, 77: "It has been stated on many occasions that the text of a decision is not necessarily sound as an instruction to be given to the jury." So here the instruction was not a proper one to have been given, but we do not find it was so misleading or vital nor the substantial rights

of the defendant so prejudiced thereby as to require a reversal of the judgment.

In the case of *Jackson v. Lactein Co.*, 209 Cal. 520, 288 P. 781, where the court instructed the jury that appellant's plea of contributory negligence presupposed the existence of negligence on their part, the Supreme Court, while refusing to sanction such instruction, refused to reverse the case. Other cases cited and relied upon by plaintiffs are *Wiezorek v. Ferris*, 176 Cal. 353, 167 P. 234; *Linforth v. San Francisco Gas & Electric Co.*, 156 Cal. 58, 103 P. 320, 19 Ann.Cas. 1230; *Stewart v. Nagenbach*, 3 Cal.(2d) 755, 47 P.(2d) 267. In the present instruction the court was obviously stating the problem in general terms and qualified it by using the words "in effect," which connoted by way of implication or suggestion only, that there must be something to which contribution could be made, that is, the concurring negligence of plaintiff.

Contributory negligence has been defined as "such an act or omission on the part of the plaintiff amounting to a want of ordinary care as, concurring or co-operating with the negligent act of a defendant, was the proximate cause of the injury complained of." *Gaster v. Hinkley*, 85 Cal. App. 55, 258 P. 988, 991. Also in *Rath v. Bankston*, 101 Cal.App. 274, 281 P. 1081, 1085, the court said, "First, because there can properly be no finding that a plaintiff is guilty of contributory negligence where the defendant has been found guilty of no primary negligence. The two are utterly inconsistent." In *Straten v. Spencer*, 52 Cal. App. 98, 197 P. 540, 543, the court said, "Since the negligence of the plaintiff must concur and co-operate with that of the defendant in order to constitute contributory negligence, it is apparent that in such cases the accident is the result or consequence of two causes or elements, the negligence of plaintiff and the negligence of defendant." It is apparent therefore from the foregoing quotations that in defining contributory negligence we must perforce set off the negligence of defendant against the negligence of plaintiff. The evil here largely is as to the manner of the statement of the principle to the jury.

The following, taken from the case of *Klemko v. Ryer*, 118 Cal.App. 238, 239, 4 P.(2d) 998, 999, seems to answer the contention of appellant here:

"In his answer, defendant traversed the allegations of the complaint, and, as a spe-

cial defense, pleaded contributory negligence on the part of plaintiff. The trial court instructed the jury, in effect, that defendant, for the purpose of this defense, admitted his own negligence. It is urged that this instruction was prejudicial and requires a reversal of the judgment. Instructions of a similar character have not received the unqualified approval of our Supreme Court, and they are better omitted. *Sheets v. Southern Pac. Co.* [212 Cal. 509] 299 P. 71. However, before such an instruction justifies a reversal, it must appear that it prejudicially affected the rights of a defendant. *Jackson v. Lactein Co.*, 209 Cal. 520, 288 P. 781; *Dullanty v. Smith*, 203 Cal. 621, 265 P. 814. Moreover, the court instructed the jury that an injury might be sustained either through the negligence of the plaintiff, or the defendant, or both, and that if the jury found that defendant was not negligent plaintiff could not recover, and further, that if defendant was negligent, and plaintiff also negligent, and that his negligence contributed proximately to his injury, then plaintiff could not recover; that such negligence on the part of plaintiff, if found to exist, constitutes contributory negligence. Considering all the circumstances, including the acts of negligence on the part of defendant as above recited, we cannot say that the giving of the instruction affected the substantial rights of appellant."

An examination of all of the instructions given the jury shows that they were fully instructed as to the burden of proof and preponderance of evidence. The instructions are too voluminous to quote in their entirety, but we may select two or three of the many which will illustrate their scope and tenor.

"Under the law of this state where the negligence, if any, of the plaintiff had proximately caused or contributed to the happening of an accident, such a plaintiff is not entitled to a verdict no matter what the other party to the accident has done. This is called the law of contributory negligence."

"No matter how slight the contributory negligence, if any, of a plaintiff may have been, such plaintiff is not entitled to a verdict against a defendant, no matter how

great the negligence, if any, of a defendant may have been."

"If the defendant was not negligent your verdict must be in favor of the defendant. If each of the plaintiffs was negligent, and their negligence, if any, no matter how slight, proximately contributed to the happening of the accident in the slightest degree, your verdict must be in favor of the defendant no matter what the defendant did. If both of the plaintiffs and the defendant failed to use the care respectively required of each of them, as stated in these instructions, and if such failure, if any, of both of the plaintiffs and of the defendant proximately caused or proximately contributed to the happening of the accident, your verdict must be in favor of the defendant."

At the conclusion of the giving of the instructions the court told the jury that they were not to single out any special sentence or individual instruction, but to consider all of the instructions together and harmonize them so far as possible.

[4] The situation here presented makes appropriate the application of the following rule, stated in *Alloggi v. Southern Pacific Co.*, 37 Cal.App. 72, 173 P. 1117, 1119: "We are not unmindful of the rule that conflicting and contradictory instructions upon a material phase of the case require a reversal where it cannot be ascertained from the record before us which instruction prevailed or was likely to prevail with the jury. While it is true that the instruction complained of in the present case is erroneous, and in a measure in conflict with several other instructions which correctly stated the rule of law relative to contributory negligence, nevertheless the correct rule of law was so specifically stated and restated to the jury that we feel that the idea in the several correct instructions must have preponderated in the considerations of the jury, and that as a consequence the erroneous instruction neither contributed to nor controlled the verdict."

It failing to affirmatively appear that the error complained of was so prejudicial as to cause a miscarriage of justice, the judgments complained of should be affirmed, and it is so ordered.

I concur: THOMPSON, J.



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SECOND SERIES

PEOPLE v. OTTEY.

Cr. 3866.

Supreme Court of California.

March 31, 1936.

Rehearing Denied April 30, 1936.

1. Homicide ⇨253(1)

Evidence sustained verdict finding husband guilty of murder in first degree of wife (Pen.Code, § 1181).

2. Homicide ⇨347

Evidence that killing was premeditated and intentional, that defendant had made prior threats against deceased, and that wounds in deceased's head indicated deliberate intent to take deceased's life, justified refusal to modify conviction for first-degree murder (Pen.Code, § 1181).

3. Criminal law ⇨656(2), 1035(3)

In murder prosecution, wherein court, after defendant had testified as to his reason for calling on deceased about an hour before he expected to have luncheon with her, asked, "That is your story, is it?" *held* not reversible error where question tended to develop plausibility for defendant's reason for his preluncheon visit with deceased, especially where no objection was interposed.

4. Criminal law ⇨1035(1)

Objection to trial error cannot be urged for first time on appeal.

5. Criminal law ⇨1035(3)

In prosecution of husband for murder of wife, error committed by court in asking defendant if he previously had tried to kill wife *held* not reversible, where no objection was interposed.

6. Criminal law ⇨656(2)

Court may ask defendant who takes stand on his own behalf questions designed to elicit facts unfavorable to his defense, provided his constitutional rights are not infringed, and no violation of his rights is indicated by conduct of court in asking such questions.

7. Homicide ⇨308(2)

Instruction in murder prosecution that, if jury should find defendant guilty of murder and still not be convinced, beyond reasonable doubt, that such murder was accompanied by "some one" of circumstances indicative of murder in first degree, jury could

find defendant guilty of murder in second degree only *held* not prejudicial error since instruction merely defined elements constituting first-degree murder in the disjunctive, rather than in the conjunctive (Pen.Code, § 189).

8. Criminal law ⇨656(1)

Constitutional amendment giving court power to comment on evidence *held* to apply to cases tried subsequent to amendment involving offenses committed prior to adoption of amendment (Const. art. 6, § 19, as amended in 1934).

9. Constitutional law ⇨16

While argument sent to voters to induce adoption of constitutional amendment giving court power to comment on evidence is not controlling in determination of purpose of amendment, argument may be resorted to as an aid in determining intention of framers and electorate when such aid is necessary (Const. art. 6, § 19, as amended in 1934).

10. Constitutional law ⇨16

Reference to courts in other jurisdictions in determining purpose of adoption of constitutional amendment giving court power to comment on evidence did not foreclose Supreme Court from resorting to decisions in sister states having same or similar rules (Const. art. 6, § 19, as amended in 1934).

11. Criminal law ⇨762(3)

Propriety of trial court's remarks to jury in commenting on evidence and credibility of witnesses depends on nature of charge, evidence, and arguments of counsel (Const. art. 6, § 19, as amended in 1934).

12. Criminal law ⇨656(1)

That constitutional amendment, giving court power to comment on evidence, places no limitation thereon does not mean that trial court may exercise such power without observing recognized restrictions (Const. art. 6, § 19, as amended in 1934).

13. Criminal law ⇨656(1)

Trial judge in commenting on evidence and credibility of witnesses may not assume role of a witness, or distort or add to evidence (Const. art. 6, § 19, as amended in 1934).

14. Criminal law ⇨1186(4)

Errors of trial court in exceeding power to comment on evidence do not require reversal without regard to whether errors were prejudicial, since constitutional provision

that harmless errors may be disregarded is still applicable (Const. art. 6, § 4½, as amended in 1914; § 19, as amended in 1934).

15. Criminal law ☞762(3)

Trial court's stating to jury fact of change in law and source and scope of court's right to comment on evidence *held* not error under constitutional amendment, especially where court cautioned jury that they were exclusive judges of facts and credibility of witnesses (Const. art. 6, § 19, as amended in 1934).

16. Criminal law ☞799

Trial court's remark that no appeal should be made to jury to disregard statement of judge any more than any other thing in case *held* not error where remark was intended as answer to argument of defense intimating that jury should not heed court's comment (Const. art. 6, § 19, as amended in 1934).

17. Criminal law ☞717

Defense counsel could properly argue to jury that judge's comments were not binding on them and that they were exclusive judges of facts (Const. art. 6, § 19, as amended in 1934).

18. Criminal law ☞811(6)

Act of trial court in singling out defendant's testimony for special comments on credibility to be accorded testimony, such as "things don't happen that way," "that if witness is deliberately false in one material instance jury has right to disregard all his testimony not shown by other evidence to be true," and "from that you have a right to conclude his statements in this case are wilfully and deliberately false" *held* not error where court left ultimate decision with jury by stating that it had "right" to so conclude (Const. art. 6, § 19, as amended in 1934).

19. Criminal law ☞811(6)

Under constitutional amendment giving court power to comment on evidence, court is not required to make remarks applying generally to all witnesses, but court may comment on credibility of any witness, including defendant when he testifies in his own behalf (Const. art. 6, § 19, as amended in 1934).

20. Criminal law ☞762(3)

Under constitutional amendment giving court power to comment on evidence and credibility of witnesses, court need not, in

commenting on evidence or testimony of witness, sum up all evidence and testimony favorable and unfavorable (Const. art. 6, § 19, as amended in 1934).

21. Criminal law ☞762(3)

Under constitutional amendment giving court power to comment on evidence and credibility of witnesses, extent of comment is discretionary if it does not withdraw any material evidence from jury and does not attempt to control verdict by a direction (Const. art. 6, § 19, as amended in 1934).

22. Criminal law ☞762(3)

Under constitutional amendment giving court power to comment on evidence, court has discretion to determine how purpose may best be accomplished so long as jury's exclusive function to decide facts and credibility of witnesses is not usurped (Const. art. 6, § 19, as amended in 1934).

23. Criminal law ☞762(3)

Comments argumentative in form are not objectionable under constitutional amendment giving court power to comment on evidence and credibility of witnesses if comments do not amount to a directed verdict (Const. art. 6, § 19, as amended in 1934).

24. Criminal law ☞1186(4)

Where it appeared that jury acted as exclusive judges of facts, weight of testimony, credibility of witnesses, and that verdict returned was their verdict, Supreme Court refused to reverse murder conviction on ground that court may have exceeded power to comment on evidence and credibility of witnesses (Const. art. 6, § 19, as amended in 1934; Const. art. 6, § 4½, as amended in 1914).

In Bank.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Irwin B. Ottey was convicted of murder in the first degree, and he appeals.

Affirmed.

J. W. Lenahan and John H. Thomsen, both of Monterey, for appellant.

U. S. Webb, Atty. Gen., Seibert L. Setton, Deputy Atty. Gen., and A. Brazil, Dist. Atty., and Dan G. Bardin, Deputy Dist. Atty., both of Salinas, for the People.

SHENK, Justice.

The defendant was charged by information with the murder of his wife, Oreane

Ottey, committed on October 31, 1934, in Monterey county. He pleaded not guilty and not guilty by reason of insanity. A jury found him guilty of murder of the first degree without recommendation. On the issue raised by the plea of not guilty by reason of insanity, the defendant was found to have been sane. From the judgment imposing the death penalty and from the order denying his motion for a new trial, the defendant has appealed.

The defendant urges, as grounds for reversal, insufficiency of the evidence to sustain the degree of the crime found by the jury, alleged errors committed by the court in the conduct of the trial and in its comments on the evidence and the credibility of the witnesses, and error in the denial of the motion for a new trial.

The defendant and the decedent had been married for about three years and lived in Monterey. In accordance with his wife's desire, the defendant had procured his discharge from the United States Army, and the parties lived in the home then being acquired by the defendant under a contract of purchase. Previous to his discharge from the Army, the defendant, who had received medals for expert marksmanship in gun practice, had been assigned to duty as a military police in Monterey. At the time of and before the homicide he had been working as a deputy for the sheriff or the constable in Monterey county. In connection with his duties he was permitted to carry firearms. Some time prior to October, 1934, because of the defendant's lack of employment, he and his wife moved out of the defendant's house and rented it, and occupied cheaper quarters. The wife continued as an office employee in Woolworth's store in Monterey. In 1933 the parties disagreed and separated, but were subsequently reconciled and lived together in a rented apartment until the first part of October, 1934, when another separation occurred. The defendant testified that after a week or so they again became reconciled, agreed to return to each other, and that the only difference then between them was the defendant's desire to give the tenants in his house notice to move so that they could re-occupy it, and the wife's preference to live downtown in an apartment.

October 31, 1934, was the defendant's birthday. He testified that he telephoned his wife at Woolworth's and asked her to dine with him and spend the evening together. She indicated that she had other

arrangements for the evening, but made a luncheon engagement with him. About 12 o'clock that morning the defendant went to the office at Woolworth's and talked with the decedent. A witness saw the defendant go down on his knees to his wife and make a request accompanied by the words, "Please, Honey," to which the wife replied that they would not then discuss the matter. The defendant testified that his request was that she go back and live in his house. He then went out and waited in his automobile parked across the street until the decedent came out at 1 o'clock. She proceeded across the street and after a few minutes' conversation they walked to a Chinese restaurant a few blocks away which they, and especially the wife, had previously patronized. Witnesses who observed them testified that they both seemed in good spirits and in an amiable mood. They entered a booth in the restaurant. A few seconds later, while the waitress was carrying water to the booth, screams were heard and a cry "Help, help!" in a woman's voice. The waitress backed into the kitchen and heard three shots fired. A fourth shot was heard when the waitress went to the cook in the yard back of the restaurant. The cook and the waitress then re-entered the restaurant by the front door, when the waitress heard the defendant in the booth mutter, "Honey, I had to do this." While a call was being put in for the police, two more shots were fired in the booth. One witness saw the defendant put the gun to his own head after three shots were fired. The wife was carried out of the restaurant dead, with two bullet wounds in her head, which showed that they had been fired at a distance of about two inches, and a bullet wound through her wrist. When confronted by the police officers, the defendant was covered with blood. He dropped his empty gun and asked, "Didn't I do a good job of it?" expressing a wish to die. He had a wound in his head and another through the palm of the left hand. Upon the approach of one of the officers the defendant stated, "I shot my wife and myself," to which the officer replied, "I know you did."

[1, 2] At the trial the defendant attempted to minimize the effect of the foregoing circumstances and declarations by testifying that his wife's wounds were caused by the accidental discharge of the gun in his hands in the course of a struggle for its possession by her when the defendant made

a threat to kill himself. On the foregoing facts, however, the jury were amply justified in concluding that the wounds received by the wife were not the result of accidental discharge of the weapon, but that the homicide was premeditated and intentional, even though they also found that the intent was not formed until a few seconds before it culminated in the actual shooting. In addition, there was evidence of prior threats made by the defendant on the life of his wife and that she had a fear of living in his house with firearms in it and of conversing with him after a separation from him while he was armed. There was also testimony of prior admission by the defendant of previous mistreatment of his wife. From the nature of the wounds, the jury might believe that there was an undirected discharge of one shot which passed through the decedent's wrist while the defendant had hold of it with his left hand, but it is not conceivable that the jury could rationally conclude that the two wounds in her head, caused by shots fired at such close range, were anything less than the result of a deliberate intent to take her life. In such a clear case of justification in the evidence for the jury's verdict of first-degree murder we may not accede to the defendant's request to exercise the discretion reposed in this court by section 1181 of the Penal Code and reduce the crime to one of lesser degree or of manslaughter as was done in the case of *People v. Kelley*, 208 Cal. 387, 281 P. 609. *People v. Adams*, 199 Cal. 361, 249 P. 186; *People v. Murphy*, 1 Cal. (2d) 37, 32 P.(2d) 635; *People v. Ramos*, 3 Cal.(2d) 269, 44 P.(2d) 301.

In view of the foregoing conclusion but little need be said in disposing of the defendant's contentions that the court committed error which prejudiced the defendant in the conclusion which the jury might reach on the nature or degree of the homicide, or in the exercise of its discretion to return its verdict without recommendation.

[3-6] Prejudicial error in a question asked by the court during its examination of the defendant is urged. The defendant took the stand in his own behalf and after direct and cross-examination by counsel the court asked the defendant questions designed to inquire into his reason for calling on his wife about an hour before he expected to have luncheon with her. The question objected to is, "That is your story is it?" From the whole context of the examination by the court we are unable to perceive that

the jury received the intimation that the word "story" was used in the vulgar sense of an incredible tale. In fact, the court's examination but served to develop a plausibility for an added reason given by the defendant for his preluncheon visit to his wife, viz., his desire to prevail upon her to change her decision and have dinner and spend the evening with him on his birthday, rather than merely to have luncheon with him. Furthermore, no objection to this line of examination by the court was taken at the time and it is too late to urge it as error for the first time on the appeal. *People v. Mendez*, 193 Cal. 39, 47, 48, 223 P. 65; *People v. Bishop*, 134 Cal. 682, 686, 66 P. 976; *People v. Santos*, 134 Cal.App. 736, 748, 26 P.(2d) 522. Neither this nor other instances of examination by the court were objectionable in the sense defined in the cases of *People v. Boggess*, 194 Cal. 212, 241, 228 P. 448, and *People v. Golsh*, 63 Cal.App. 609, 614, 615, 219 P. 456, nor was any of them objected to at the time by the defendant. The questions asked by the court were propounded merely for the purpose of eliciting the truth and all, with the possible exception of the question, "Well, did you every try to kill her before this?" were proper. As to this question, a sufficient answer is that no objection was made to it or to its form at the time. As stated in *People v. Golsh*, supra, 63 Cal. App. 609, page 615, 219 P. 456, the court's primary duty is to see that justice is done, both to the accused and to the people. The court is not powerless to ask a defendant who takes the stand on his own behalf questions designed to elicit facts unfavorable to his defense, provided his constitutional rights are not infringed, and no violation of his rights is indicated by the conduct of the court in this respect.

[7] The court instructed the jury that in order to constitute murder of the first degree the intent to kill must be the result of deliberate premeditation; that if the act of killing be preceded by and the result of a concurrence of will, deliberation, and premeditation, the killing is murder of the first degree, no matter how rapidly these acts succeed each other or how quickly they may be followed by the act of killing; "but if you find the defendant guilty of murder and still are not convinced, beyond a reasonable doubt, that such murder was accompanied or characterized by some one of the circumstances just explained as indicative of murder in the first degree, you can

find the defendant guilty of murder in the second degree only." The defendant predicates prejudicial error in the use of the language "some one," rather than language indicating the presence conjunctively of the elements of will, deliberation, and premeditation as used in the Code section (section 189, Pen.Code), and in the first part of the charge. The effect of the language used by the court was to define the elements constituting the degree under discussion in the disjunctive, rather than in the conjunctive. In *People v. Pool*, 27 Cal. 572, this was held not to be error, inasmuch as the three elements are severally expressive of the same thing and may be regarded as cumulative. The record does not indicate any prejudice to the defendant's rights by the use of the words complained of.

The defendant lays particular stress on alleged erroneous comments of the court on the evidence and the credibility of the witnesses as justifying a reversal. In the discussion of this contention we repeat the wording of section 19 of article 6 of the Constitution as it read prior to and after the amendment adopted by the people at the general election of November, 1934. Prior to the amendment that section contained the prohibition: "Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." That prohibition had been the law since 1849. At the November, 1934, election the section was recast in the following language: "The court may instruct the jury regarding the law applicable to the facts of the case, and may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the case. The court shall inform the jury in all cases that the jurors are the exclusive judges of all questions of fact submitted to them and of the credibility of the witnesses."

[8] There is no merit to the defendant's contention that the amendment does not apply in cases tried subsequent to the amendment involving offenses committed prior to the adoption of the amendment. *People v. Talkington*, (Cal.App.) 47 P.(2d) 368.

This court has had occasion heretofore to consider generally the scope of the power reposed in the courts of this state by the change in the Constitution. *People v. De Moss* (Cal.Sup.) 50 P.(2d) 1031. In view of the extensive research by counsel on

the question, as evidenced by their briefs, some further elaboration seems desirable. In the first place, it is certain that a very distinct and important innovation in the long-standing rule in this state was brought about by the constitutional amendment. Its purpose was to abolish the prior limitations on the trial judge's participation in the trial of a case with respect to comment on the evidence and on the credibility of the witnesses. In other words, it was the intention to place in the trial judge's hands more power in the trial of jury cases and make him a real factor in the administration of justice in such cases, instead of being in the position of a mere referee or automaton as to the ascertainment of the facts. To the seasoned practitioner in our state courts this so-called radical change has no doubt come with considerable of a shock. None the less the change has been made and it must be recognized as an endeavor to remedy an evil in the trial, especially of criminal cases, by jury. It is the duty of this court to accord to the amendment its full beneficial effect, uninfluenced by decisions in this state under the old law.

[9, 10] It is apparent from the history of the constitutional amendment that its purpose was to establish the rule in this state in substantial harmony with the practice in other jurisdictions where like powers have been exercised by the trial courts. In the argument submitted to the electors at the general election in 1934, in support of the proposed amendment, it was stated: "This measure also enables the trial judge to comment to the jury on the facts of the case; to give the jurors his analysis of the evidence and to express his opinion on the merits of the case, but informing them at the same time, that his views are advisory only, and that the jury is the final and sole judge of the facts and of the guilt or innocence of the accused. This is the practice in the courts of Great Britain and Canada, and also in our United States courts." While the argument sent to the voters is not controlling (*Fay v. District Court of Appeal*, 200 Cal. 522, 537, 254 P. 896), it may be resorted to as an aid in determining the intention of the framers and the electorate when such aid is necessary. Here we need not invoke such argument as an aid to interpretation, for the language of the amendment, though brief, is plain and unambiguous; but it may with propriety be noticed to indicate that it was the

general understanding that the proposed innovation in the practice in this state was intended to conform to the practice in other jurisdictions where similar powers were vested in the trial courts, viz., Great Britain, Canada, and the United States courts. By a reference to the courts in those jurisdictions, we are not foreclosed from resorting to decisions in sister states which have adopted the same or similar rules.

[11] As often as a trial court's action in such cases has been brought into question, it is obvious that no hard and fast rule determinative of what a trial judge may or may not say to a jury in commenting on the evidence and the credibility of the witnesses can be laid down. It is impossible to state in an opinion just what particular comment should or should not be made in all cases. That question must depend, in a criminal case, upon the nature of the charge, the nature of the evidence, and, to some extent, on the arguments of counsel—in short, upon all of the circumstances of the case. "It is impossible, however from the cases to find the dividing line between what is objectionable and what is not, and to lay down a hard and fast rule by which the doubtful cases can be placed on one side or the other of the dividing line. [Reviewing cases.] It is evident from an examination of these cases that each case, in a large measure, stands on its own bottom, except as to the recognition of certain general principles." *Malaga v. United States* (C.C.A.) 57 F.(2d) 822, 827, 828; *Stokes v. United States* (C.C.A.) 264 F. 18; *People v. Lintz*, 244 Mich. 603, 222 N. W. 201.

[12] It may not be successfully argued that because the language of our constitutional amendment is in itself without limitation as to the comment that may be made by the court on the evidence and the credibility of the witnesses, it must follow that the power thus conferred is without any of the restrictions with which the law of the land surrounds it.

[13] One general principle to be recognized is stated by the Supreme Court of the United States as follows: "This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. In commenting upon testimony he may not assume the role of a witness. He may an-

alyze and dissect the evidence, but he may not either distort it or add to it. His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses." *Quercia v. United States* (May 9, 1933) 289 U.S. 466, 53 S.Ct. 698, 699, 77 L.Ed. 1321. See, also, *People v. Lintz*, supra.

In England, to which we look as the original source of the rule, the practice is stated by Chitty (*Brickwood's Sackett on Instructions to Juries*, p. 126 et seq.) to be: "It is the practice for the judge at nisi prius not only to state to the jury all the evidence that has been given, but to comment on its bearing and weight, and to state the legal rules upon the subject and their application to the particular case, and to advise them as regards the verdict they should give."

In New Jersey, where the English practice has been adopted, it is the duty of the judge to give his views upon the weight of the evidence where he thinks it is required for the promotion of justice; and whether or not he exercises all or any of his right in that regard in a particular case depends entirely upon his judicial discretion. *State v. Hummer*, 73 N.J.Law, 714, 65 A. 249. In Connecticut the exercise of the court's discretion is not reviewable except in a clear case of abuse. *State v. Wade*, 96 Conn. 238, 113 A. 458, 461. In those states and in Michigan and Pennsylvania, as well as for the most part in the United States courts, the extent to which the court shall comment is largely within its own discretion (*State v. Journey*, 115 Conn. 344, 161 A. 515; *Com. v. Radzinowicz*, 39 Pa.Super. 173; *People v. Lintz*, supra; *State v. Grace*, 98 N.J.Law, 341, 119 A. 767; *Quercia v. United States*, supra), so long as it exercises that discretion without usurping the functions of the jury as the final arbiters of the facts and otherwise in accordance with the law in force in the particular jurisdiction.

A statement of the general rule worthy of notice is found in *Malaga v. United States*, supra, where it is stated 57 F.(2d) 822, at page 828: "The right of a trial judge to aid the jury in arriving at a just verdict is a valuable and important judicial function in the administration of justice. We have no desire to limit it except within its proper sphere. It is a trite saying, but a true one, that in the interest of justice a judge should be permitted to con-

trol the conduct of the case rather than counsel for the litigants. A trial in a court of justice should not be a game over which the judge presides in the capacity of umpire to see that certain rules are observed, but a proceeding in which a just verdict is the sole aim.

"The trial judge must declare the law governing the rights of the parties and determine what evidence it is proper for the jury to consider under the established rules of evidence. He should also by reason of his training in analyzing testimony, and experience in determining the credibility of witnesses, and the influence that personal interest, bias, and prejudice have in influencing witnesses, be permitted to assist the jury in determining what evidence has a bearing on the disputed issues in the case, and aid them in weighing the evidence, taking care that the jurors clearly understand that it is their own judgment which must finally determine what the facts are. To this end a judge in the federal courts may inform the jury of the impression certain evidence makes on his mind. But having in mind the weight that jurors ordinarily give to the opinion of the presiding justice, he should take especial care that they understand that it is their independent judgment which must finally determine the factual issues, and are not unduly influenced by the opinion of the court."

[14] The defendant contends that if error is made apparent from the comments by the trial court because in violation of the restrictions and limitations announced in certain cases relied on by him, a reversal is justified without any inquiry into the question whether such error has been prejudicial. We cannot accede to the correctness of such a statement. Section 4½ of article 6 of the Constitution is as applicable in the determination of the appeal under the new procedure as it was before the change.

With the foregoing and other pertinent rules in mind we have examined the record. We find therein no indication that the jury's verdict was unduly influenced by the court's comments. On the contrary, it may be said that the evidence before us indicates that the jury would have returned the same verdict if the judge had refrained from any comment whatsoever on the evidence and the credibility of the witnesses. In such a state of the record it would be of little if any value to set out in

this opinion the full context of the court's comments, which were somewhat lengthy.

[15-17] There can be no possible objection to the court's stating to the jury the fact of the change in the law and the source and scope of its right to comment on the evidence in the case and the credibility of the witnesses. The court did this and at the same time cautioned the jury that they were the exclusive judges of the facts and the credibility of the witnesses. The further remark of the court that no appeal should be made to the jury to "disregard the statement of the judge any more than any other thing in the case," is not subject to criticism under the circumstances shown. It was intended as an answer to the argument of defense counsel intimating that the jury should give no heed to the court's comment, if the court should make any; that the jury system "has served us well" and "has been bought at too dear a price to be given up without mature deliberation," and was undoubtedly so understood by the jury. While counsel had the right to, and did, argue to the jurors that the judge's comments were not binding on them and that they were the exclusive judges of the facts, etc. (*Morse v. United States* [C.C.A.] 255 F. 681), it is obvious that counsel went far beyond the scope of permissible argument or accurate statement.

[18, 19] The defendant urges prejudicial error in singling out the defendant's testimony for special comments on the credibility to be accorded it. The court remarked upon the defendant's interest in the case, its opinion on a phase in the testimony that "things don't happen that way," and included a charge that if a witness is deliberately false in one material instance, the jury has the right to disregard all of his testimony not shown by other evidence to be true; also "from that you have a right to conclude his statements in this case are wilfully and deliberately false." The remarks cannot be said necessarily to go beyond the bounds of propriety. *State v. Schleifer*, 102 Conn. 708, 130 A. 184, 191, 192; *State v. Warady*, 77 N.J.Law, 348, 72 A. 37, 38; *State v. Grace*, 98 N.J.Law, 341, 119 A. 767, 768; *Com. v. Orr*, 138 Pa. 276, 20 A. 866; *People v. Wudarski*, 253 Mich. 83, 234 N.W. 157, 95 A.L.R. 782. Furthermore, the court did not say that the jury "must" or "should" conclude that the statements were not to be believed; but left the ultimate decision with the jury by stating

that it had the "right" to so conclude. *R. v. Davis*, 118 L. T. 416; *Weiderman v. United States (C.C.A.)* 10 F.(2d) 745, 746; *Trefone v. United States (C.C.A.)* 67 F.(2d) 954, 955. The court in commenting on the credibility of the witnesses was not enjoined by the constitutional amendment to confine its remarks to apply generally to all witnesses. The constitutional amendment expressly permits the court to comment on the credibility of any witness, which must be assumed to include the defendant when he testifies on his own behalf. The contentions with reference to the trial court's comments on the credibility of other witnesses are likewise disposed of by the foregoing observations.

[20-23] There is no merit to the contention that the court, if it venture to comment on the evidence or the testimony of witnesses or of any witness, must sum up all the evidence and the testimony both favorable and unfavorable. There is no such injunction, express or implied, in the language of the Constitution, and none that would compel it under established rules in other jurisdictions. The provision in the Constitution expressly permits the court to "make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the case." The court may therefore exercise its own discretion in respect to what comment it will make, so long as it does not withdraw any material evidence from the consideration of the jury (and it does not appear to have done so in the present case), and does not attempt to control the verdict by a direction. *State v. Fuersten*, 103 N.J.Law, 383, 135 A. 894, and cases hereinabove cited. It appears to be obvious that the people, by the enactment of the section as recast, desired to permit the jury to look to the court for assistance by receiving from the court such analysis of the evidence and testimony and the credibility of witnesses as the court might deem necessary to prevent injustice by a wrong verdict either for the prosecution or for the defendant, or unnecessary retrial because of the possibility that the jury might fail to reach a verdict one way or the other. The trial court, under the operation of the section, is therefore the best judge of the extent of its comment and should thus be free to exercise the power in accordance with its own discretion as to how the end should best be accomplished, so long as it does not usurp the exclusive function of the jury to decide the facts

and the credibility of the witnesses. *People v. De Moss*, supra; *Vicksburg & M. Railroad Co. v. Putnam*, 118 U.S. 545, 7 S.Ct. 1, 30 L.Ed. 257; *Quercia v. United States*, supra; *Lovejoy v. United States*, 128 U.S. 171, 173, 9 S.Ct. 57, 32 L.Ed. 389; *State v. Hauptmann*, 115 N.J.Law, 412, 180 A. 809, and cases cited; *State v. Duffy*, 57 Conn. 525, 18 A. 791, 792; *State v. Wade*, 96 Conn. 238, 113 A. 458, 461; *State v. Journey*, 115 Conn. 344, 161 A. 515; *Com. v. Radzinowicz*, 39 Pa.Super. 173; *R. v. O'Connell*, 12 Cr.App.Rep. 219, 221. The foregoing conclusion and the cases cited indicate that comments argumentative in form are not objectionable (see, also, *State v. Dichter*, 95 N.J.Law, 203, 112 A. 413), so long as they are not calculated to and do not effect what the court may not do directly, viz., direct a verdict. The so-called "argument" of the court in this case did not partake of the nature of partisan advocacy which was held obnoxious and prejudicial in such cases as *Starr v. United States*, 153 U.S. 614, 14 S.Ct. 919, 38 L.Ed. 841; *Adler v. United States (C.C.A.)* 182 F. 464, and similar cases. There is no merit to the contention that the court stated facts outside of the record.

Expressions of the court's opinion as to the guilt or innocence of the defendant have been held to be within the scope of "comment," so long as the province of the jury as defined by the constitutional section is not invaded. *Egan v. United States (C. C.A.)* 22 F.(2d) 776, 779; *Ching v. United States (C.C.A.)* 118 F. 538, 543 (writ of certiorari denied, 189 U.S. 509, 23 S.Ct. 849, 47 L.Ed. 923); *State v. Giampietro*, 107 N.J.Law, 120, 150 A. 367, 369; *Com. v. Nafus*, 303 Pa. 418, 154 A. 485; *Com. v. Edwards*, 318 Pa. 1, 178 A. 20; *State v. Pinaggia*, 99 Conn. 242, 121 A. 473; *R. v. Newman*, 9 Cr.App.Rep. 134, 136; see, also, *Horning v. Dist. of Col.*, 254 U.S. 135, 138, 41 S.Ct. 53, 65 L.Ed. 185. In *United States v. Murdock*, 290 U.S. 389, at page 394, 54 S.Ct. 223, 225, 78 L.Ed. 381, it was said: "A federal judge may analyze the evidence, comment upon it, and express his views with regard to the testimony of witnesses. He may advise the jury in respect of the facts, but the decision of issues of fact must be fairly left to the jury. *Patton v. United States*, 281 U.S. 276, 288, 50 S.Ct. 253, 74 L.Ed. 854, 70 A.L.R. 263; *Quercia v. United States*, 289 U.S. 466, 53 S.Ct. 698, 77 L.Ed. 1321. Although the power of the judge to express an opinion as to the guilt of the defendant exists, it should be

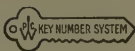
exercised cautiously and only in exceptional cases."

[24] The court, not once, but several times during the course of its remarks, reminded the jury of its exclusive function in respect to the facts and the credibility of the witnesses, and that the opinion of the court was advisory only and not binding upon it and could be disregarded entirely. Although the court's comments might be said to show some lack of care in the preparation thereof, nevertheless viewing the comments as a whole in the light of the evidence and the inferences rationally to be drawn therefrom, we cannot escape the conclusion that the jury did so function as the sole and exclusive judges of the facts, the weight to be accorded the testimony, and the credibility of the witnesses, and that the verdict returned by them was their verdict exclusively. R. v. Beeby, 6 Cr.App.Rep. 138, 140, 141. In such a case further discussion of the subject-matter or the views of the courts in other jurisdictions as applied to special classes of comments indulged under the law and the facts there involved would serve no useful purpose.

The defendant had a full and fair trial, unprejudiced by any error occurring in the course thereof or in the instructions or comments of the court. The contention that the court erred in denying the defendant's motion for a new trial has been examined and likewise found to be lacking in merit.

The judgment and the order are and each is affirmed.

We concur: WASTE, C. J.; THOMPSON, J.; LANGDON, J.; SEAWELL, J.; CURTIS, J.; CONREY, J.



6 Cal.2d 62

PEOPLE v. STONE.

Cr. 3986.

Supreme Court of California.

April 2, 1936.

Criminal law ¶1182

Where, on automatic statutory appeal from judgment of death in murder prosecution,

the defendant's attorneys stated that in their opinion no ground for reversal existed and evidence demonstrated that defendant was guilty of deliberate and premeditated murder, judgment would be affirmed (Pen. Code, § 1239, as amended by St.1935, p.1868).

In Bank.

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

Elton M. Stone was convicted of murder, and he appeals.

Affirmed.

Arthur C. Shepard, Edward L. Kellas, and A. W. Carlson, all of Fresno, for appellant.

Dan F. Conway, Dist. Atty., W. C. Tupper, Asst. Dist. Atty., and James M. Thuesen, Chief Deputy Dist. Atty., all of Fresno, and U. S. Webb, Atty. Gen., for the People.

THOMPSON, Justice.

The defendant was indicted for murder. At the time of arraignment, it appeared that he had not secured counsel. The court explained to him the charge and the possible penalty therefor and, upon defendant's request, appointed counsel. After arraignment, ample opportunity was extended defendant for consultation with the two lawyers appointed by the court, before he was required to enter his plea. He pleaded guilty to the charge and the court took evidence for the purpose of ascertaining whether there were any facts which would justify the court in imposing a life sentence instead of the extreme penalty. The trial judge concluded that there were no such facts and sentenced defendant to be hanged.

The appeal is here because, in 1935 (St. 1935, p. 1868), the Legislature amended section 1239 of the Penal Code by inserting the following sentence:

"When judgment of death is rendered, upon any plea, an appeal is automatically taken without any action by the defendant or his attorney."

At the time set for the oral argument on this appeal, both of the attorneys for defendant appeared and stated that in their opinion there was no ground upon which a reversal could be based and that in truth the entire proceeding was fair and in con-

formity with the law. We deem it unnecessary, under the circumstances, to detail the evidence. Suffice it to say that we have read the testimony, including a full and apparently complete confession by the defendant. It demonstrates beyond question that defendant is guilty of a deliberate and premeditated killing of a high school girl in Fresno, under peculiarly aggravated circumstances. It follows that the judgment should be and it is hereby affirmed.

We concur: WASTE, C. J.; LANGDON, J.; CONREY, J.; CURTIS, J.; SEAWELL, J.; SHENK, J.

the proceeds of the sale of the property was for his commission as auctioneer, whereas the claim sought to be impressed as a lien arose by reason of a loan from the respondent Jack White to the appellant, and an agreement by said respondent that the loan might be repaid from the proceeds of a sale then in contemplation. We deem it unnecessary to grant a hearing to correct this error, because the result undoubtedly would have been the same if the inaccuracy in the statement of the facts had not been made. The right of the appellant to the claimed lien was, on the facts shown by the record, properly denied by the trial court.

The petition for a hearing is denied.



11 Cal.App.2d 570

WHITE v. WHITE et al.

Civ. 5519.

Supreme Court of California.

March 31, 1936.

Courts ⇨212

Appellant *held* not entitled to hearing before Supreme Court, after decision by District Court of Appeal, to correct error in statement of facts by District Court of Appeal, where error did not affect result.

In Bank.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Suit by Pauline Starke White against Jack White and others, wherein Lewis S. Hart filed a petition for an order directing the receiver to pay petitioner commissions to satisfy asserted lien on proceeds of sale of personal property involved in suit. From an order denying the application, the petitioner appeals. On petition for hearing.

Petition denied.

Prior opinion, 54 P.(2d) 482.

PER CURIAM.

On petition for hearing in this court after decision by the District Court of Appeal, attention is called to an apparent inaccuracy in the statement of the District Court of Appeal to the effect that the lien which the appellant sought to impress upon

5 Cal.2d 674

In re STEINBERG'S ESTATE.

SIEGELMAN v. STEINBERG.

L. A. 15448.

Supreme Court of California.

March 24, 1936.

Rehearing Denied April 23, 1936.

1. Guardian and ward ⇨62

Guardian who used possession of one-third of issued stock belonging to ward as means of compelling president of corporation to purchase guardian's one-third of issued stock *held* properly required to account to ward for half of sum received, retention of which sum would be benefit solely to guardian and great financial loss to ward (Civ.Code, § 2229).

2. Guardian and ward ⇨161

Guardian who used possession of ward's stock as means of compelling president of corporation to purchase guardian's stock could not complain that court imposed incorrect measure of damages by requiring guardian to pay to ward half of sum received, where ward was not suing for damages in ordinary sense of word, but sought to correct account on ground that guardian dealt with trust property for her own financial gain (Civ.Code, § 2229).

In Bank.

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Judge.

In the matter of the guardianship of the estate of Selma Sylvia Steinberg, a minor, who objected to the account filed by Frieda Siegelman, guardian of Selma Sylvia Steinberg. From a judgment settling the account, the guardian appeals.

Affirmed.

George S. Hupp, of Los Angeles, for appellant.

Alexander W. Staples, of Los Angeles, for respondent.

SHENK, Justice.

Frieda Siegelman, as guardian of the estate of Selma Sylvia Steinberg, a minor, filed her final account. The minor objected to a charge of 6,666 shares of the capital stock of Benjamin Kaplan & Co., Inc. After hearing the trial court found that the correct accounting should be a charge of 3,333 shares of said stock and the sum of \$5,000, with interest from September 26, 1928. From the order so settling the account and the judgment entered on the findings, the guardian has appealed. The only contentions on the appeal are that the findings are not supported by the evidence and that the court has not applied the correct "measure of damages."

The issuable and issued shares of Benjamin Kaplan & Co., Inc., a California corporation, numbered 20,000, of which 6,668 shares were owned by Benjamin Kaplan, its president, 6,666 by Frieda Siegelman, who is Kaplan's sister, in her own right, and 6,666 shares were owned by the minor, a niece, and held by the guardian as part of the minor's estate. About September 26, 1928, the guardian used the two-thirds' control thus afforded her to oust Kaplan as president and elect herself in his place, in pursuance of a threat made by her so to do unless Kaplan would purchase her stock for \$10,000. Her coup was successful, and Kaplan paid her the sum of \$10,000, took 6,666 shares of stock from her, and reelected himself president. Since that time the stock of the corporation has greatly depreciated in value. The final account of the guardian was filed about August, 1934. The trial court found that the sale by the guardian of the stock for her sole account was an abuse of her trust as guardian, and that she should be charged in accordance with

the court's conclusion that she sold one-half of her own stock and one-half of the minor's.

[1] There is no merit to the arguments presented on the appeal, all of which resolve themselves into a contention that the findings and judgment are not supported. The only showing necessary to justify the findings and judgment, and which was made, was that the guardian dealt with the trust property for her own financial gain. While the facts herein are not identical with those involved in such cases as *Wickersham v. Crittenden*, 93 Cal. 17, 28 P. 788, and *Pacific Vinegar, Etc., Works v. Smith*, 145 Cal. 352, 78 P. 550, 104 Am. St. Rep. 42, the principles there stated are applicable and control the disposition of the appeal adversely to the guardian's contentions. Civ. Code, § 2229. See, also, *Magruder v. Drury*, 235 U.S. 106, 35 S. Ct. 77, 59 L. Ed. 151; *In re Montgomery's Estate*, 140 Wash. 51, 248 P. 64. The court was justified on the facts presented in concluding that the guardian could not in good conscience retain the fruits of the transaction procured through the use by the guardian of the ward's stock, the retention of which would be a benefit solely to the guardian and a great financial loss to the ward.

[2] It may also be said that the court has not imposed an incorrect "measure of damages." The ward was not suing for damages, in the sense in which that word is used in actions to recover damages for breach of contract of sale of personal property, which is apparently what the appellant has in mind. It is arguable from the cases above cited that the ward, on her objection to the account as rendered, would have been entitled to have the entire amount of the sale credited to her. The court, however, took the view that the transaction should be credited for the joint benefit of the ward and the guardian. This is not a solution of which the guardian may complain, and the ward has not appealed from the judgment.

Other points need not be specially noticed.

The judgment is affirmed.

We concur: WASTE, C. J.; THOMPSON, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.

5 Cal.2d 704

THORNE et al. v. McKINLEY BROS.

Sac. 4881.

Supreme Court of California.

March 25, 1936.

1. Judgment ⇨112

Default of defendants in prior action was admission that all allegations in complaint therein were true.

2. Judgment ⇨585(5)

Default judgment enjoining defendants from asserting right to waters of designated creek or its tributaries *held* not res judicata of defendants' right to waters of creek, in subsequent action in which evidence showed defendants' title to riparian property had been acquired subsequent to prior judgment.

3. Judgment ⇨743(1)

Judgment enjoining defendants from using or asserting any right to waters of designated creek or its tributaries, reciting that defendants were in possession of land which they claimed to own, *held* not adjudication that defendants were owners of land (Code Civ.Proc. § 1963, subd. 11).

4. Property ⇨9

Presumption of ownership by proof of possession is rebuttable and may be controverted (Code Civ.Proc. § 1963, subd. 11).

5. Judgment ⇨21

Judgment providing that prior appropriator was owner of entire flow of stream between sunrise and sunset *held* not void for uncertainty in failing to limit or fix amount of water which could be diverted.

6. Waters and water courses ⇨143

Extent of appropriator's right to divert water is limited by quantity which is or may be applied by him to beneficial uses rather than by quantity actually diverted or by capacity of ditch.

7. Waters and water courses ⇨143

Appropriator's use during day of water diverted during nighttime by means of storage of water in reservoir would constitute appropriation of night flow of stream, giving appropriator right to entire flow thereof.

8. Waters and water courses ⇨140

Lower appropriator diverting water on private land can claim no right to divert water of stream as against right of upper riparian owner to reasonable use of water, where

upper riparian owner acquired title to land through United States patent issued subsequent to date of appropriation by lower appropriator.

9. Waters and water courses ⇨140

Appropriation of night flow of water in stream which was made upon land held in private ownership *held* not to give appropriator right superior to that of upper riparian owner of land, which at date of appropriation was unoccupied public land of United States, but which subsequently passed into private ownership.

—♦—

In Bank.

Appeal from Superior Court, Lake County; Benjamin C. Jones, Judge.

Action by Charles Thorne and another against McKinley Bros. From an adverse judgment, the defendant appeals.

Affirmed.

H. G. Crawford, of Lakeport, for appellant.

William H. Hazell, of Lakeport, and Joseph C. Sharp, of San Francisco, for respondents.

CURTIS, Justice.

The controversy in this case involves the right to the use of certain of the waters of Anderson creek. While the amended complaint asks that plaintiffs' title to a tract of land described therein be quieted against the claims of the defendant, no contention seems to have been made during the trial, nor is any now made, that the defendant has any interest, right, title or estate in said land. We will therefore confine our discussion in this case to those questions which affect the respective rights of the parties to the waters of said creek. The amended complaint asks that plaintiffs' title to the waters of Gunning creek and Lampley creek be quieted and that defendant be forever debarred from asserting any claim thereto. These two creeks unite to form Anderson creek, which latter creek in turn joins English creek to form Putah creek. Putah creek has its source in Cobb Mountain in Lake county, flows in a generally easterly direction, draining an extensive watershed in Lake, Napa, Yolo, and Solano counties, and empties into the Sacramento river below the town of Davis. It is a seasonal stream, flowing a large quantity of water in the rainy season and a compar-

atively small amount in the dry season. This stream with its tributaries is the same stream of water involved in the case of *McKinley Brothers v. McCauley*, 215 Cal. 229, 9 P. (2d) 298.

Plaintiffs own a 40-acre tract of land which is riparian to Gunning and Lampley creeks and claim the right to the use of the water flowing in said creeks by virtue of the riparian character of their land which is situated upstream and above defendant's point of diversion hereinafter referred to. The defendant, a corporation, is the owner of lands near Anderson creek but not riparian to said creek. It claims the right to the use of all the water of Anderson creek, which includes that flowing in the two tributaries, Gunning creek and Lampley creek, to the extent of 500 miners' inches measured under 4-inch pressure. This claim is based upon an appropriation of said water by its predecessors in interest in 1862 for milling purposes and irrigation, while the land at the point of diversion and that above the diversion point, including the land now owned by plaintiffs, was still unoccupied public land. As a separate defense to plaintiffs' cause of action, defendant pleaded a judgment rendered in the superior court of the county of Lake, entitled *McKinley Brothers (a Corporation) v. Arthur Thorne, David Thorne, Charles Thorne, et al.*, and numbered 2229, and contended that the plaintiffs were barred from maintaining the present action by reason of the matters adjudicated in said previous action. Upon the trial of this action, the court held that the judgment in case No. 2229 was not *res adjudicata* as to the rights of the plaintiffs to the waters of said creeks; that the defendant *McKinley Bros.* was the owner and holder of an appropriative right in and to the waters of Gunning and Lampley creeks to the extent of the entire flow thereof between the hours of sunrise and sunset from the 1st day of June to the 1st day of November in each year, and to the extent of the nominal and usual and ordinary flow of said stream at all other seasons of the year between said hours, and that defendant's appropriative right was superior and paramount to the riparian rights of the plaintiffs in and to the waters of said creeks as owners of land riparian to said stream; that the plaintiffs' land was riparian to Gunning and Lampley Creeks; and that plaintiffs were entitled to the reasonable use of the riparian flow of said streams upon their said tract of riparian land for household and domestic purposes

and for irrigation thereof, and other riparian uses between the hours of sunset and sunrise of all seasons of the year. From this judgment the defendant *McKinley Bros.* has appealed.

[1-4] Appellant first contends that the trial court erred in holding that the judgment in case No. 2229 was not a bar to the present action instituted by the respondents. Action No. 2229 was instituted by the appellant, *McKinley Bros.*, a corporation, against various defendants, including the two respondents herein. It was brought, as appears from the prayer of the complaint therein, to enjoin the defendants therein from obstructing or diverting the flow of water of Putah creek from its channel onto certain lands described in the complaint in said action, and from constructing any dam or ditch whereby said waters to the extent of 500 miners' inches measured under a 4-inch pressure were diverted from the mill of the plaintiff or were prevented from descending to the land of said plaintiff. The lands described in the complaint in said action include the land upon which the respondents herein claim the right as riparian owners to use the waters involved in this action. The complaint in said action was filed August 13, 1913, summons thereon issued and served on the respondents herein, and, upon their failure to answer said complaint, judgment was rendered against said defendants enjoining them from using or asserting any right in or to the waters of Putah creek or its tributaries. In said complaint it was alleged that the defendants in said action, including the two respondents in the present action, wrongfully diverted the waters of Putah creek upon a quarter section of land, which included the 40-acre tract now owned by respondents, and "that defendants (including the two respondents herein) are in the possession of and claim to own the same." The default of the defendants in said action was an admission that all of the allegations of the complaint therein were true, and the court in its default judgment inserted a recital or finding to that effect. Appellant contends that the finding of the court that the defendants in said action were in the possession of the real property and claimed to be the owners thereof is tantamount to a finding that said parties were the owners of said real property, and, as the judgment in said action enjoined the defendants in said action from interfering with the rights of the plaintiff in said action to the water flowing in Putah creek and further enjoined them from

using or asserting any right to the waters of Putah creek or its tributaries, appellant contends that this judgment was a complete bar to the prosecution of this action by respondents and was *res adjudicata* as to them. Appellant's position might be impregnable were it not for other evidence in the case. This evidence consists of a patent issued by the United States government on May 27, 1912, something less than a year before action No. 2229 was instituted, to Alexander K. Crawford to the lands described in the complaint in this action, being referred to above as a 40-acre tract. On April 1, 1929, Alexander K. Crawford conveyed said tract of land to Lindsay A. Crawford, who subsequently conveyed the land to the respondents. Neither one of the Crawfords was made a party to the action No. 2229, and the judgment therein was, of course, not binding upon either of them or upon their grantees. The judgment against respondents in action No. 2229 was not, therefore, a bar to the present action, which is based upon a title to said tract of land acquired subsequent to the rendition of the judgment in the prior action. *Segarini v. Bargagliotti*, 79 Cal.App. 347, 249 P. 545, and authorities cited therein. There is no merit in appellant's contention that, as in action 2229, the respondents herein were alleged to be, and the court found that they were, in possession of the land and claimed to own the same; therefore they were adjudicated to be the owners of said land. They were simply adjudged to be in the possession of said land. While ownership may be presumed by proof of possession, such presumption is a rebuttable presumption and may be controverted. Section 1963, subd. 11, Code Civ.Proc. This presumption was entirely overcome in the present action by the admission in evidence of the patent to Crawford and subsequent deeds. This evidence was conclusive proof that the respondents were not the owners of the 40-acre tract at the time judgment was rendered in action No. 2229. They were not, therefore, bound by said judgment in so far as their title to said 40-acre tract was involved. Having acquired said land subsequent to the entry of the former judgment and said land being riparian to the two tributaries of Putah creek, said judgment was not an adjudication of their newly acquired right to said waters, and respondents were not barred nor concluded by said judgment in asserting in the present action their rights to said water against the appellant.

[5] It is next contended by appellant that the findings of the court are uncertain, and the judgment is void, for the reason that the court failed in said finding to fix the amount of water to which appellant was entitled to divert under its appropriative right. In its answer, appellant claimed to be entitled to use all of the natural flow of said stream up to 500 miners' inches measured under a 4-inch pressure. The court found that the entire flow of Anderson creek (the creek formed by the junction of Gunning creek and Lampley creek to which respondents' land is riparian) was diverted between June 1 and November 1 in each year for the operation of appellant's mill between the hours of sunrise and sunset, and gave judgment accordingly without limiting the amount to 500 inches. It would seem that appellant is in no position to complain that its right was not thus limited. We do not understand that it does, but it contends that, in failing to limit or fix the amount, the finding is uncertain and the judgment based thereon is void. It cites in support of its contention the case of *Riverside Water Co. v. Sargent*, 112 Cal. 230, 44 P. 560. In that case the court found that the plaintiff was the owner of all the water flowing in the river except so much thereof as the defendants were entitled to take, and then fixed the latter amount at the capacity of defendants' ditch. On appeal this court held that the findings and judgment must fix the extent of the superior right, "viz. the quantity of water to be allowed to the party whose claim is paramount; otherwise, the judgment fails to attain the certainty necessary to an estoppel upon the main subject of the litigation." The court then went on to show that the carrying capacity of a water ditch is subject to rapid changes, being affected by the nature of the soil through which it passes, the rapidity and consequent scouring force of its current, the care it receives, and other matters more casual, and that such a finding seemed well devised to "lead to future disputes and litigation." The finding and judgment in the present action in our opinion are not open to criticism. They provide that appellant is the owner of the entire flow of the stream during certain definite periods of time. There is nothing uncertain in such a statement. While the entire flow of a stream may vary at different months of the year, as long as a party is awarded the right to divert all the water flowing in a stream, there can be no uncertainty as to the extent of his right.

[6-9] As will be noted from what has already been said, the court limited appellant's right to use the water of said stream to the hours between sunrise and sunset. While appellant's original diversion embraced the entire flow of the stream, appellant only used the water thereof during the daytime until the year 1895, when it constructed its storage reservoir and thereafter used the entire flow of the stream. Up to the year 1895, the appellant, while diverting all the water from the stream, only put the day flow of said stream to a beneficial use. "The extent of an appropriator's right is limited not by the quantity of water actually diverted by him nor by the capacity of his ditch but by the quantity which is, or may be, applied by him to beneficial uses." 26 Cal. Jur. p. 94. This principle has been so well established by the decisions in this state, as well as in other jurisdictions where the right of appropriation exists, as to require no further citation of authority. As appellant only devoted the day flow of the stream to a beneficial use up to the year 1895, its rights prior to that date were limited by such use. If it acquired any further right to use said waters during the nighttime, it must have been acquired by its use of said water during that period of the day by means of the storage of said water in the reservoir constructed in that year. Such a use of said water would be in legal effect an appropriation of the night flow of said stream, and would give to appellant the right to the entire flow of said stream, provided a valid appropriation of the waters of said stream could then be made by appellant, which would give it a right superior and paramount to the rights of the respondents whose lands are riparian to said stream and are located above appellant's point of diversion, and which were in 1895 unoccupied public lands of the United States. The problem thus presented is whether an appropriation of water in a flowing stream, made upon land held in private ownership, gives to the appropriator thereof a right superior and paramount to that of an upper riparian owner on said stream of land which at the date of said appropriation was unoccupied public land of the United States, but subsequent to said appropriation has passed into private ownership. This actual situation was before this court in *Cave v. Tyler*, 133 Cal. 566, 65 P. 1089, and it was

there held that the lower appropriator, if the diversion was made on private land, can claim no right to divert the waters of a stream as against the right of an upper riparian owner to the reasonable use of said waters, although the latter acquired title to his land through a United States patent issued subsequent to the date of said appropriation. The case of *Cave v. Tyler*, supra, was followed and approved by this court in the case of *San Joaquin & Kings River Canal & Irrigation Co., Inc., v. Worswick*, 187 Cal. 674, 688, 203 P. 999, 1005. In that case, after an exhaustive discussion of the subject and the citation of numerous authorities, the court expressly upheld the doctrine announced in the case of *Cave v. Tyler*, supra, concluding the discussion by the following pronouncement: "Our conclusion is that the appropriations of 1871 and 1872, by which the water rights of the plaintiff were acquired, are not, by the aforesaid acts of Congress of 1866 and 1870, made superior or paramount to the riparian rights pertaining to the public lands of the United States situated on the stream above the place of diversion, and afterwards purchased by the defendants from the United States." In a still later case, this court approved the case of *Cave v. Tyler*, supra. *Cory v. Smith*, 206 Cal. 508, 512, 274 P. 969. While the case of *Cave v. Tyler* has been criticized both by Mr. Kinney (*Kinney on Irrigation and Water Rights*, vol. 2, § 676, p. 1173) and by Mr. Wiel (*Water Rights in the Western States* [2d Ed.] pp. 157-159), this court has never receded from its position taken in that case, but has, on the other hand, expressly approved the doctrine therein announced on two subsequent occasions. We therefore feel constrained to follow in the path of our former decisions upon this subject and hold that appellant's appropriation of the night flow of said stream, and its right to the use of the flow of said stream during the nighttime, is subject to the superior riparian rights of respondents to the reasonable use of the night flow of said stream upon their lands described in the amended complaint herein for household and domestic purposes and for the irrigation of said land.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.; LANGDON, J.

5 Cal.2d 697

ADAMS v. BELL et al.

L. A. 15262.

Supreme Court of California.

March 25, 1936.

Rehearing Denied April 23, 1936.

1. Fraudulent conveyances ⇨261

In action to set aside conveyance as fraudulent, petition alleging that plaintiff was judgment creditor in action pending at time of conveyance, and that conveyance was made without consideration and for purpose of defeating recovery by plaintiff on her judgment, *held* sufficient, notwithstanding failure to allege that conveyance was made by defendant while insolvent or in contemplation of insolvency (Civ.Code, §§ 3439, 3442).

2. Fraudulent conveyances ⇨57(1)

Conveyance may be set aside as fraudulent, where actual intent to defraud is satisfactorily shown, even though debtor has not entirely stripped himself of assets (Civ. Code, §§ 3439, 3442).

3. Appeal and error ⇨193(5)

Objections to pleadings raised for first time on appeal are not regarded with favor, and, where no demurrer has been interposed and cause has been tried on theory that certain facts are in issue and substantial justice has been done, omission from complaint of material issue thus tried is cured by judgment, which will not be reversed for technical defects in pleadings.

4. Fraudulent conveyances ⇨241(2)

Although ordinarily person asserting that conveyance is fraudulent must show that he was creditor of debtor at time of transfer, he is not required to show that claim at that time had been reduced to judgment.

5. Fraudulent conveyances ⇨241(2)

Person having valid claim whereon specific performance suit was subsequently filed and money judgment rendered *held* "creditor" of person against whom judgment was rendered and entitled to sue to set aside as fraudulent conveyance which was made while specific performance suit was pending.

[Ed. Note.—For other definitions of "Creditor," see Words & Phrases.]

6. Fraudulent conveyances ⇨297

Return of execution nulla bona establishes prima facie case of insolvency, entitling creditor to set aside conveyance as fraudulent.

7. Fraudulent conveyances ⇨299(13)

Evidence *held* to support judgment setting aside conveyance as fraudulent on ground that property conveyed by grantor to her son was only property out of which judgment could be satisfied, and that it was conveyed with intent to defraud judgment creditor (Civ.Code, §§ 3439, 3442).

8. Limitation of actions ⇨60(5), 100(3)

Ordinarily, cause of action by judgment creditor to set aside conveyance as fraudulent would accrue on date of judgment, but, where creditor knows nothing about fraudulent conveyance, cause of action does not arise until discovery of fraud, in absence of laches (Civ.Code, §§ 3439, 3442; Code Civ.Proc. § 338, subd. 4).

9. Appeal and error ⇨173(10)

Whether action to set aside conveyance as fraudulent was barred by limitations would not be considered on appeal, where defendant failed to raise issue of limitations or laches at trial and matter was not mentioned in findings, notwithstanding that statutory period had expired since conveyance and that plaintiff failed to allege circumstances surrounding discovery of fraud within period of limitations (Civ.Code, §§ 3439, 3442; Code Civ. Proc. § 338, subd. 4).

In Bank.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Thelma Louise Adams against Belle F. Bell and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

A. N. Soliss, of Compton, for appellants.

Hamish B. Eddie and George F. Rankin, both of Los Angeles, for respondent.

CONREY, Justice.

The plaintiff, as judgment creditor of defendant Belle F. Bell, brought this action to set aside, annul, and declare void a conveyance of real property made by said defendant to her son, the codefendant L. L. Sidwell. Judgment having been entered in favor of plaintiff, the defendants appeal therefrom.

The said real property is in Los Angeles county. The deed of conveyance, Bell to Sidwell, was executed on April 11, 1930. At that time there was pending in the superior court an action of plaintiff, Adams,

against defendant Bell, in which action, on July 21, 1930, the plaintiff obtained judgment against Mrs. Bell in the sum of \$4,500. Execution was issued, whereupon defendant moved to quash that writ. From an order denying the motion to quash, the defendant appealed. On that appeal the order was reversed by judgment of this court, filed December 11, 1933. Adams v. Bell, 219 Cal. 503, 27 P.(2d) 757. Thereafter another execution was issued, and the return nulla bona was duly made thereon, on April 4, 1934. This present action was commenced by complaint filed on May 8, 1934.

The complaint alleged that on April 11, 1930, during pendency of the former suit, defendant Bell had conveyed to her son, defendant Sidwell, the said real property owned by her, which conveyance was made by said grantor and accepted by said grantee without consideration and for the purpose of defeating recovery by plaintiff on her claim. The prayer of the complaint was that the transfer be declared invalid and that the said real property be decreed subject to said \$4,500 judgment.

The cause went to trial on issues joined by the answer of defendants. Thereafter the trial court rendered findings in favor of plaintiff to the effect that the \$4,500 judgment was still due, owing, and unpaid; that the property deeded to defendant Sidwell by defendant Bell was the latter's sole property and the only property out of which said \$4,500 judgment could be satisfied; that the conveyance was made without consideration from defendant Sidwell, with intent to defraud plaintiff as creditor; and that therefore defendant Sidwell did not become the owner of said property so far as plaintiff was concerned; and that plaintiff was at liberty to proceed upon the execution issued in her favor, or to issue another execution.

[1-3] The first point stated by appellants presents their contention that the complaint in the instant case failed to state a cause of action, in that it failed to allege that the conveyance to Sidwell was made by defendant Bell while insolvent or in contemplation of insolvency, section 3442, Civ. Code. The pleading may be sustained under the provisions of sections 3439 and 3442 of the Civil Code. Vogel v. Sheridan, 4 Cal.App.(2d) 298, 305, 40 P.(2d) 946; Fross v. Wotton, 3 Cal.(2d) 384, 44 P.(2d) 350, and cases cited. It alleged that plaintiff was a judgment creditor in an action

pending at the time the conveyance was made, and alleged actual fraudulent intent (Rossen v. Villanueva, 175 Cal. 632, 635, 166 P. 1004), in that it affirmatively alleged that the conveyance from Bell to Sidwell was made for the purpose of defeating recovery by plaintiff on her judgment. Where an actual intent to defraud is satisfactorily shown, the conveyance may be set aside, even though the debtor has not entirely stripped himself of assets. Vogel v. Sheridan, supra, and cases therein cited; Johns v. Baender, 40 Cal.App. 790, 182 P. 55; Benson v. Harriman, 55 Cal.App. 483, 204 P. 255; Tobias v. Adams, 201 Cal. 689, 695, 258 P. 588; Fross v. Wotton, supra. Moreover, objections to pleadings raised for the first time on appeal are not looked upon with favor by the courts. Where, as here, no demurrer has been interposed and the cause has been tried on the theory that certain facts are in issue and substantial justice has been done, the omission from the complaint of a material issue thus tried is cured by the judgment, and the judgment will not be reversed for technical defects in the pleadings. 2 Cal.Jur. p. 257 et seq.; Reynolds v. Hook, 109 Cal.App. 226, 292 P. 1000; Payne v. California Union Fire Ins. Co., 129 Cal.App. 582, 19 P.(2d) 40; Starkweather v. Eddy, 87 Cal.App. 92, 98, 261 P. 763.

[4,5] Another contention of appellants is that plaintiff was not a creditor on April 11, 1930, date of alleged fraudulent conveyance, because on said date there was no indication that the pending specific performance suit would terminate in a money judgment as rendered on July 21, 1930. While ordinarily one asserting that a conveyance is fraudulent must show that he was a creditor of the debtor at the time of transfer (Haller v. Haller, 102 Cal.App. 370, 373, 283 P. 94), it is not necessary that the claim at said time be reduced to judgment. Here plaintiff's claim was good and valid in 1929 when the specific performance suit was filed, and the money judgment thereafter rendered constituted no more than a judicial determination of the validity of said existing claim. Chalmers v. Sheehy, 132 Cal. 459, 64 P. 709, 84 Am. St.Rep. 62; Benson v. Harriman, supra, 55 Cal.App. 483, at page 490, 204 P. 255; Schwartz v. Brandon, 97 Cal.App. 30, 37, 275 P. 448; McKinney v. Wright, 105 Cal. App. 401, 407, 287 P. 506.

[6,7] Appellants' next point, that defendant Bell was not insolvent at time of

the transfer, is without merit. As stated above, it is not always necessary to show that a debtor has been stripped of all other assets in order to set aside a fraudulent transfer. Intent to defraud, not present insolvency, is the controlling element in these cases. Furthermore, on trial of this action it was stipulated that execution on the \$4,500 judgment was returned unsatisfied. The return of an execution nulla bona establishes a prima facie case of insolvency. *Ohio Elec. Car Co. v. Duffet*, 48 Cal.App. 674, 192 P. 298. The court found, on sufficient evidence, that the property conveyed by Bell to Sidwell was the only property out of which the judgment could be satisfied, and that it was deeded with intent to defraud plaintiff as creditor.

Appellants next argue, under several headings, the question of sufficiency of the evidence to support the findings and judgment, particularly the finding that there was no consideration for the transfer. The chief witnesses for plaintiff were defendants, called under section 2055, Code of Civil Procedure. They testified to a consideration growing out of an agreement between them whereby defendant Sidwell had improved the property in return for his mother's promise to deed it to him. But the trial court was privileged to discredit this testimony. At most it created a conflict of evidence, and there was a sufficient showing in support of the findings and judgment. *McKinney v. Wright*, *supra*; *Fross v. Wotton*, *supra*. Defendant Sidwell testified as follows:

"Q. Was any time set when she was to deed you this? A. Well, at that particular time I was having domestic trouble and so forth, and I didn't desire to have the deed in my name.

"The Court: How did she happen to give it to you in April? A. We had just postponed it from time to time, and she was sued on a specific performance and got in trouble with Mrs. Adams, and when it came up she could not handle it on account of her hearing.

"The Court: She decided because the suit was brought against her to fulfill the promise that she made to you before? A. Yes.

"By Mr. Eddie: * * * You knew all about the suit that your mother had with Mrs. Adams? A. Yes."

After making the deed, defendant Bell continued to reside on the property with defendant Sidwell.

[8,9] Lastly, appellants claim that the action was barred by section 338, subd. 4, Code of Civil Procedure, which prescribes a limitation of three years for the commencement of "(4) An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." In their brief the point is barely stated, without argument. Ordinarily, such cause of action would accrue on date of judgment, but it has been held that, if the creditor knows nothing about the fraudulent conveyance, the cause (in the absence of laches) does not arise until he discovers the fraud by which his rights have been invaded. *Marshall v. Buchanan*, 35 Cal. 264, 95 Am.Dec. 95; *Brown v. Campbell*, 100 Cal. 635, 35 P. 433, 38 Am. St.Rep. 314; 76 A.L.R. 866. Plaintiff states that the facts on which this case is founded were not disclosed to her until return of the execution unsatisfied. True, she failed to allege the circumstances surrounding discovery of the fraud, but this defect in the pleading (*Graham v. Los Angeles First Nat. Trust & Sav. Bank*, 3 Cal.(2d) 37, 43 P.(2d) 543, and cases therein cited) evidently escaped the notice of appellants. Had appellants raised the point in any way at the trial, the trial court would have had an opportunity to permit plaintiff to amend her complaint. Furthermore, appellants did not plead laches nor claim that there were facts which should have put plaintiff on notice at the time the \$4,500 judgment was entered. Appellants did set up the statute of limitations by their answer, but it was not made an issue on the trial. No evidence was received on the subject nor is the matter mentioned in the findings. Hence, in such state of the record, the subject will not be considered on appeal. *McDonald v. Bear River and Auburn Water & Min. Co.*, 13 Cal. 220; *Vassault v. Seitz*, 31 Cal. 225, 226, 229; 16 Cal.Jur. 638-640.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; LANGDON, J.; CURTIS, J.; THOMPSON, J.

6 Cal.2d 14

PEOPLE v. GOSDEN.

Cr. 3897.

Supreme Court of California.

April 1, 1936.

As Amended April 30, 1936.

1. Criminal law  1159(3)

Supreme Court cannot disturb jury's determination of conflicts in evidence, if supported by any substantial evidence.

2. Homicide  253(1)

Evidence held sufficient to support conviction of first-degree murder.

3. Homicide  166(12)

Evidence of defendant's first wife's death from strychnine poisoning and insurance of her life with defendant as beneficiary held admissible in trial for murder of his second wife in same way to show his motive and knowledge of effect of strychnine on human being, though first wife died almost seven years before second wife's death.

4. Homicide  166(7)

Evidence of defendant's illicit relations immediately after his wife's death with girl whom he contemplated marrying held admissible in trial for murdering wife to show his lack of affection for deceased and motive for killing her.

5. Criminal law  1035(3)

Defendant's failure to object at trial to court's comments on evidence as part of instructions to jury did not preclude him from taking advantage of errors therein on appeal (Code Civ.Proc.   647; Const. art. 1,   13, and art. 6,   19, as amended in 1934).

6. Criminal law  811(5)

Constitutional amendment, authorizing court to make such comment on evidence and any witness' testimony and credibility as he deems necessary for proper determination of case, permits him to single out individual witness and comment on latter's testimony (Const. art. 6,   19, as amended in 1934).

7. Criminal law  811(2)

Trial court's statements to jury in husband's trial for murdering his wife by strychnine poisoning that defendant's innocent purpose in signing wife's name to life

insurance application had "not to my mind been satisfactorily explained," that his explanation of his purchase of strychnine did not "appeal to my mind as reasonably consistent with an honest mind," and that testimony of defendant's mother might be viewed in light of her interest in case, held within court's constitutional power to comment on evidence and witness' credibility (Const. art. 6,   19, as amended in 1934).

8. Criminal law  811(5)

Trial court's statement to jury that he saw no reason for disbelieving certain witnesses for prosecution held within his constitutional power to comment on witnesses' credibility (Const. art. 6,   19, as amended in 1934).

9. Criminal law  762(5)

Trial court's comments to jury in husband's trial for murdering his wife by strychnine poisoning that defendant's innocent purpose in signing wife's name to life insurance application had not been satisfactorily explained and that his explanation of his purchase of strychnine did not appeal to court as reasonably consistent with honest mind held not improper as expressions of court's opinion as to defendant's guilt (Const. art. 6,   19, as amended in 1934).

10. Criminal law  756

Trial court's comments on evidence in husband's trial for murdering his wife as to whether she died from strychnine poisoning administered by defendant or committed suicide after calling attention to medical testimony for and against defendant as to cause of wife's death held not erroneous as not giving adequate consideration to testimony in defendant's behalf (Const. art. 1,   13, and art. 6,   19, as amended in 1934).

11. Homicide  282½

Jury's exclusive right to fix punishment of one convicted of first-degree murder at either life imprisonment or death is not arbitrary right to be exercised without reference to or independently of evidence (Pen. Code,   190).

12. Criminal law  768(4)

Trial court's statements to jury that if they found defendant guilty of first-degree murder they should consider all evidence to determine whether any circumstances or reasons existed for exercise of their discretion

to relieve defendant from extreme penalty, but that court had been unable to find any, held proper as purely comment on evidence, justified by constitutional amendment (Pen. Code, § 190; Const. art. 6, § 19, as amended in 1934).

In Bank.

Appeal from Superior Court, Alameda County; Frank Ogden, Judge.

Louis N. Gosden was convicted of murder in the first degree, and he appeals.

Affirmed.

Melvin M. Belli, William Clecak, and J. R. Carlstrom, all of San Francisco, for appellant.

U. S. Webb, Atty. Gen., Seibert L. Sefton, Deputy Atty. Gen., and Earl Warren, Dist. Atty., Charles D. Wehr, Asst. Dist. Atty., and Warren Olney III, Deputy Dist. Atty., all of Oakland, for the People.

CURTIS, Justice.

The appellant by the verdict of a jury was found guilty of murder in the first degree without recommendation for leniency and was by the court adjudged to suffer the death penalty. From this judgment and also from the order denying a new trial, he has appealed.

The indictment against the appellant charged him with the murder of Laura Gosden on the 20th day of November, 1934. Laura Gosden at the time of her death was the wife of appellant. They were married October 7, 1930, about four years before the death of the wife, and at the time of her death they with their daughter Joyce, born during the first year of their marriage, were living in the city of Oakland. No accusation was made against the appellant charging him with his wife's death until over three months thereafter, when the indictment in this case was presented on the 5th day of March, 1935, charging him with being criminally responsible for her death. On February 26, just prior to the filing of the indictment, the wife's body was exhumed and examination of the contents of her stomach was made, and the autopsy physician, Dr. Gertrude Moore, making said examination, reported the presence of traces of strychnine in the stomach of the deceased wife. At the trial of the action it was further shown that appellant on September 27, 1934, had purchased strychnine

from a local drug store under the assumed name of L. N. Larsen. The appellant at the time of the purchase gave a fictitious address to the druggist. The druggist's register showed that the purpose of his purchase of the poison was to "kill a kitty." At the time of his arrest appellant first denied the purchase of the strychnine, but later admitted that he purchased the same for the purpose of killing rats on his father's home at Sunnyvale. He testified at the trial that he used the strychnine to exterminate rats at his father's home, but that he did not tell either his father or mother at the time that he was attempting to exterminate rats on their place by the use of poison. The father and mother, however, testified that the rats at their place disappeared about the time the appellant stated that he had put out the poison for the purpose of killing them. A short time after appellant's arrest a small bottle, corresponding in size and shape with the bottle in which the druggist sold the strychnine to appellant, and in which there had been strychnine, was found under appellant's house. Appellant testified that his wife knew of his purchase of the poison and had access to it after its purchase up to the time of her death. According to his testimony, on the day of her death she was in usual health but became ill about 7 o'clock in the evening. She went into the bathroom and would not let him come in. At about 10:30 o'clock she said she was getting worse. Appellant suggested that he get a doctor but she would not let him. A little later in the evening the appellant went for a doctor but returned without one, stating that the stores were all closed at that hour of the night. The Gosdens had no telephone in their home and evidently appellant wished to have it appear that he endeavored to find a telephone at some of the nearby stores to be used in telephoning for a doctor. A Mrs. Gonsalves, who lived next door to the Gosdens and whose home was just across the driveway from that of the Gosdens, testified that she went into her bathroom at about 11 o'clock the night Mrs. Gosden died. The window of her bathroom faced the window of the Gosdens' kitchen. From her window, she saw appellant and his wife in the kitchen. She could hear indistinctly their conversation. After appellant returned from his unsuccessful search for a doctor, which was about 11 o'clock, Mrs. Gonsalves heard Mrs. Gosden tell her husband to go across

the street to the Cereghinos and 'phone for a doctor. Again she told him to hurry and get a doctor. The appellant left the house, but instead of going for a doctor stood outside under the kitchen window listening to the groans and cries of his wife. He walked back and forth in the shadow of the house, but in plain view of Mrs. Gonsalves, for about an hour. During this time he made no effort to get a doctor, although he could hear his wife's crying and her statements that she was dying. Finally the wife, about 1 o'clock, called for Mrs. Gonsalves and the latter, in response to the call, went over to the Gosden home. Immediately on hearing this the appellant went into his house and said to his wife: "What did you want to bother that woman for?" and his wife replied that she had to have somebody. The appellant then left the house and went across the street to the Cereghinos and told Mr. Cereghino to telephone for a doctor. In response to Mr. Cereghino's call his family doctor, Dr. Ream, arrived at the Gosden's house in about ten minutes. Dr. Ream found Mrs. Gosden on the kitchen floor. He remained with her until the time of her death, which occurred about one-half hour after his arrival. The evidence before us indicates that the death of Mrs. Gosden was due to strychnine poisoning.

As a motive that appellant murdered his wife, the following state of facts was shown: Appellant was a plumber by trade. He had made a fair living at his trade until a few months before the death of his wife. As a result of being out of employment, his financial resources were at a low ebb. When he lost his position in August, 1934, his bank account had been reduced to slightly over \$50. Notwithstanding the condition of his finances at that time he took out two policies of insurance on September 5, and one on September 8, 1934, paying therefor in premiums the sum of \$19.75. These policies were all upon the life of the wife, with appellant as the beneficiary. Two of these policies were payable in case of accidental death, and the other, as we understand from the evidence, was payable in the event of death due to natural causes. Two other policies of insurance were also taken out at the same time upon the life of appellant with his wife as beneficiary. There is some uncertainty in the evidence as to whether Mrs. Gosden knew, or at least realized, that any of these policies was

issued upon her life, or that she signed all three, or any, of the applications for said policies. This question is not of any material importance, as we view this case. The fact remains that appellant either with or without the knowledge of his wife procured policies of insurance upon her life payable to himself as beneficiary, and these were secured only a short time before the death of his wife. On the day of his wife's death the appellant called on an undertaking company and ordered a \$500 funeral for his wife, offering as evidence of his ability to pay the cost of the funeral first one and then the other of the two accident policies, which were rejected by the undertaker for the reason that the policies were payable only in case of accidental death, and the death certificate showed death was due to pneumonia and not to accident. It was suggested that an autopsy be performed to show that death was due to ptomaine poisoning as contended by appellant, but upon discovery that death by poisoning was not covered by the policy that idea was abandoned.

On the day his wife died the appellant procured Lydia Sanborn, a girl about seventeen years of age, ostensibly to take care of his daughter, Joyce. He first called for Lydia Sanborn at 7 o'clock in the morning, and not finding her at home, went again later in the day to the place where she was living and arranged for her to come to his home and care for his young daughter. The inference is quite strong that appellant was on at least friendly terms with Lydia Sanborn before the death of his wife. Lydia Sanborn went with appellant and lived at his home and at other places, taking care of his young daughter and performing other domestic duties. The appellant admits that he had sexual intercourse with her within a week after his wife's death. They lived together thereafter apparently as man and wife until Lydia, who was only seventeen years of age, was taken into custody by the juvenile authorities and the appellant was charged with contributing to her delinquency.

The evidence also disclosed the fact that the appellant had been married prior to his marriage with Laura Gosden. His first marriage was in 1927 to a girl seventeen years of age named Vivian Taylor. On January 16, 1928, Vivian died suddenly under circumstances that strongly indicated that her death was due to strychnine poisoning. Appellant a week prior to her

death had procured a policy of insurance upon Vivian's life payable to himself as beneficiary. He attempted to collect the amount called for by this policy after her death, but was informed that he could not do so, as there had been no medical examination of Vivian as required by the policy.

There were also admitted in evidence two prior unsuccessful attempts by appellant to take out policies of life insurance upon the life of his mother with himself as beneficiary. These attempts to insure his mother's life were made after the death of Vivian and before the death of Laura Gosden. Both failed for the reason that the appellant gave a fictitious address for his mother in his application for such insurance. The evidence indicates that the mother had no knowledge of the making of either of these applications for insurance upon her own life.

Among the grounds for reversal of the judgment assigned by appellant is that the evidence is not sufficient to justify his conviction. We will first discuss this ground before taking up the assignments which relate to purely questions of law, for the reason that a clear understanding of all these facts in the case will better enable us to decide whether the trial court correctly applied the law to the factual situation presented to him by the evidence in this case.

[1] In stating the facts set forth above, we have followed to a large extent the evidence produced by the prosecution. This evidence is not entirely uncontradicted. On the other hand, the appellant has entered a more or less vigorous denial to many of the statements made by the witnesses on behalf of the prosecution. These conflicts in the evidence have been by the jury resolved in favor of the respondent, and under these circumstances this court cannot disturb the jury's determination if supported by any substantial evidence. As this case involves the life of the appellant, we feel that some discussion should be made of those facts and circumstances which he relies upon to overcome the evidence of the prosecution.

[2] Appellant admits his former marriage with Vivian Taylor and that she died about six months after their marriage. He claims she was not poisoned but died of double pneumonia, as was shown by the death certificate issued by the attending physician. This same physician testified at

appellant's present trial and admitted that he issued a death certificate in which he stated that the cause of Vivian Gosden's death was double pneumonia, but that after learning more of the facts and circumstances surrounding her death was of the opinion that he was in error in issuing said death certificate, and that he was of the opinion that Vivian Gosden's death was caused by strychnine poisoning. While appellant admits he procured life insurance on the life of his wife Vivian about a week before her death, he claims that his wife knew of such insurance and consented to the same being issued upon her life. As we view the action of the appellant at that time, the fact which weighs against him is not that he surreptitiously procured insurance upon his wife's life, but that he had in fact insured her life with himself as the beneficiary just prior to her death, and that upon the very day of her death, which was apparently from the effects of strychnine poisoning, he took steps to collect this insurance. These facts would tend to show a motive on appellant's part for taking his wife Vivian's life. Appellant makes the claim that when he insured his wife Laura's life, she was fully cognizant of that fact, and that appellant at the same time insured his own life making his wife beneficiary under the policy. Conceding appellant's claim in this respect to be true, and there is substantial evidence to support it, yet the fact stands out that appellant at the time of the death of his wife Laura had insurance on her life which he endeavored to collect immediately upon her death. Appellant testified at the trial that he purchased strychnine from a neighboring drug store about one month prior to his second wife's death and that the purchase was made under the assumed name of Larsen. He claims that his wife knew of the purchase and that he purchased the poison under an assumed name at her request in order, so he says she stated, that they might not get into any trouble regarding the purchase of poison. While this was the testimony of the appellant given at the trial, immediately after or at about the time of his arrest, in a statement made to the district attorney, he denied purchasing any strychnine at or about the time of his wife's death under the assumed name of Larsen, or under his own or any other name. It clearly appears that it was not until he was confronted with the absolute proof of such purchase and the finding of the empty bot-

tle under his home that he admitted that he bought the strychnine and gave as a reason for purchasing it the extermination of rats on the parents' place at Sunnyvale. There can be no criticism of the implied finding of the jury that the appellant purchased the strychnine for an ulterior purpose. The story told by the appellant of events transpiring during the evening immediately preceding his wife's death differed materially from that set forth herein in the statement of facts. Appellant admits that his wife took violently ill about 7 o'clock in the evening; that he wanted to go for a doctor, but that she refused to permit him to do so; that he remained with her until around 11 o'clock, when he went out in search of a doctor and endeavored to find a telephone in some of the stores nearby; that most of these were closed and in one of them not closed he was informed that there was none in that particular store. He produced at the trial a proprietor of a store in the neighborhood who testified that some man inquired for a telephone at his store at about the time the appellant stated he was out searching for a doctor, but this witness could not identify the appellant as the man who made the inquiry. Appellant, so he testified, then went back to his wife and eventually went out across the street to Mr. Cereghino and had him telephone for a doctor. Appellant denied that he spent an hour or any time at all walking between his house and that of Mrs. Gonsalves, as testified to by Mrs. Gonsalves. This statement of the appellant, particularly that in which he denies that he spent an hour along about midnight just outside of his house and between his house and that of Mrs. Gonsalves, is directly contradicted by the testimony of Mrs. Gonsalves, and his failure to call a doctor for his wife until almost 1 o'clock, and then only after his wife had called to Mrs. Gonsalves. It is not satisfactorily explained by anything contained in his evidence concerning his actions on that evening. One of the first statements made by the doctor called to attend his wife was to censure the appellant for his failure to call him earlier in the evening. In behalf of the appellant there was evidence introduced both by himself and other witnesses that his wife Laura was despondent for some months prior to her death and threatened to take her own life. In January just prior to her death she had undergone an operation in which she had both breasts removed.

She complained that by reason of the operation she was not only disfigured, but that she would be unable to nurse a baby again in case one was born to her. There is evidence that she was then pregnant, or thought she was, and was taking pills to relieve her condition. As a result she expressed herself, so some of the witnesses testified, as having tired of life and being more than willing to die. This evidence is not uncontradicted. On the other hand, it was shown in rebuttal that his wife was not despondent over her condition; that her breasts were normal in size and shape; and that she was not in a pregnant condition. The ultimate determination of the weight of this evidence, both for and against appellant was with the jury and we cannot say that it failed in its duty by disbelieving, as apparently it did, the story of appellant and his witnesses. Upon the facts before the jury as shown by the record, it cannot be reasonably claimed that the verdict is not supported by sufficient and substantial evidence.

[3] Turning now to the questions of law raised by appellant, the first contention made is that the trial court erred in admitting evidence of the death of appellant's former wife, Vivian Taylor Gosden. It is not necessary to repeat the evidence to show the similarity of the circumstances surrounding the deaths of appellant's two wives. This evidence tended to show that each died of strychnine poisoning, each was insured with the appellant as the beneficiary, and in each case the appellant attempted immediately upon the death of the wife to collect the insurance upon her life. The evidence as to the death of the first wife and the fact that her life was insured with the appellant as beneficiary was properly admitted to show the motive of appellant in the murder of his second wife. *People v. Northcott*, 209 Cal. 639, 652, 289 P. 634, 70 A.L.R. 806. It was also admissible to show knowledge on the part of the appellant as to the effect of administering strychnine to a human being. The fact that he was fully cognizant at the time of the circumstances surrounding the death of his first wife from the effects of strychnine administered to her tended to show that he had a knowledge of the symptoms and fatal effects of strychnine poisoning, and with this knowledge he made no attempt to procure a doctor to relieve his second wife until the administered poison had brought her to the

brink of death. In support of the admissibility of this evidence, we would cite the following excerpt from the opinion in *People v. Morani*, 196 Cal. 154, 159, 236 P. 135, 137: "The evidence was therefore relevant for the purpose of showing knowledge as an element of criminal intent. In this view of the case, the remoteness in point of time of the previous offense is of no material consequence. If the defendant acquired such knowledge three and one-half years previously under the circumstances here shown in evidence it is not at all likely that he had forgotten it in the interim. Where the evidence of another offense is admissible and relevant for the purpose of showing knowledge as an essential element of criminal intent, the remoteness in point of time of such other offense may go to the weight of the evidence, but not to its admissibility." Appellant contends that in this case the remoteness in point of time of the death of his first wife, which was almost seven years before the death of his second wife, renders the evidence of the previous crime inadmissible in the present action. As stated by the language just quoted, the remoteness of the first offense only goes to the weight and not to the relevancy of its evidence. The evidence shows that the appellant, if not present at the death of his wife Vivian, knew that she died in convulsions of the most distressing and harrowing nature, evidently the result of strychnine poisoning. It is not probable that he had forgotten the scene surrounding her death, although seven years intervened between that event and the death of his second wife.

[4] Appellant also assigns as error the admission in evidence of his relations with Lydia Sanborn immediately after the death of his wife Laura. In the case of *People v. Smith*, 55 Cal.App. 324, 335, 203 P. 816, 821, the court declared that "no rule is more firmly established than that, upon the trial for murder of husband or wife, evidence tending to show illicit relations of the accused with another is admissible to show lack of love and affection for the defendant's lawful spouse." While in that case the evidence showed that the illicit relations occurred prior to the time the accused was alleged to have murdered his wife, we see no reason why the same rule should not apply where the evidence showed that the illicit relations took place immediately after the crime was commit-

ted. In *Pierson v. People*, 79 N.Y. 424, 435, 35 Am.Rep. 524, evidence was held competent as showing motive which showed that the defendant on trial for the death of the husband was married to the wife of the deceased within one week after the husband's death. In the case before us appellant was acquainted with Lydia Sanborn during the lifetime of his wife Laura. Just how intimate this acquaintance with her was does not clearly appear. But he admits that when he first had improper relations with her, only a week after his wife's death, he was interested in her to such an extent that at least in his own mind he contemplated making her his wife. It may reasonably be inferred from this admission that his interest in Lydia Sanborn antedated the death of his wife Laura. This evidence not only showed lack of love and affection for his wife Laura, and therefore he was not unwilling to see her die, but it showed a motive for him to put her away that he might marry another.

[5] At the conclusion of the argument of this case before the jury, the trial court, as a part of his instructions to the jury, made certain comments on the evidence in pursuance of the authority conferred upon trial courts by the recent constitutional amendments. Section 13 of art. 1 and section 19 of art. 6.

The Attorney General raises the objection that appellant is foreclosed from taking exception to the comments of the court upon the evidence for the reason that he failed to object to the court's comments at the time they were made or at any time during the trial of said action. As stated before, the comments of the court, which the appellant claims trespassed upon his legal rights, were made just before the case was submitted to the jury and as a part of his instructions to the jury. By section 647 of the Code of Civil Procedure, the giving of an instruction, although no objection to the instruction was made, is deemed to have been excepted to. Section 19 of article 6 as now in force reads in part as follows: "The court may instruct the jury regarding the law applicable to the facts in the case, and may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the case." Evidently this section of the Constitution contemplated that comments on the evi-

dence might be given by the trial judge in the same manner and as a part of the instructions in the case. When so given, it is not necessary for the party whom they may affect adversely to object to them. They then come within the terms of said section 647 of the Code of Civil Procedure and are deemed to have been excepted to. As the comments of the trial judge in this case were given along with and as a part of the instructions to the jury, the appellant is not precluded from taking advantage of any errors, if any were made, contained therein by his failure to object to them at the trial of the action. The case of *People v. Bishop*, 134 Cal. 682, 685, 686, 66 P. 976, and other California cases cited in respondent's brief and relied upon in support of the claim that appellant, by failure to except to the court's charge, is precluded from raising any objection to the comments of the court contained in the instructions to the jury, are not in point, as for instance in the *Bishop Case*, on appeal the acts of the court which were claimed to be erroneous were made during the progress of the trial, without objection by the party complaining and without any exception having been made thereto.

[6] Appellant's first criticism of the court's comment is that the trial judge went outside the record, singling out individual witnesses and expressing an opinion as to their interest. We find no instance wherein the trial court to any appreciable extent went outside of the record in commenting upon the testimony of any witness. The right of the court to single out any individual witness in commenting upon his testimony seems to be expressly given by the Constitution which, as we have seen, provides that the court may make such comment on the evidence and the testimony and credibility of any witness as in his opinion is necessary for the proper determination of the case. It is true there are decisions of this court, rendered prior to the adoption of said amendment, and in other jurisdictions, which hold that the court may not single out an individual witness and direct its instructions to the witness mentioned. But if we are to give full effect to the Constitution as it now is in force and which expressly gives the court the power to comment upon the testimony of "any witness," we must hold that a new rule of procedure has been engrafted onto the

jurisprudence of this state which permits the court to single out an individual witness and comment upon his testimony, which power the court did not possess prior to the recent amendment to the Constitution.

[7] The trial court in the exercise of its recently acquired power called attention to the evidence of the appellant in signing his wife's name to an application for insurance and stated that the innocent purpose of the appellant in so doing had "not to my mind been satisfactorily explained." The court further referred to the purchase of strychnine by appellant and stated that appellant's explanation of that purchase did not "appeal to my mind as reasonably consistent with an honest mind." The court also referred to the testimony of appellant's mother regarding the knowledge of Laura Gosden as to insurance on her life and stated that the testimony of the mother "may be viewed in the light of the witness' interest in the case." Appellant contends that these comments were beyond the court's powers in that they expressed an opinion as to the interest of these witnesses in the result of the case on trial. In the case of *Reagan v. United States*, 157 U.S. 301, 310, 15 S.Ct. 610, 613, 39 L.Ed. 709, we find the rule upon this subject aptly expressed. After referring to the fact that it was beyond the power of the court to even indirectly instruct the jury to disbelieve the defendant simply because he was the defendant, the court goes on to say: "On the other hand, the court may, and sometimes ought, to remind the jury that interest creates a motive for false testimony; that the greater the interest the stronger is the temptation; and that the interest of the defendant in the result of the trial is of a character possessed by no other witness, and is therefore a matter which may seriously affect the credence that shall be given his testimony." Under this rule as announced by the Supreme Court of the United States, the comments of the trial court regarding the testimony of the appellant and that of the mother and as to their interest in the case was well within the power given him by the Constitution.

[8] Appellant also complains of the comments of the court in regard to the evidence of certain witnesses of the prosecution where the trial judge states that "I see no reason for disbelieving them." This criticism is squarely answered by the pro-

visions of said section of the Constitution which gives to the trial judge the power to comment upon the "credibility of any witness."

[9] It is further contended by appellant that the power to comment upon the evidence gives the court no right to express an opinion upon the guilt of the accused. We have carefully examined the comments of the court as set forth in the record of the case and find no instance wherein it either directly or indirectly expressed its opinion that the appellant was guilty. It is true in the court's comment it questioned appellant's innocent purpose in signing his wife's name to the applications for insurance, and further commented upon appellant's explanation of his purpose in purchasing strychnine, but in neither instance did the court express any opinion as to appellant's guilt or innocence of the charge against him. It was the right of the court to make such comment upon the testimony and credibility of the appellant as in its opinion was necessary for the proper determination of the case, and when it questioned appellant's explanation of his purpose in signing his wife's name to the applications for insurance and of his purchase of the strychnine, it did no more than comment upon the credibility of appellant as a witness. Appellant relies upon the case of *United States v. Murdock*, 290 U.S. 389, 54 S.Ct. 223, 225, 78 L.Ed. 381, where the court held that the trial court erred in giving an instruction reading in part as follows: "The court feels from the evidence in this case, that the Government has sustained the burden cast upon it by the law and has proved that this defendant is guilty in manner and form as charged beyond a reasonable doubt." The comment of the court in that case was so radically different from anything found in the comment of the trial court in the instant case as to render the federal case of slight value for our present purpose. Comments like those given by the trial court as last referred to were not improper as expressions of opinion as to the guilt of the appellant. *Egan v. United States (C.C.A.)* 22 F.(2d) 776, 778.

[10] It is next contended that the court in its comments upon the evidence related only the evidence in behalf of

the prosecution and made no reference to that offered in favor of the accused. In reading the court's comment we find that in considering the various questions presented by the evidence the court set forth in practically, if not in every instance, the evidence offered by each side of the controversy. The first question the court considers is whether Laura Gosden died from the effects of strychnine poison. In its comments upon this question the court calls attention to the medical testimony both for and against the accused, as to the cause of Laura Gosden's death, and then gives its opinion as to the weight of this evidence. In the same manner the court discusses the questions as to whether the strychnine, the testimony of Mrs. Gonsalves, the relations of appellant, Gosden, herself with suicidal intent, as claimed by the appellant, by reason of the fact that she was despondent since the operation upon her breasts and as shown by entries in her diary and the testimony of the appellant and other witnesses. In the same manner the court discusses appellant's explanation as to his purpose in purchasing the strychnine, the testimony of Mrs. Gonsalves, the relations of appellant and Lydia Sanborn, the taking out of insurance upon the life of his wife Laura with himself as beneficiary, and circumstances surrounding the death of appellant's first wife Vivian after he had, or thought he had, insured her life in his favor. Upon all of these questions and, in fact, upon all matters commented upon by the court, we think adequate consideration was given to the testimony in behalf of the appellant as well as that against him.

[11, 12] As a final objection to the comments of the court, appellant takes exception to the following statement appearing therein: "In the event of your finding the defendant guilty of murder in the first degree you should consider all the evidence to determine whether any circumstances or reasons exist for the exercise of your discretion in relieving the defendant from the extreme penalty. I have been unable to find any." We will first discuss this comment without the last sentence. While instructions containing statements similar to the comment of the court just quoted (with the last sentence thereof

eliminated) have been frequently criticized, in no instance has this court held that it was reversible error to give such an instruction. *People v. Bollinger*, 196 Cal. 191, 237 P. 25. The exclusive right of the jury in a criminal case to fix the punishment of a defendant found guilty of murder in the first degree either at life imprisonment or by death, is not an arbitrary right to be exercised by it without reference to or independent of the evidence in the case. *People v. Reid*, 193 Cal. 491, 496, 225 P. 859, 861; *People v. Wolfgang*, 192 Cal. 754, 762, 221 P. 907. In each of these two cases an instruction containing the following provisions was sustained: "If the evidence shows [beyond all reasonable doubt] the defendant to be guilty of murder in the first degree but does not show some extenuating fact or circumstances, it is the duty of the jury to find a simple verdict of murder in the first degree, and leave with the law the responsibility of fixing the punishment." These authorities not only justify the comment of the court now under discussion, but the only reasonable conclusion to be drawn from that language is that the jury in exercising its discretion in fixing the punishment in a case of murder in the first degree is to be governed by a consideration of the evidence in the case. This brings us, then, to the consideration of the comment of the court above quoted including the last sentence, which reads, "I have not been able to find any." In other words, the court told the jury that it had not been able to find in the evidence that any circumstance or reason existed for the exercising of the jury's discretion in relieving the appellant of the extreme penalty. This was purely a comment on the evidence in the case and was justified under the authority given the court by the constitutional amendment to make such comments on the evidence as in its opinion are necessary for the proper determination of the case. Appellant does not contend that the comment of the court that "I have not been able to find any" is not justified by the evidence in the case, nor does he indicate any evidence which might have been considered by the jury in the exercise of its discretion in fixing the punishment at life imprisonment rather than at death, if it found him guilty of murder in the first degree beyond a reasonable doubt. The comment complained of finds express support in the case of *Commonwealth v. Nafus*, 303 Pa.

418, 154 A. 485, 486, where an instruction much more inimical to the interest of the defendant than that in the present case was approved, the court holding that, "It may be here suggested that trial judges should be very careful in expressing an opinion as to the penalty. It should not be done except in an atrocious case such as this is, and then it should be well guarded. However, it is not reversible error to express an opinion as to the punishment to be fixed, as long as the jury is left free to act regardless of that opinion." Similar views were expressed by the Supreme Court in the later cases of *Commonwealth v. Stabinsky*, 313 Pa. 231, 169 A. 439, and *Commonwealth v. Edwards*, 318 Pa. 1, 178 A. 20. The statute of Pennsylvania, giving the jury the right to fix the punishment in cases of murder in the first degree, is practically the same as section 190 of the Penal Code of this state.

The comment of the trial judge in the instant case, on the whole, was fair, temperate, and impartial. It briefly covered the salient points of the case and the evidence of each side bearing upon the several questions presented for the jury's determination. While the conclusions drawn were not favorable to the appellant in most instances, they were practically the only conclusions that could legitimately be drawn from the evidence. The statement of the court at its very beginning contained an admonition that the jury were the sole judges of all questions of fact and the credibility of the witnesses; that they were not to consider any comment of the court as binding upon them or necessarily to be followed by them; that the court did not intend or desire that the judgment of the court should be substituted for that of the jury; and that their verdict should reflect their sound judgment and not that of the court. The court reiterated in substance these admonitions at the close of his statement and again impressed upon the jury that they should consider themselves not bound or influenced against their own judgment, by any comment of the court. The trial court, in our opinion, discharged its full duty in the giving of these admonitions, and did not by its comments transgress the legal limits of the law, fixed by the present Constitution of this state, as expounded by the courts of those jurisdictions where similar laws have prevailed before the same was incorporated into the judicial procedure of our state.

As we find no reversible error in the record, we are of the opinion that the judgment should be affirmed and it is so ordered. The order denying motion for a new trial is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; THOMPSON, J.; SEAWELL, J.; SHENK, J.; CONREY, J.



6 Cal.2d 33

WATTSON et al. v. DILLON et al.

L. A. 14405.

Supreme Court of California.

April 1, 1936.

1. Appeal and error ⇨1008(1)

Question of negligence is generally one for trier of facts.

2. Judgment ⇨443(1)

Equity will vacate judgment where it appears that such judgment was rendered as result of extrinsic fraud practiced on party seeking to have it vacated.

3. Judgment ⇨435

Equity will vacate judgment on ground of mistake where its enforcement would be unconscionable and unjust to party seeking relief.

4. Judgment ⇨436

Power of equity to grant relief from final judgment on ground of extrinsic fraud or mistake is limited to cases where such fraud or mistake was not result of negligence of one seeking relief.

5. Judgment ⇨568

Serving of complaint and summons imposed on defendants duty of appearing in action and of setting up their defense, and in not doing so, defendants were concluded by judgment.

6. Judgment ⇨436

Evidence that defendant contractors, against whom default final judgment had been rendered, relied on representations of bonding company, to which complaint had been referred, that suit would be taken care

of held insufficient to justify vacation of judgment on ground that defendants were not negligent in failing to defend suit, where defendants made no effort to ascertain status of case until more than a year after service of process.

7. Judgment ⇨403

Statute providing relief before judgment becomes final where rendered against party through his neglect held not to broaden power of equity court to vacate final judgment in independent proceeding calling for exercise of equitable powers based on established rules (Code Civ.Proc. § 473; Civ.Code, § 3527).

In Bank.

Appeal from Superior Court, Los Angeles County; Dailey S. Stafford, Judge.

Suit by R. A. Wattson and another against Dan L. Dillon, Lilly Dillon, and others. Judgment for plaintiffs, and named defendants appeal.

Reversed and remanded with directions. Prior opinion, 48 P.(2d) 143.

Fred W. Heath, of Los Angeles, for appellants.

Chauncey E. Snow, Halverson & Halverson, George Halverson, and Byron Halverson, all of Los Angeles, for respondents.

SEAWELL, Justice.

Since the petition for hearing was granted by this court in the above-entitled cause, we have given further consideration to the opinion and decision as prepared and rendered by the District Court of Appeal, Fourth Appellate District, and are satisfied with the conclusion reached by said appellate court. We therefore adopt the major portions of said opinion, delivered by Jennings, J., as our own. The portions inclosed in quotation marks indicate the portions taken from the opinion of said District Court of Appeal, and together with such observations as we have added thereto, constitute our decision in the cause. The opinion follows:

"The plaintiffs instituted this action for the purpose of vacating a final judgment rendered against them in a prior action wherein they were defendants and the defendants Dan L. Dillon and Lilly Dillon were plaintiffs. Upon a trial of the action, judgment was entered in favor of plain-

tiffs vacating the former judgment. From this judgment, the above-named defendants have appealed.

"The material facts which were developed by the evidence produced during the trial and as to which there is no dispute are as follows: Prior to January 9, 1928, the plaintiff R. A. Wattson had entered into a contract with the city of Los Angeles whereby he agreed to perform certain street improvement work, a part of which consisted of the filling of certain canals in Venice. On January 9, 1928, the said plaintiff entered into a contract with the Hollywood Granite Company, Inc., whereby the corporation agreed to perform a portion of the work which the plaintiff was obligated to perform under his contract with the city. Included in the work covered by this contract was the filling of the canals. At some subsequent date the Hollywood Granite Company, Inc., entered into a contract with the Lewis Construction Company whereby the last-mentioned company agreed to perform the work which the Hollywood Granite Company, Inc., was obligated to perform under its contract with the plaintiff R. A. Wattson. On October 7, 1930, Dan L. Dillon and Lilly Dillon instituted an action in the Superior Court of Los Angeles county whereby they sought to recover damages for an alleged trespass to real property owned by them. The trespass consisted of the removal of earth from the premises of the plaintiffs. In this action R. A. Wattson, John H. Wattson, Hollywood Granite Company, Inc., and Raymond Lewis, doing business under the fictitious name of Lewis Construction Company, were named as defendants. On October 8, 1930, service of process in the suit was made on the Wattsons. After they had been served with process and on the date of service, John H. Wattson telephoned the agent of the bonding company which had executed a bond in behalf of the Hollywood Granite Company, Inc., guaranteeing to the Wattsons faithful performance of the work to be done under the contract between the Wattsons and the Hollywood Company. In this telephone conversation John H. Wattson informed the agent of the bonding company of the fact that service of process in the suit of Dillon v. Wattson had been made, that the Wattsons expected the bonding company 'to take care of it,' and was advised to send the complaint and summons to the bonding company 'and

they would take care of it.' Acting on this advice, John H. Wattson thereupon, on the same date, sent by mail the summons and complaint in the action of Dillon v. Wattson to the Standard Accident Company. In a letter which accompanied the above-mentioned documents, John H. Wattson stated that he was inclosing a copy of the complaint, referred to his telephone conversation of the same date with the agent of the company, and concluded with the following statement: 'Please be advised that we look entirely to you for protection in this matter.' Receipt of the complaint and summons was acknowledged in a letter sent to R. A. Wattson by agents of the Standard Accident Company on October 15, 1930, wherein it was stated: 'In connection with the complaint served on you we handed this claim over to our claim department and we understand they took this matter up with the Union Indemnity Company and the latter company will handle this matter.' Approximately a week or ten days after the Wattsons had been served with process, R. A. Wattson had a telephone conversation regarding the action of Dillon v. Wattson with Raymond Lewis of the Lewis Construction Company and was informed by Lewis 'that the matter had been handled satisfactorily.' No appearance was made in the action of Dillon v. Wattson by the Wattsons or by any one in their behalf. Their default for failure to make an appearance was accordingly noted on December 13, 1930. A demurrer to the complaint in said action was interposed by the defendant Raymond Lewis on October 15, 1930. On October 20, 1930, this demurrer was sustained with leave to plaintiffs to amend their complaint. So far as appears, the plaintiffs did not, however, amend the complaint as to the defendant Lewis. On May 21, 1931, evidence respecting the damage alleged to have been sustained by the Dillons was presented to the Superior Court and a judgment after default was rendered in favor of Dan L. Dillon and Lilly Dillon in the amount of \$1,575 and costs against R. A. Wattson and John H. Wattson. A writ of execution to enforce collection of the amount specified in the judgment was issued on July 2, 1931. This writ of execution was placed in the hands of the sheriff of Los Angeles county on December 30, 1931, and on December 31, 1931, the sheriff attached a bank account of R. A. Wattson under authority of the writ. This at-

tachment conveyed to the Wattsons notice for the first time that no appearance in the action had been made for them and that judgment by default had been taken against them. On January 4, 1932, they instituted the present equitable action to vacate the judgment. * * *

We are of the view that plaintiffs Wattson from the first did not give the attention to the suit filed against them which ordinarily prudent business men would give to a matter of serious concern. The filing of the suit was no surprise to them, as they had been threatened with suit and efforts to compromise the matter and settle the claim made by Dillon and his wife against them on account of the taking of their surface soil to fill up the canals which they had contracted with the city of Venice to fill to the level of the surrounding lands had failed. The Wattsons made no investigation whatever as to whether the surety bond covered their liability in the matter, nor did they consult any one upon whom they could reasonably rely for legal advice either as to their appearance in the action or as to matters of defense, but felt satisfied to pass the matter from their shoulders to the shoulders of the bonding company, which was not a party to the action.

Lewis, who was a codefendant, appeared for himself by demurrer, general and special. Notice of sustaining his demurrer with leave to amend was served October 20, 1930. No appearance was made by the Wattsons. On December 13, 1930, almost two months after decision on the demurrer of Lewis, no appearance having been made by or on behalf of the Wattsons, their default was entered. Their default was noted on December 13, 1930. Judgment was taken on May 21, 1931. On December 30, 1931, a writ of execution was issued and placed in the hands of the sheriff, who made the levy on the following day. The Dillons were unable to locate any property standing in the name of the Wattsons, free of encumbrances, until the levy herein was made.

The trial court found, and seemed to have given considerable weight to the finding, which is to the effect that the Wattsons, prior to the instant action, had referred all claims and other matters requiring attention arising out of the said subcontract with Hollywood Granite Company, Inc., and with Raymond Lewis to said bond companies and that all such

claims had been satisfactorily adjusted by said companies. It appears from the evidence that Mr. Lewis was not as prompt in his attention to the complaints that were being made by property owners against the manner in which the filling of canals was being done as he should have been, and it is not clear that plaintiffs, knowing what they knew as to his reliability in the matter, were free from blame in relying absolutely upon his promise to take the necessary steps to protect their interests. It is a fair inference from the testimony that the part taken by said bond companies and Lewis in the past was by way of compromise and settlement of damages with the property owners through their claim adjusters or officers. No claim is made that the Wattson matter ever came to the attention of an attorney until the day execution was levied. What the facts may have been in the other cases is not material to this case, as negligence will not be justified on the theory that it was the practice or custom of the actor to do the particular act in a negligent or careless manner. The court found that in accordance with the practice of said parties, plaintiffs notified said bond companies of service of process and were told by said companies that if the complaint and summons were sent to the Standard Accident Company it would be duly cared for; that if forwarded they would be attended to; that on October 21, 1930, R. A. Wattson telephoned to Raymond Lewis and was told by him that the matter had been attended to and that "there was nothing further for the above plaintiffs (Wattsons) to do." No vigilance was shown on the part of any of said parties. Neither plaintiffs nor the parties to whom they delivered the complaint and summons consulted an attorney as to plaintiffs' duties or rights, nor was any attempt made by them, or any of them, to settle or compromise the matter after service made.

"The finding which is most material to the appeal is that wherein the trial court found that 'without negligence on the part of above plaintiffs and through mistake and accident the above plaintiffs believed that said complaint and summons had been properly disposed of, and that they had no further knowledge, notice or information regarding the same until December 31, 1931, at which time a levy of execution was made against the bank account of plaintiff, R. A. Wattson pursuant to judgment in favor of said Dan L. Dillon and

Lilly Dillon.' The question which arises with respect thereto is whether or not it may be declared that the finding that respondents were free from negligence is fairly supported by the evidence which, as has been observed, was undisputed.

[1] "In giving consideration to this question, it may be remarked at the outset that the question of negligence is generally one for the trier of facts. This principle has been developed in tort actions which are based on failure to perform a legal duty known to the law as negligence. No citation of authorities is required in support of a principle so familiar and so thoroughly established. It may be assumed that the principle is applicable to the problem here presented.

"It should next be observed that the present action is one whereby respondents are seeking the aid of equity to relieve them from a judgment duly rendered against them whose enforcement they claim will be unjust and inequitable as to them.

[2-4] "In an action of this character it is settled that equity will afford relief when it is made to appear that the judgment sought to be vacated was rendered as a result of extrinsic fraud practiced on the party who seeks to have it vacated. It is equally well established that mistake furnishes a ground for equitable interposition where enforcement of the judgment would be unconscionable and unjust to the party seeking relief. *Bacon v. Bacon*, 150 Cal. 477, 491, 89 P. 317. The power of equity to grant relief from a final judgment either on the ground of extrinsic fraud or mistake is limited, however, to those cases wherein the fraud or mistake was not the result of negligence on the part of the complainant. *Jeffords v. Young*, 98 Cal. App. 400, 404, 277 P. 163.

"It is not pretended that fraud furnished the ground for seeking equitable relief in the instant proceeding. The complaint is bare of any allegation respecting fraud. No evidence tending to show that fraud was practiced on respondents was produced during the trial. No finding indicating the existence of fraud was made by the trial court. It is obvious from the allegations of the complaint and from the evidence presented during the trial that the ground for seeking relief was mistake. As above noted, the court found that through mistake and accident respondents believed that proper disposition of the process served

upon them had been made. The only mistake which the evidence indicated was present was that respondents believed that some appearance in the action wherein they were named as defendants would be made in their behalf. It must, however, be conceded that this mistake of itself would not warrant the very broad relief which they sought in the form of a decree vacating a solemn judgment duly rendered upon evidence submitted to the court. Upon respondents rested the further burden of showing that the mistake was not due to their own negligence. * * *

Conceding all that plaintiffs urge as constituting grounds for annulling the judgment, we are of the opinion that it does not show enough in the circumstances of the instant case to absolve them from the neglect and lack of vigilance of which they are guilty.

[5, 6] "The complaint served upon respondents informed them of the nature of the action. The summons notified them, that if they did not appear in the action within the time specified, the plaintiffs in said action would take judgment for the amount demanded in the complaint. The duty was then imposed upon respondents of appearing in the action and of setting up whatever defense they may have had. In default of the performance of this duty, they were concluded by the judgment. *Brum v. Ivins*, 154 Cal. 17, 20, 96 P. 876, 129 Am.St.Rep. 137. The evidence shows that their default was not noted until more than two months after they had been served with process. The evidence further shows that more than five months elapsed after default was noted before judgment was rendered. During all of this time respondents made no effort to discover what, if anything, had been done in the action. The suit was a matter of public record. It was open to inspection. The slightest exercise of diligence by respondents would have disclosed that no appearance in their behalf had been made. They made no inquiry. They put forth no effort to discover the status of the case. They consulted no attorney. They remained inactive and quiescent for more than a year after service of process and it was not until the bank account of one of them was attached by virtue of a writ of execution that they exhibited any interest in the proceedings. Under such circumstances, the following language from the decision in *Rudy v. Slotwinsky*, 73 Cal.App. 459, at page 466,

238 P. 783, 785, is apropos to the situation:

"While it is true that one seeking to set aside a judgment is not limited to the relief provided for by section 473, Code of Civil Procedure, but may, where the facts justify it, invoke the aid of a court of equity, he must, in doing so, exercise due diligence. The instant case in our opinion, however, does not present such a situation. Here, as stated, the default was a matter of public record, open to inspection at all times to the plaintiffs and their attorneys. This fact should have put them upon inquiry which would have led to the discovery of the alleged fraud in the procurement of the judgment."

"Here, also, the default was a matter of public record open to inspection by respondents. It put them on inquiry which would have immediately disclosed that they were mistaken in their belief that an appearance had been made for them in the action. The uncontradicted evidence, in our opinion, entirely fails to support the trial court's finding that respondents were free from negligence.

[7] "It should finally be observed that we are not here dealing with an application for relief under the provisions of section 473 of the Code of Civil Procedure. The provisions of that remedial statute are broad enough to relieve a party from a judgment taken against him through his neglect if the court to whom the application is addressed can discover some reasonable excuse for such neglect. The breadth of the provisions of the statute may not, however, properly be construed as an attempt to broaden the powers of a court of equity in determining its jurisdiction in an independent proceeding. The application for relief under the statute is addressed to the discretion of the trial court within a limited time and before the judgment has become final. The institution of an independent action to vacate a judgment calls for the exercise of equitable powers by an independent court based upon established rules. *Amestoy Estate Co. v.*

City of Los Angeles, 5 Cal.App. 273, 277, 90 P. 42. One of such rules which is so well established that it is denominated a maxim of jurisprudence in the Civil Code of California is the familiar principle that 'the law helps the vigilant, before those who sleep on their rights.' Section 3527, Civ.Code."

In conclusion we may add that there is no claim made that the defendants are in any way responsible for plaintiffs' default. No collusion or fraud is chargeable to defendants. The facts seem to present a clear case of negligence on the part of plaintiffs to give proper attention to a matter which the law exacts of every person upon whom legal service is made. The failure of plaintiffs to appear in the action was not occasioned by a mistake of law or by mistaking one thing for another or by misrepresentation. It was a case of neglecting to do a necessary act. There is no question of illness on the part of plaintiffs or an attorney whom they had engaged to attend to the matter, which has in proper cases been deemed sufficient cause to relieve the defaulting party. The grounds upon which a judgment legally entered may be set aside must be of a very substantial character. A stronger showing is required to justify the annulment of a judgment than is required for the opening of a default for the relief provided by section 473, Code of Civil Procedure. The showing made by the plaintiffs as to a meritorious defense are not so persuasive as to justify a departure from the basic rules of law which must be observed to the end that the stability of judgments may not be weakened by a growing tendency to overturn them for slight causes.

For the reasons stated, the judgment is reversed and the trial court is directed to correct its findings in accordance with the views herein expressed and to enter judgment in favor of appellants.

We concur: WASTE, C. J.; THOMPSON, J.; SHENK, J.; CURTIS, J.; CONREY, J.; LANGDON, J.

GARRATT v. BAKER et al.

S. F. 15450.

Supreme Court of California.

March 31, 1936.

Rehearing Denied April 30, 1936.

1. Gaming ☞11

Partners' agreement, that on death of any of them survivors would pay deceased's widow stated sum monthly during her life, held not void as wagering contract against public policy, though only one person benefited thereunder.

2. Contracts ☞187(1)

Partners' agreement, that on death of any of them survivors would pay deceased's widow stated sum monthly during her life, held valid contract for third party's benefit, though not naming and identifying beneficiary as individual.

3. Contracts ☞187(1)

Contract may be enforced by third party showing that he is member of class of persons for whose benefit it was made.

4. Contracts ☞338(2)

Pleading ☞216(1)

Defense of rescission of contract, sued on by third party beneficiary, whose complaint contains nothing from which rescission may be inferred, must be pleaded and cannot be considered on demurrer to complaint.

5. Contracts ☞56

Three partners' mutual promises to pay widow of any partner who died stated sum monthly during her life held sufficient consideration for such agreement, though surviving partners could gain nothing thereby.

6. Frauds, statute of ☞158(1)

Contracts within statute of frauds are presumed to be in writing.

7. Frauds, statute of ☞150(2)

Objection that agreement sued on was oral and not to be performed during promisor's lifetime cannot be raised by demurrer to complaint not showing that it was oral, in view of presumption of writing in case of contracts within statute of frauds.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by May A. Garratt against A. H. Baker and another. Judgment for defendants, and plaintiff appeals.

Reversed, with directions.

For prior opinion, see (Cal.App.) 43 P. (2d) 828.

Charles H. Sooy, of San Francisco, for appellant.

T. C. Van Ness, Jr., and H. B. M. Miller, both of San Francisco, amici curiæ.

Charles Dalmage Sooy, of San Francisco, amicus curiæ for Abe Hart, Cornelius D. De Iongh, and J. L. Pixley Co.

Christopher M. Bradley, of San Francisco, for respondents.

LANGDON, Justice.

The plaintiff appeals from a judgment entered in favor of defendants after a demurrer to her complaint was sustained without leave to amend.

The allegations of the complaint are simple. Three persons, decedent Edward C. Garratt, defendant A. H. Baker, and defendant John Callahan, all married men, were engaged in business as partners. They entered into an agreement by the terms of which each agreed that in the event of the death of any one of them, the two survivors would pay to the widow of the deceased partner the sum of \$500 per month as long as they and she should live. Edward C. Garratt died November 19, 1932. Plaintiff is his surviving widow. The other partners paid the monthly sum above specified for some time, and then refused to make further payments. Plaintiff brought this action for \$4,750, the amount alleged to be in arrears.

The position of the defendants, in which the lower court concurred, was that the agreement as set forth in the complaint was an illegal wagering contract, and hence wholly void. It is also contended that it lacks consideration, is unenforceable by reason of the statute of frauds, and is neither a valid insurance contract nor a contract for the benefit of a third party. In our opinion, none of these contentions is sound.

[1] The object of the agreement seems perfectly clear and thoroughly proper. Members of a partnership, desirous of continuing the business without interruption upon the death of one of them, agree that instead of permitting the business to be

wound up and the partnership assets to be sold to meet the needs of the decedent's widow, they will undertake the personal obligation of such support. It is said that such arrangements are common, and in view of the practical advantages that are realized, there is no reason why they should not be. It is also said that insurance policies are available under which the partners may "reinsure"; that is, may secure a policy which will assure payments to the partnership sufficient to meet the obligation assumed toward the widow. It is difficult to see how a contract between partners which carries out in a satisfactory manner the object of assuring support to the widow of a deceased partner can be against public policy. It has none of the characteristics of a bet or wager. None of the "betting" partners receives the "stake"; the first widow is the only beneficiary. Nor is there anything peculiar in the fact that only one person benefits under the agreement. There were but three partners, and upon the death of a second member the partnership could not continue as such, and the object of the arrangement would fail.

[2-4] The agreement meets all of the requirements of a contract for the benefit of a third party. It was expressly for the benefit of one of the three possible surviving widows, and it was not necessary that the beneficiary be named and identified as an individual. A third party may enforce a contract where he shows that he is a member of a class of persons for whose benefit it was made. *Woodhead Lumber Co. v. E. G. Niemann Investments*, 99 Cal.App. 456, 278 P. 913; *Bryan v. Banks*, 98 Cal.App. 748, 277 P. 1075. The suggestion is made that the third party beneficiary cannot recover, under the California rule, where the parties have previously rescinded the contract. There is nothing in the complaint from which rescission may be inferred, and since this defense must be pleaded (*Stanton v. Santa Ana Sugar Co.*, 84 Cal.App. 206, 257 P. 907), it cannot be considered on demurrer.

[5] It is suggested also that the agreement is void for lack of consideration, since the two surviving partners could gain nothing by it; but the mutual promises of the three partners were obviously sufficient as consideration. See *Papadakos v. Soares*, 177 Cal. 411, 170 P. 1114.

[6, 7] It is further argued that the agreement is oral, and was not to be performed during the lifetime of the promisor. It is unnecessary to determine whether this objection has any merit, for the complaint does not show that the agreement was oral, and under the settled presumption of a writing in the case of contracts within the statute of frauds the objection cannot be raised by demurrer. See *Warfield v. Basso*, 62 Cal.App. 47, 216 P. 48.

None of the objections to the agreement can be sustained, and the demurrer should have been overruled.

The judgment is reversed, with directions to the trial court to overrule the demurrer, and permit defendants, if they so desire, to answer.

We concur: WASTE, C. J.; CURTIS, J.; THOMPSON, J.; SHENK, J.; SEAWELL, J.; CONREY, J.



5 Cal.2d 687

STOLL v. STOLL et al.

Sac. 4948.

Supreme Court of California.

March 24, 1936.

Rehearing Denied April 23, 1936.

1. Principal and agent ⇨41

Although power exists to terminate agency contract for definite term, where that power is not coupled with an interest, principal is liable for damages directly caused by revoking authority of agent, contrary to right, under contract supported by valuable consideration.

2. Executors and administrators ⇨206(3)

Son who relinquished profitable employment to manage father's business until final distribution of father's estate for stipulated consideration held entitled to recover from administratrix of estate for damages resulting from termination of such contract by father's incompetency and subsequent death.

3. Husband and wife ⇨82

Where contract between father and son providing for management of father's busi-

ness by son until final distribution of father's estate was signed by wife and heirs, wife *held* liable individually to son for repudiation of such contract.

4. Insane persons 44

Where contract between father and son for management of father's business by son was terminated by father's incompetency, father's guardian *held* not liable after father's death, individually or as guardian for damages resulting from termination of contract, since son could then maintain claim against administratrix of estate.

In Bank.

Appeal from Superior Court, Sacramento County; Neal Chalmers, Judge.

Suit by Edwin P. Stoll against John T. Stoll, Jennie T. Stoll, and the Capital National Bank of Sacramento, individually and as guardian of the estate of John T. Stoll, an incompetent person, wherein Jennie T. Stoll, as administratrix of the Estate of John T. Stoll, deceased, was substituted as such administratrix as defendant in place of deceased, who died during pendency of the suit. Judgment for defendants, and plaintiff appeals.

Affirmed in part and reversed in part.

Prior opinion, 47 P.(2d) 328.

Rehearing denied; CONREY, J., dissenting.

White, Miller, Needham, Harber & Merino, of Sacramento, for appellant.

Inman & West, Downey, Brand & Seymour, Ralph H. Lewis, and Frederic R. Pierce, all of Sacramento, for respondents.

THOMPSON, Justice.

This cause was transferred to this court after decision by the District Court of Appeal, Third Appellate District, in order that we might give further consideration to the important question of whether liability for damages exists in the case of the termination of a contract for personal services for a time certain by the incompetency or death of the principal. With two or three slight changes in the text, which are noted by the punctuation, we adopt the statement of facts from the opinion of the District Court of Appeal, as follows:

"The plaintiff has appealed from a judgment which was rendered against him

pursuant to an order sustaining separate demurrers of the defendants and denying leave to amend a complaint for damages based on the termination of an employment to manage the business and properties of John T. Stoll for a definite period of time at a fixed salary.

"The complaint alleges that for many years the plaintiff had been employed as division manager of the Remington Arms Company, with headquarters at San Francisco, at a salary of \$350 a month, and that his prospect for continued services with that company was excellent. He was an experienced business manager. John T. Stoll, his father, who was aged, was possessed of a business and valuable properties at Sacramento which required the attention of an experienced manager. The family of John T. Stoll consisted of his wife, Jennie T. Stoll, who was not the mother of his children, and four sons, besides the plaintiff. John T. Stoll persuaded his son Edwin to give up his employment with the Remington Arms Company and abandon his prospects of advancement with that corporation to become the manager of his business and property at an agreed salary of \$350 a month until 'final distribution of the estate of said second party (John T. Stoll) has been made.' That contract was executed October 26, 1929. It also provided that in consideration of the employment the plaintiff should receive from the estate of his father at least his proportionate share as an heir at law. That contract was signed and approved by the wife of John T. Stoll and by each of his sons in which they specifically 'agree to be bound by the terms and conditions thereof in so far as said terms and conditions affect the rights and interest of each or any of us and each hereby agrees * * * that such employment shall continue for the period provided for in said agreement and at the compensation therein provided with all the powers, authority and duties therein provided.' * * *

"The plaintiff thereupon abandoned his employment with the Remington Arms Company and efficiently managed the property and business of his father until January, 1932, for which service he was paid the sum of \$350 a month according to the terms of the contract. On December 2, 1931, John T. Stoll was adjudged to be incompetent, and, upon proceedings duly had, the defendant, Capital Na-

tional Bank, was appointed and qualified as guardian of his estate. In the former case of Capital National Bank of Sacramento v. Stoll, 220 Cal. 260, 30 P.(2d) 411, 414," this court "held that the employment of this plaintiff, as agent, was terminated by the subsequent incompetency of John T. Stoll, under the provisions of sections 1996 and 2355, 2356 of the Civil Code. In the last-mentioned case it was specifically held that the contract, as distinguished from the mere agency which it created, remains in full force and that 'whatever right the agent may have to recover damages or to protect his expectant interest in the estate is not involved in this action.'" "We think, however, that the court was in error in declaring the contract terminated. The contract not only provides for the employment of defendant as agent, but also contains the agreement not to reduce his expectant share of the estate. If the consideration is adequate and the contract otherwise fair and reasonable, and the defendant is willing to perform and has not been guilty of any improper performance, we see no reason why this part of the agreement may not be valid and subsisting, and binding on the estate of the incompetent." Capital Nat. Bank of Sacramento v. Stoll, supra.

[1] The language quoted from our former opinion is based upon the conception that, although the power exists to terminate a contract of agency for a definite term, when that power is not coupled with an interest, yet the right to terminate is essentially different, and, where the contract is supported by a valuable consideration and the power is exercised contrary to the right, the principal is liable for the direct and proximate damages caused by revoking the authority of the agent. Thus it is said in Parke v. Frank, 75 Cal. 364, 368, 17 P. 427, 428:

"Even if, however, it should be conceded that, under the Code, the principal retains the right to revoke a power, at his option, in every case where the agent is not vested with an interest in the subject of the agency, this would not render illegal a collateral agreement whereby the principal should agree, for a consideration, not to exercise the power for a definite period, or for a reasonable time ascertainable. In case of such an agreement, if the agency is revoked by the principal, and the agent is thereby deprived of authority further to act as such, the principal is liable

in damages by reason of the breach of his promise not to recall the agency.

"Whether, therefore, it be considered that the defendant violated his contract, by refusing to make consignments to the plaintiffs, or violated it by revoking the agency he would be liable upon proper pleading. And in each case the rule of damages would be the same, that is, the plaintiffs would be entitled to recover the direct or approximate [proximate] damages sustained by reason of defendant's depriving them of the benefits of the agency."

This case has been followed by an unbroken line of authorities. For example, we find the following in Roth v. Moeller, 185 Cal. 415, 418, 197 P. 62, 63: "The effect of defendant's revocation of the agents' authority is the paramount point to be determined in passing upon the correctness of the judgment of nonsuit. Save in the case of an agency coupled with an interest, a principal has the power to revoke an agent's authority at any time before the agent has completed performance. Civ.Code, § 2356; Flanagan v. Brown, 70 Cal. 254, 11 P. 706; Parke v. Frank, 75 Cal. 364, 17 P. 427; Blumenthal v. Goodall, 89 Cal. 251, 26 P. 906; 1 Cal.Jur. p. 705. A principal may, however, curtail his right of revocation by contracting not to revoke the authority for a definite time. If the principal does so contract, he still retains the power to determine the agency, and the termination cannot be prevented by the agent, but a revocation of authority within the designated period renders the principal liable for damages for the violation of a legal right of the agent, just as in the case of any other breach of contract. Parke v. Frank, supra; Blumenthal v. Goodall, supra; Ropes v. John Rosenfeld's Sons, 145 Cal. 671, 79 P. 354; Sill v. Ceschi, 167 Cal. 698, 140 P. 949; Boehm v. Spreckels [183 Cal. 239], 191 P. 5." See, also, Brown v. National Electric Works, 168 Cal. 336, 143 P. 606.

The foregoing makes manifest what was intended by the language employed in the former opinion. It simply means that, although the agency was terminable, yet the appellant, upon proof of the consideration and his willingness to perform, was entitled to be made whole. According to the allegations, the parties deliberately (the plaintiff only after great persuasion had given up his salary and prospects) entered into the contract, and it would be unconscionable, upon proof of those facts, to

hold that plaintiff is without a remedy. The contention of respondents that the revocation was by operation of law is unavailing. In 1 Mechem on Agency (2d Ed.) p. 476, § 668, we read:

"Where, however, the transaction is more than the mere creation of a power and amounts to a mutual and binding contract of employment for a definite time, or the performance of a specific act, the effect of the principal's death upon the continuance of the contract depends upon a variety of considerations. Most contracts for personal services so evidently involve personal considerations and are so clearly dependent upon the continuance of the lives of the parties, as to be fairly subject, *where no express provision is made*, to the implied condition that the death of the principal or master as well as that of the agent or servant shall terminate the contract without liability.

"But, on the other hand, there may be contracts of employment which involve no such considerations, and contemplate merely the accomplishment of certain objects which are not dependent upon the life of the principal. Here the contract liability may survive even though the power to act may not; the contract may impose upon the representatives of the principal the obligation to renew or recognize the authority or to permit it to be exercised; and damages for the breach of the contract may be recovered against the representatives of the deceased principal if, being in a situation to permit the performance of the contract, they refuse so to recognize it." (Italics ours.)

[2] Examples and illustrations of such recoveries may be found in *Dumont v. Heighton*, 14 Ariz. 25, 123 P. 306, 39 L.R.A. (N.S.) 1187; In re *Grapel v. Hodges*, 112 N.Y. 419, 20 N.E. 542; *Wylie v. Cox*, 15 How. (56 U.S.) 415, 14 L.Ed. 753; *O'Meara v. Green*, 25 Mo.App. 198; and *Morgan v. Gibson*, 42 Mo.App. 234. It is obvious that the incompetency and the death of the principal are analogous and the right of the plaintiff determined by the same legal principle in either event. It follows from what has been said that plaintiff is entitled to maintain an action for dam-

ages as against the representative of the deceased.

[3] We may now inquire whether the action is maintainable against Jennie T. Stoll in her individual capacity. As has been pointed out heretofore, she, together with all of the heirs, agreed to be bound by the terms of the agreement and for the period provided therein. In effect, this portion of the agreement bound Mrs. Stoll and all of the heirs to take every legitimate step necessary to the complete protection of plaintiff in his contractual rights. By way of example, it may here be noted that plaintiff might have been nominated as administrator of the estate of John T. Stoll, in order to accomplish the evident purpose of the parties. Having assumed the burden of the contract and thereby induced plaintiff to enter into the contract, Mrs. Stoll may not now repudiate the obligation without being answerable therefor. The allegations of the complaint are to the effect that Jennie T. Stoll demanded that the services of plaintiff be terminated, and that she, in conjunction with the other defendants, prevented the performance by plaintiff of the terms of the contract. It follows that the demurrers of Jennie T. Stoll, individually and as administratrix, were improperly sustained.

[4] However, it is manifest that no liability attached to the defendant Capital National Bank in its capacity as a bank. Whether it was liable in its capacity as guardian of the estate is not now material to the case, for the reason that any claim against the estate of John T. Stoll must now be pressed against the administratrix of the estate. Hence the demurrers of the Capital National Bank, a corporation, and as guardian of the estate of John T. Stoll, an incompetent, were not erroneously sustained.

The judgment in behalf of the bank individually and as guardian is affirmed, but that portion which dismisses the action against Jennie T. Stoll and Jennie T. Stoll, as administratrix of the estate of John T. Stoll, is reversed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.

5 Cal.2d 730

In re SHERMAN'S ESTATE.

SHERMAN v. COHN et al.

L. A. 15425.

Supreme Court of California.

March 31, 1936.

1. Executors and administrators ⇨35(16)

Wishes of executor who resigns or has been removed for cause, and who has no beneficial interest in the estate, are immaterial and cannot be considered in proceeding for removal of coexecutor or in selection of successor of executor removed.

2. Executors and administrators ⇨35(16)

Agreement of executor that he would resign if court would remove executrix could not be considered in determining whether executrix, who was mother of deceased and his sole heir, had forfeited her right to administer deceased's estate.

3. Executors and administrators ⇨221(4)

Strict proof should be required in establishing validity of claims asserted against estate of a deceased person, especially where party asserting such claims occupied confidential relation with deceased.

4. Executors and administrators ⇨35(19)

Where proceedings by executrix for removal of coexecutor had become final by court's order removing coexecutor, such order would be considered on appeal from order removing coexecutrix in same proceeding, as supporting executrix' action as matter of law.

5. Executors and administrators ⇨35(15)

In proceeding by executrix for removal of coexecutor, evidence held to show that executrix' request for removal of coexecutor was not without reasonable justification (Probate Code, § 521; Code Civ.Proc. § 1880, subd. 3).

6. Executors and administrators ⇨35(15)

Evidence held insufficient to support removal of petitioner, who was the sole heir of her son, as executrix of the estate of her son.

7. Executors and administrators ⇨31

Where judgment removing petitioner as executrix of her son's estate was reversed and petitioner was restored to office as sole executrix, resignation of her coexecutor having been accepted, powers of special administrator ceased upon restoration of administratrix

who had duty to complete execution of will (Probate Code, §§ 466, 511).

In Bank.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Proceeding in the matter of the estate of Lowell Sherman, deceased, between Julia Louise Sherman and Morry Cohn, wherein the Citizens National Trust & Savings Bank of Los Angeles, special administrator with general powers, was impleaded. From a judgment removing Julia Louise Sherman and Morry Cohn as executors of the estate of Lowell Sherman, deceased, Julia Louise Sherman appeals.

Reversed.

Simon & Garbus, Abram Robert Simon, and Morton Garbus, all of Hollywood, for appellant.

Albert E. Sherman and Austin C. Sherman, both of Los Angeles, for respondent.

Cosgrove & O'Neil, of Los Angeles, for respondent Citizens Nat. Trust & Savings Bank of Los Angeles.

SEAWELL, Justice.

This appeal is from an order and judgment removing Mrs. Julia Louise Sherman as executrix of the last will of her deceased son, Lowell Sherman, and revoking letters testamentary theretofore issued to her in said estate matter.

Mrs. Sherman instituted proceedings by petition for the removal of her coexecutor, Morry Cohn, on April 9, 1935, and Mr. Cohn retaliated thirteen days thereafter—April 22—by filing a petition praying for her removal. Mrs. Sherman requested in her petition for removal of Mr. Cohn that she be permitted to act as the sole and only executor. Mr. Cohn rejoined by offering in writing to act as the sole executor in the event the court should remove Mrs. Sherman. The proceedings were consolidated for the purpose of hearing, and both parties (hereafter referred to as executors) were by the court's order and judgment removed from office and their respective letters testamentary were revoked. Mrs. Sherman has appealed from said order and judgment of removal and revocation, but no appeal was taken by Cohn, and the order has become final as to him.

On May 22, 1935, while proceedings were pending, Cohn filed his resignation to be-

come final upon its acceptance by the court. No action was taken on his resignation by the court until the judgment was pronounced wherein said resignation was accepted after his removal had become accomplished.

[1-3] The findings contain a recital that Cohn offered to resign as co-executor, "provided the court would appoint a disinterested administrator with the will annexed * * * in place of Julia Louise Sherman as co-executrix and Morry Cohn as co-executor." Just what materiality said finding has to the proceedings is not apparent, inasmuch as the wishes or desires of an executor who resigns or who has actually been removed for cause and who has no beneficial interest in the estate are of no consequence and should not be considered for any purpose, advisory or otherwise, in the matter of the removal of a coexecutor or in the selection of a successor of the one removed. The written resignation of Cohn was absolute and free from conditions of any kind, as it must have been to meet the requirements of a resignation. The proposition of Cohn that he would resign provided the court would remove Mrs. Sherman from the executorship was a matter that was entitled to no consideration whatever in the determination of the question as to whether the mother of the decedent, who was his sole heir under the will, had forfeited her right to administer upon his estate. An early incipient breach between the executors was widened by Mr. Cohn's action in procuring the allowance of two claims presented on his own behalf without notifying Mrs. Sherman of his intention to present them to the judge for allowance, and without informing the judge of Mrs. Sherman's objections thereto, well knowing her opposition to their allowance, and also on account of his failure to inventory or account for certain real and personal property which it is claimed was purchased with the decedent's money. Mr. Cohn's proposal to resign in the event of Mrs. Sherman's removal would have eliminated her authority to disallow his asserted claims and he would at least have gained the opportunity of securing their allowance by a single administrator appointed in accordance with his proposed plan. In all cases where real controversial grounds exist as to the allowance of claims against the estate of a deceased person the party asserting such claim should be put to his proof in estab-

lishing the validity of the same in the tribunal established for such purpose. Especially is this true where the party making the claims occupies a close confidential and business relation with the decedent, as shown in the instant case.

There never was, at any time, a question as to the estate's solvency. Practically at all times the amount of cash on hand was amply sufficient to take care of the estate's indebtedness, to say nothing of valuable real and personal property, stocks and solvent securities as assets belonging to the estate.

Mrs. Sherman was a widow at the time of her son's death, sixty-four years of age. He left no wife, children, brother or sister. The next of kin were his mother and an uncle and aunt. The mother and son resided together in a home owned by him situate in Beverly Hills, county of Los Angeles. The mother owned real property in her own right and it appears that she was fairly comfortably situated so far as finances go.

Lowell Sherman died December 28, 1934, at the age of forty-six years. He had been in poor health for a time—the duration of which does not appear in the record—prior to his demise. Evidently he was quite prominent in the motion picture industry as an actor and director and had enjoyed financial success commensurate with his prominence in motion picture circles. The appraised value of the estate, as found by the court, was \$256,235.31, and the approximate amount of creditors' claims, including federal and state inheritance taxes, federal income taxes, and expenses of administration, would be approximately the sum of \$80,000, leaving a clear balance of \$176,623.51 to be distributed solely to Mrs. Sherman. The estate, according to the statement made by the attorney for the executors, who withdrew from the case at about the time the removal proceedings were before the court, was liquid, and was practically ready to be closed. This was no doubt correct, except as to the validity of certain money claims made by Cohn against the estate and the conflicting claims of Cohn and Mrs. Sherman as to the ownership of certain securities and real property to which Cohn made claim and refused to inventory. These matters precipitated the proceedings.

Letters testamentary were issued to Julia Louise Sherman and Morry Cohn on January 30, 1935, and they entered upon the

performance of their duties. There was no serious discord until shortly before Morry Cohn presented for approval two claims against the estate, one in the sum of \$2,670.32, that sum being one-half of the proceeds of Pacific Shore Oil Company stock, property of Mr. Sherman, and the second for the sum of \$3,385.55 on account of alleged increased salary allowances made by decedent during the last few months of his life.

Morry Cohn had been in the employ of Lowell Sherman as secretary and business manager for approximately seven years prior to his death. By no means does he make definite by his testimony the amount of salary he was receiving prior to and at the time that decedent apparently surprised him by a gratuitous and exceedingly generous raise in his salary. There is evidence tending to show that he was receiving \$75 per week up to and including the larger portion of the year 1934, at which time he claims that his salary was increased to \$10,000 per year, and in addition thereto he was to receive ten per cent of the yearly gross income of decedent on all sums over and above the sum of \$125,000. His coexecutor disputed the validity of the claim for \$2,670.32, which, according to Cohn's own evidence, was at best but a gratuity on the part of the decedent, and also the second claim of \$3,385.55, claimed as increase in salary. Both claims rest upon evidence which the application of the rule of inherent improbability would subject to a severe strain. Section 1880, subdivision 3, Code of Civil Procedure, excludes a claimant from testifying in his own behalf against the estate of a deceased person. He called as his principal witness to approve both claims Wilbur D. Nichols, chief personal property appraiser of Los Angeles, and a restorer of damaged paintings, a friend of both Cohn and Sherman, who testified that he was a frequent visitor at the home of decedent; that during the latter part of March, 1934, he visited the home of Sherman and as he entered the house he heard a heated argument between Cohn and decedent. He heard Mr. Sherman, in spirited terms, say, "Well, you will," and Mr. Cohn say, "You won't" [meaning he would not accept], and he heard the names of the Mdivani boys mentioned a few times, and then Lowell Sherman left the room, saying as he left, "Well, think it over." The witness asked Mr. Cohn what all the shouting was about. Sherman returned to the room and asked

Cohn what he had decided to do about the Pacific Shore oil stock sale. Cohn said, "I don't like to do that, I don't like to take that money; I don't feel it is mine, that is rightfully yours," and Mr. Sherman said, "Well, suppose we split it and settle the deal that way." Mr. Sherman said, "What did you decide, Morry, are you going to take that?" and Cohn said, "Well, I don't feel as though I should," and Mr. Sherman said, "Well, let's split it and call it even," and Cohn said, "All right, we'll settle it that way." It is this sum which Mr. Cohn said he reluctantly consented to accept that he now seeks to enforce payment of. The witness further testified that this conversation was referred to every time he saw Mr. Sherman "from then on for the rest of the summer."

The same witness testified that he had a conversation with Mr. Sherman with respect to the salary of Morry Cohn during the latter part of July or the forepart of August, 1934. According to his story, Mr. Sherman called him to his home with respect to restoring a painting and after he had finished his work Sherman asked him what he thought he should do with Mr. Cohn in the way of a salary increase and he replied that he didn't have any say in the matter. Sherman said he couldn't get Cohn to take anything but just a nominal salary for his work and he thought he owed him a good deal more than he was paying him. Sherman asked the witness what he thought of a salary of \$10,000 a year plus 10 per cent. of his gross income over \$125,000 per year. The witness said he thought that a "pretty sweet salary," but he thought that Cohn earned it. Sherman then said he would surprise Cohn when he returned from his vacation. George H. Rudd, certified public accountant, was employed by Mr. Sherman to expert Mr. Cohn's book accounts but his report was not finished until a few days before Mr. Sherman died. Certain entries made by Cohn and favorable to his contentions, but which Sherman never saw, appear in Rudd's report. Sherman never saw the report as finally finished, as it was delivered to Mr. Cohn personally, presumably by reason of Sherman's illness. It is claimed by Mr. Cohn that said audits, except for the short period preceding Mr. Sherman's death, as progressively prepared were presented to him and that the initials "L. S." indorsed thereon were made by him. The audit of Cohn's accounts was made for the information of Sherman as to Cohn's stewardship.

The accounts of Mr. Cohn were rather indefinite in several respects and he seemed unable to give satisfactory information as to certain matters relating to his personal transactions with Sherman, about which there should be no uncertainty on the part of the manager and secretary, particularly as to the identification of the property owned by his employer as distinguished from any property claimed by the secretary. It further appears that the South Arnez drive property was bought in the name of Cohn and that at least \$2,000 of Mr. Sherman's money went into the proposition. This sum, which Mr. Cohn says was a loan, has not been repaid. There also exists a dispute between the parties as to the ownership of three hundred shares of Bancamerica-Blair stock. There is an unadjusted difference as to whether or not the estate owns the whole or a part interest in those properties, which must be determined.

The action of Mr. Cohn in procuring the allowance of his personal claims by the probate court against the estate, without giving Mrs. Sherman notice of his intention to do so, knowing full well that she strongly opposed the allowance of said claims, and thereupon making out and signing checks for the payment of the same and presenting them to Mrs. Sherman for her signature was a proceeding well calculated to engender suspicion in her mind, thereby weakening the confidential relations that should exist between coexecutors.

[4, 5] It is unnecessary to point out all of the grounds upon which the action of Mrs. Sherman in refusing to allow Mr. Cohn's claims and her insistence upon an accounting with the estate as to ownership of the legal or equitable title of the South Arnez drive property and certain personal property in controversy, may be sustained upon reasonable grounds. Certainly it would not justify an order of removal. The proceedings instituted by her for the removal of the coexecutor have become final by the court's order and, as a matter of law, must be taken as supporting her action. Her refusal to allow said claims and to determine the ownership of property to which Cohn asserts a hostile claim as against the estate furnishes no evidence of bad faith on her part. The justification of the charges made by Mrs. Sherman for the removal of her coexecutor will not be further pursued, inasmuch as no question is before us as to the sufficiency of the evi-

dence to support the order removing Mr. Cohn, thereby justifying her action. That is a closed chapter and it has been given consideration only to the extent that it bears upon the question as to whether Mrs. Sherman acted as a reasonable person placed in her position would have been influenced to act, or whether her action was without reasonable justification and was founded in malice.

This brings us to a consideration of the grounds upon which Mrs. Sherman's letters were revoked. Less than three months after said executors had qualified Mrs. Sherman asked for the cancellation of Mr. Cohn's letters based on the grounds heretofore set out. Two weeks later Mr. Cohn asked for the cancellation of her letters.

On January 2, 1935, Mr. Cohn and Mrs. Sherman entered into a contract whereby it was agreed that Mr. Cohn would continue as business manager of the affairs of Lowell Sherman, deceased, in the same capacity as he had served during his life, at a salary of \$75 per week in addition to his statutory fees. He received said compensation as business manager until March 16, 1935, amounting to the sum of \$900, on which day the coexecutrix, concluding that there was no necessity for continuing the special employment, discontinued said weekly payments.

We will now consider the principal grounds on which Mrs. Sherman's letters were revoked as they appear in the court's findings. The court found that Cohn presented to Mrs. Sherman the two checks for the sums of \$2,670.32 and \$3,385.35, respectively, on account of claims presented against the estate by Mr. Cohn personally, which she refused to sign. The allowance of these claims was afterwards withdrawn by the court. Her action in the matter cannot be treated as a ground for removal in the circumstances herein set forth. The court by its findings expressly refrained from commenting on the validity of said claims, as well as the ownership of the other property in the case, for the reason that said disputes could be settled in a proceeding brought in the proper tribunal. It did, however, make a finding that the "court finds that there was no fraud or wrongful practice in the making of said claims or in the presentation thereof by Morry Cohn." If the executor had not committed a fraud upon the estate or was not planning to do so (section 521, Probate Code), he should not have been removed, as the crux of the

petition and the only grounds alleged for his removal are based upon the alleged fraudulent transactions with reference to his conduct in neglecting to inform the judge, at the time he presented said claims for allowance, of the opposition of his co-executor to said allowance, and thereby attempting to induce Mrs. Sherman to sign the checks payable to himself in the belief that the court had, with full knowledge of the situation, directed her to affix her name to said checks. The other transactions which she assigned as causes for removal rest upon like grounds. These grounds, if not sustained, would have left the petition of Mrs. Sherman without a foundation to rest on. It was further found that Morry Cohn was entitled to a continuance of said salary of \$75 per week for special services which he continued to render until April 13, 1935. A finding that Morry Cohn recommended to Mrs. Sherman that she sell a \$9,500 note secured by a trust deed and 1,500 shares of Transamerica stock in order to have on hand funds with which to pay the expenses of administration, which proposition she disagreed with, is in no wise an impeachment of her business judgment or her fitness to act as an executrix. Before her refusal may be urged as contumaciousness or want of ordinary business judgment more must be shown than appears in the record on that issue. She was more interested in the estate than anyone else and she certainly had a right to disagree with her coexecutor in this as well as in all other matters requiring the exercise of judgment, provided she did not act arbitrarily or wilfully to the detriment of creditors. No serious contention may be made that the estate was ever in a position where the creditors were in doubt as to the payment of their claims or that the estate was at any time sorely pressed by them. The first publication of notice to creditors was made on February 1, 1935, and there was certainly no reason for the exercise of undue haste in the payment of claims during the first six weeks or two months of the administration of the estate. The claim that she refused to allow certain claims and preferred some creditors over others is so lacking in merit as not to require extended consideration. The examination and investigation of the validity of claims cannot be made upon the instant, and certainly the law imposes upon every executor such duty. No unreasonable delay was shown. A sale of the estate's property is not to be made

unless a real necessity exists therefor or the estate would be advantaged thereby.

Another ground alleged and found as a fact supporting the petition for removal is based upon the testimony of Roy Hashimoto, a gardener who had been discharged by Mrs. Sherman. He testified that Mrs. Sherman told him some time after March that Mr. Cohn was a thief and that she had fired him. Giving full credence to this testimony, it relates to a time after March 27, and but a few days before Mrs. Sherman actually filed her petition for removal on account of Mr. Cohn's action with respect to the two claims in the circumstances heretofore set forth and because of claims made by him as to his ownership of certain other properties.

It is alleged and found as a ground of removal that Mrs. Sherman had permitted her three dogs to damage expensive rugs and drapes by entering the premises on which she lives. The testimony on this issue was given by Mr. Cohn and is very scant. The examination was conducted by Mr. Cohn's attorney and is as follows:

"Q. Did you have a conversation with Mrs. Sherman in reference to the Chinese rugs at the home at 803 North Bedford Drive? A. I did.

"Q. What was the conversation? A. I suggested that she send the dogs to a kennel so that they would not ruin the rugs as they were very expensive rugs.

"(By the Court). Did they ruin the rugs? A. Yes.

"Q. Can't the rugs be repaired at the present time? A. The spots can't be removed."

The answer that the rugs were ruined was but a conclusion, as well as was the answer that the "spots can't be removed." The witness had no special knowledge on the subject and he should have described what he considered as irreparable damage to the rugs. He named no sum as to the amount of damage done. We assume from the questions and answers that the dogs at times entered the residence. Mrs. Sherman apparently was occupying her son's former premises with no near kin as her companion. As to what household privileges should be accorded to dogs is a matter of personal prerogative which the dog fancier claims the unhampered right to exercise, even though his fancies be not in accord with the opinions of others who believe that dogs should occupy what they

term "a dog's place" and be excluded from the luxuriant privileges which are accorded them by a great many fond masters and their families. Dogs are frequently taken into the home to act as guardians of the home in the absence of the elders, or to signal an alarm at the approach of an intruder, even at the risk of causing some occasional inconvenience or damage. We think this issue is dissipated by a consideration of the common practice which prevails in the larger cities. Besides, the rugs were Mrs. Sherman's property. The title had vested in her.

Mr. Cohn charged in his petition as a ground of removal of his coexecutor a failure on her part to inventory and appraise certain personal effects of the decedent and to report the sum of \$600 found in his safe deposit box, as follows: One solid gold dresser set, consisting of eight pieces; one match box, spelling his name, "Lowell," set in diamonds; two solid gold cigarette cases; one cigarette case, gold and tortoise; one crystal and platinum watch; one shirt stud, sapphire and diamonds; one lady's emerald and diamond ring; one silver cigarette box; three volumes of books (Fore-edge paintings). We understand that since the contests were started all of the above personal effects have been inventoried. This evidence, considered in its relation to the situation of the parties, does not support the above assignment. In the first place, there is no claim that Mrs. Sherman made any attempt to conceal the above or any property of the estate. It is her testimony that the above jewels were kept in a safe deposit box and were delivered to her by Mr. Cohn, who said when he passed them to her that they were trinkets belonging to decedent and it was not "worth while bothering about them." Mr. Cohn knew of the existence of said personal property and it was his duty as much as it was her duty to inventory said articles. There is not the slightest evidence, inferentially or otherwise, to the effect that Mrs. Sherman had a corrupt or dishonest purpose or intent in the matter. Many of the above articles were worn by Lowell Sherman as personal adornments and all, with two or three exceptions, were distinctly such articles as are carried upon the person for useful and ornamental purposes. No doubt she regarded them as personal mementoes of a son's affection for a mother. In a strictly legal sense they were a part of the estate,

property which under the will would ultimately have been distributed to her. To hold that the mother attempted to perpetrate a dishonest act or defraud any one, or misappropriate property of the estate, would be to convict her of a stupid and insane act, lacking in motive, as all of said property would ultimately have been distributed to her and the title then was vested in her. The estate was a valuable one and there was no question as to its solvency. No one has intimated that she was dishonest.

Prior to March 27, 1935, Mrs. Sherman joined with her coexecutor in the allowance of many claims and personally participated in the business of the estate. Mr. Cohn was receiving from Mrs. Sherman, in addition to the fees fixed by law, \$75 per week for his services as an inducement to give full time to the transaction of the estate's business. On or about the day last above named his procurement of the allowance of his claims and his asserted claim to the properties above referred to intensified the dispute, and Mrs. Sherman declined to have further personal communication with him. She testified that she had completely lost faith in him for reasons detailed by her, and personal discussions with him were discontinued. Thereafter she communicated with him through her secretary, Milton Cashy, and her personal attorney, Mr. Garbus, who represented her in the trial court and appeared for her on this appeal. There is no question as to her taking an active interest in the business of the estate and her participation in the transaction of said business through her representatives. The personal relations between the executors having become so acute as to render it advisable to select a reputable person to confer with the other executor in her stead, we are unable to perceive any grounds upon which removal may be predicated by reason of the employment of a competent person to act either as her adviser, or to act in uncontested matters as a medium through which the business of the estate may be transacted, especially in a case where proceedings had been commenced or were about to be commenced by one of the executors to remove the other. It is a common and in many cases a commendable practice for executors to confer with an attorney other than the attorney for the estate, and even with a layman who the executor may feel has had a wider business

experience, or who possesses superior judgment than himself, to consult and advise with such person. The business of the estate suffered no detriment by reason of Mrs. Sherman conferring with Mr. Cohn through an intermediary. In fact, the business of the estate had already been temporarily halted by reason of failure of the executors to agree on matters which materially affected the assets of the estate. No complaint can be made as to a want of watchfulness on the part of Mrs. Sherman as to the affairs of the estate. There can be no question but that the executors mutually assumed conflicting and adverse attitudes towards each other, but such adverse positions cannot constitute sufficient grounds for removal unless founded upon substantial grounds. The question here is whether Mrs. Sherman's conduct was contumacious, arbitrary, or resulted in detriment to the estate.

[6] We think the evidence is not sufficient to sustain a finding based on any of said grounds. We have read the testimony of Mrs. Sherman, as well as the entire record, and she appears to be an intelligent woman capable of administering her son's estate. As a matter of fact the estate is ready to close, with the exception of the determination of the validity of the contested claims and the settlement of disputes existing between said parties as to the ownership of certain real and personal property. We have not included in our discussion all of the items in controversy, but there is no reason why they cannot be or will not be, so far as the estate is concerned, amply safeguarded in the hands of Mrs. Sherman with the aid and advice of a competent attorney. Such claims as are of questionable or doubtful validity should be disallowed and those which have been satisfactorily established should be allowed.

Another reason for the retention of Mrs. Sherman as executrix exists in the fact that the only brief filed in this case for respondent, is on behalf of the Citizens' National Trust & Savings Bank of Los Angeles, which institution was appointed special administrator of said estate after the pending appeal herein had been taken. The special administrator in its brief has taken a

position supporting the order of removal of Mrs. Sherman and therefore has placed itself in a position adverse to that of the sole heir under the will, which is that Mr. Cohn must establish his claims in the manner provided by law after rejection by the executor. This provision of the statute is by no means oppressive or unreasonable in its requirements.

In conclusion it may be said that the greatest concern of the decedent was his mother's welfare. By his most solemn act he made her his sole heir and appointed her to administer upon his estate. His selection should not be annulled except upon a clear showing that the best interests of the estate require it. We are of the opinion that the showing made is not sufficient to justify the cancellation of her letters testamentary.

No other question is decided by our decision herein except the single one which has to do with the order canceling said letters testamentary, and we do not assume to decide any other questions or issues which may hereafter come before the court for decision but which are not involved in this proceeding.

[7] The order and judgment revoking the letters of Julia Louise Sherman as executrix of the estate of Lowell Sherman, deceased, are hereby reversed and she is restored to the office of sole executrix. Her coexecutor having been removed both by order of court and upon the acceptance of his resignation duly entered, this court is left without jurisdiction to review any order affecting him. In case any one of several executors to whom letters were granted is removed the remaining executor must proceed to complete the execution of the will. Probate Code, § 511.

Under the provisions of the Probate Code, § 466, the powers of the special administrator automatically cease upon the restoration of the said Julia Louise Sherman as herein directed.

It is so ordered.

We concur: WASTE, C. J.; THOMPSON, J.; CURTIS, J.; LANGDON, J.; CONREY, J.; SHENK, J.

CASSERLY v. CITY OF OAKLAND et al.**ERNY v. SAME.****SHERRY v. SAME.****S. F. 15525-15527.****Supreme Court of California.****April 3, 1936.****Rehearing Denied April 20, 1936.****Municipal corporations ☞ 187, 200**

Pensions awarded members of police and fire departments under charter of city of Oakland which established relief and pension fund for such departments to which firemen and police contributed could be reduced, because of economic necessity, to amount measurable by salary of office at time payment fell due instead of salary at time pension was awarded, notwithstanding pensions when awarded created vested rights in pensioners.

In Bank.

Appeal from Superior Court, Alameda County; John D. Murphey, Judge.

Separate actions by Nora Casserly, A. E. Erny, and J. J. Sherry against the City of Oakland and others for peremptory writs of mandamus. From judgments denying the writs, the petitioners appeal.

Affirmed.

Prior opinion, 47 P.(2d) 569.

Decoto & St. Sure and John D. Martin, both of Oakland, for appellants.

C. Stanley Wood, former City Atty., F. Bert Fernhoff, City Atty., and John W. Collier, Asst. City Atty., all of Oakland, for respondents.

PER CURIAM.

The question involved in each of these three cases is, to all intents and purposes, the same. In the first case, the plaintiff, Nora Casserly, who is the widow of William Casserly, a member for several years prior to his death on December 12, 1930, of the Oakland fire department, filed her petition in the superior court for a peremptory writ of mandamus against the respondents, compelling them to pay her the full amount of pension allowed to her August 9, 1932, without reduction therefrom by reason of the ordinance hereafter to be mentioned. At the time of William Casserly's death, he held the rank of hoseman

and was receiving the sum of \$2,400 per annum. His widow was allowed a pension of \$1,200 per annum. The trial court declined to issue the writ and Nora Casserly prosecutes this appeal.

A. E. Erny also appeals in the second case from a similar ruling. He was retired on June 8, 1933, for disability resulting from injuries received in the performance of his duties as a member of the Oakland police department. For a year prior thereto, he had held the rank of patrolman and was awarded as a pension the sum of \$1,200 per annum, or one-half the salary received by him as a patrolman.

J. J. Sherry was retired from the Oakland police department, which he had served for thirty-six years, on May 27, 1932, because of his age, under a pertinent provision of the Oakland charter. He had held the rank of sergeant for more than a year prior to retirement, at a salary of \$220 a month, and was accordingly allowed a pension of \$110 monthly. He appeals from a like order in the third case.

In all cases the charter provided that the pension to be paid should be "equal to one-half of the salary attached to the rank held," with this difference. In the case of officers killed in the performance of their duties, such as William Casserly, it was the rank held by him at the time of his death, while, in the other two cases, it was the rank held by them for a year prior to retirement which measured the pension.

In July, 1933, certain amendments to sections 91 and 97 of the Oakland charter became effective, which, in substance, authorized the city council, when it found by an affirmative vote of not less than six members thereof that an economic emergency confronted the city government, due to extraordinary conditions beyond its control, to provide for a reduction of not to exceed 10 per cent. of the annual salaries which otherwise were to be paid by the provisions of the charter. Pursuant to this authorization, the city council adopted an ordinance on July 31, 1933, reducing the salaries of the police and fire departments. Subsequently, the board of trustees of the firemen's relief and pension fund and the board of trustees of the police pension fund reduced all pensions, including these appellants, to correspond with reductions in salaries. The charter also provides, with respect to both the police and the fire departments, that an amount equal to 5 per

cent. of the salary paid to an officer should be deducted from his salary and paid into the pension fund of that department to which he belongs, and that the city shall contribute the balance necessary to maintain the fund. It should also be noted that salaries in all ranks of policemen and firemen were increased in 1919, 1923, and 1925, all of which were subsequent to the employment of Casserly and Sherry, but prior to the allowance of pensions to any of the three appellants. So far as Erny is concerned, it appears that he was an officer for only one year prior to his disability.

The appellants contend that, upon the happening of the contingency which entitled them to a pension, the right to a pension award vested in them, which right may not subsequently be disturbed by legislative action or municipal ordinance; that where the services are rendered under a pension statute, its provisions become a part of the contract and may not be abrogated by subsequent enactment, nor the pension reduced below the amount of the original award, but that an employee may accept an upward fluctuation. In other words, the contention is that the rights of petitioners became vested and fixed when the contingency happened which entitled him or her to the award. The respondents concede that petitioners have a vested right to a pension, as determined by the case of *O'Dea v. Cook*, 176 Cal. 659, 169 P. 366, but they insist that the pensioners have not a right to a specific sum of money as a pension. They contend that the salary attached to the rank at the time the payments fall due, and not the salary at the time the pension was awarded, measures its amount.

We are constrained to agree with respondents. Reason and authority both compel this conclusion. In *Klench v. Board of Pension Fund Commissioners*, 79 Cal.App. 171, 187, 249 P. 46, 52, a case involving similar language, we find the following:

"We have said that it is our belief that the word 'salary' as used in section 4 of said act was intended to refer to the rank of the retired police officer and not to the time at which he was retired. In other words, the section as phrased seems clearly enough to indicate that what the Legislature intended thereby to declare was that, on being retired under said act, a member of the police department should be paid a pension based upon the salary which may be paid to police officers of the rank held by

him at the time of the retirement of such officer. This conclusion is directly supported by the case of *Rumetsch v. Davie*, 47 Cal.App. 512, 514, 190 P. 1075, 1076, wherein it is said by Justice Brittain, speaking for the court: 'While he is on the retired list, it would seem to be entirely consistent with the language, as well as the purpose, of section 95, that he should receive as pension one-half the amount he would receive as a corporal if on active service. This court has no hesitation in determining that the amount of the pension is fixed by the salary attached to the rank of the retired man at the time of retirement provided he held that rank for the period of one year prior to the date of retirement.' Inferentially, the same view is entertained by the case of *Whitehead v. Davie*, 189 Cal. 715, 722, 209 P. 1008. Furthermore, the conclusion we have arrived at regarding the meaning and intent of the language of the section in question is fortified, indeed, it seems to us, conclusively settled, by two significant considerations, the one arising from the pension law itself under which the city of Stockton is operating and has practically operated since the year 1901, and the other arising from a judicial construction of the nature, in legal effect, of the pension granted by pension statutes. The first is the offspring of the provision of section 4 of the Statute of 1897, also incorporated into the Ordinance No. 698 as well as into the present city ordinance (No. 854) to the effect that when the physical disabilities suffered by the pensioner shall cease such pension shall cease, and such person be restored to active service as a member of the force of the rank held by him when retired. The second is the declaration by the Supreme Court in a number of cases, notably the case of *O'Dea v. Cook*, supra, to the effect that a pension granted to officers and employees of the government for services yet to be performed (and such statutes granting such pensions always operate prospectively) constitute a part of the compensation of such officers and employees and as such in a sense enters into the contract whereby such officers and employees are employed. By the first of these considerations it is unquestionably established that, notwithstanding his retirement, a patrolman retired under the pension law of 1889 and the latter statute and ordinances perpetuating the provisions thereof is still a member of the police department and is subject to such rules of the department as

apply in such a case. From the second, considered in the light of the first, it irresistibly follows that a retired patrolman is subject to any changes which may be made in the compensation of patrolmen; that, therefore, an increase made at any time by the proper city authorities in the salary to be paid to such police officer or other members of the department after and pending the retirement of a member of such department under the pension laws operates to correspondingly augment the amount or basis upon which the pension compensation of the retired officer is to be computed."

In *Aitken v. Roche*, 48 Cal.App. 753, 755, 192 P. 464, in which the sole question was as to "whether or not pensioners are entitled to one-half of the pay attached to their retirement rank when pension installments successively become due, or to one-half of the pay which was attached to the rank when they were retired," we also read pertinent language as follows:

"On behalf of the defendants it is correctly stated that the right to pension is a vested one, and that it enters into the contract of employment when a man enters the police department. *O'Dea v. Cook*, 176 Cal. 659, 169 P. 366. From this it is argued that the amount of the prospective pension is fixed. This is fallacious, because if it were as the defendants contend, an increase in salary while a man was on active duty would not carry with it, as it does, the right to a correspondingly increased pension upon his subsequent retirement. Under such circumstances there would be no difficulty in determining that the right which was vested is the right to have the pension, not of a particular number of dollars, but 'equal to one-half of the amount of salary attached to the rank,' whether it should be more or less than that attached to the rank when the contract of employment was made. A similar contention, made in regard to another sort of contract, would be swept aside with little consideration. Suppose, for instance, the owner of an office building should lease it for a term of years, reserving as rent a sum equal to one-half of the gross rentals received by

the tenant from subtenants, and it were shown that the gross rentals either increased or decreased in subsequent years. The right to a sum equal to one-half of those rentals would be vested, but neither party could successfully contend that the change in the amount of gross rentals warranted any change in the proportionate amount of money to be paid to the owner of the building."

Again, in *Jones v. Cooney*, 82 Cal.App. 265, 255 P. 536, it was held that a retired chief of police was entitled to a corresponding increase in his pension when the salary of that office was raised from \$400 to \$500 a month, the language of the ordinance being the same as that involved here. The case rests upon the authorities herein mentioned and other California cases. We think the construction placed upon the phrase has become so well settled that it should not be disturbed.

But aside from the adjudicated cases, it appears that the language is admirably suited to accomplish justice for retired officers, as well as for the city. The cost of living and the value of money fluctuate, as indicated by the three raises in salaries of officers since *Cassery* and *Sherry* were originally appointed, and by the present reduction, brought about by the emergency which has been found to exist. A pension measured by the pay of officers of similar rank inures to the benefit of pensioners, when the value of money is low and the pay increased, but no injustice is done to the city and its taxpayers if, by the increase in the value of money and an emergency, it feels compelled to reduce the cost of government.

Authorities involving a fixed sum of money are not in point, nor can it be argued that there was an abrogation of contractual rights, any more than it may be argued that the reduction in pay of the active officer is a violation of his contract. The reduction in the amount of the pension is in strict accord with the compensation agreement.

It follows from what has been said that the judgments, and each of them, should be and they are affirmed.

13 Cal.App.2d 39

PEOPLE v. REED.

Cr. 2851.

District Court of Appeal, Second District,
Division 2, California.

March 31, 1936.

Rehearing Denied April 10, 1936.

Criminal law ⇨1019

District Court of Appeal *held* without jurisdiction of appeal from conviction in municipal court of illegal practice of medicine, where accused was prosecuted by complaint and not by indictment or information (St.1933, p. 1276, § 17; Const. art. 6, §§ 4b, 5).

Appeal from Superior Court, Appellate Department, Los Angeles County; Hartley Shaw, Edward T. Bishop, and B. Rey Schauer, Judges.

Fred Reed was convicted in the municipal court of illegal practice of medicine, and he appealed to the Appellate Department of the Superior Court, and from a judgment which affirmed the conviction, he appeals to the District Court of Appeal. On Attorney General's motion to dismiss the appeal.

Appeal dismissed.

Martin E. Geibel, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

CRAIL, Presiding Justice.

The defendant was charged under a complaint filed against him in the municipal court of the city of Los Angeles with a violation of section 17 of the Medical Practice Act (St.1913, p. 722, as amended by St.1933, p. 1276), a misdemeanor, and he was convicted thereon. The defendant took an appeal to the appellate department of the Superior Court of Los Angeles county and the judgment of conviction by the municipal court was affirmed. Thereafter the defendant gave notice of appeal to this court and the matter comes before us on the motion of the Attorney General to dismiss the appeal herein on the ground that this court is without jurisdiction to hear or determine the same. This is not a case which was prosecuted

by indictment or information, and this court has no jurisdiction of the appeal. Article 6, §§ 5 and 4b, Constitution of the state of California; *People v. Tossetti*, 107 Cal.App. 7, 289 P. 881.

The appeal is dismissed.

We concur: WOOD, J.; McCOMB,
Justice pro tem.



13 Cal.App.2d 16

JORDAN v. CLAUSEN et al.

Civ. 1617.

District Court of Appeal, Fourth District,
California.

March 30, 1936.

Rehearing Denied April 24, 1936.

Hearing Denied by Supreme Court
May 28, 1936.

1. Wills ⇨432

Adjudication of fact of testator's residence in county of court first acquiring jurisdiction for probate of will is binding on world for all purposes of administration of estate, including petition for letters of administration.

2. Courts ⇨475(2, 3)

Superior court of county of testator's residence having appointed executor of his estate, no other court could appoint another as administrator thereof while such executor continued to act.

3. Executors and administrators ⇨29(3)

Appointment of administrator by superior court of county in which testator died after appointment of executor of his estate by superior court of county in which he resided was void, and decree against such administrator, reforming deeds from testator to plaintiff, had no legal effect on testator's heirs, from whom defendants, in plaintiff's subsequent action to quiet title to realty covered by reformed deeds, claimed title thereto, and did not perfect any record or color of title in plaintiff.

4. Quieting title ⇨44(4)

Failure of plaintiff and defendant administrator in suit for reformation of deeds from decedent to plaintiff to have actual appearance and defense made on estate's behalf,

notwithstanding plaintiff's knowledge from search of records that others claimed interest in realty conveyed as successors of decedent's heirs, *held* fraud on court, such heirs, and successors, so that plaintiff could not prevail on proof of judgment reforming deeds in subsequent action against such successors to quiet title.

5. Evidence ☞383(6)

Certified copies of proceedings in matter of decedent's estate, including decree distributing residue to trustee for decedent's widow, with directions to distribute it to his heirs as remaindermen under his will on her death, such heirs' quitclaim deed to another, and deeds completing chain of title from them to defendants in action to quiet title in one claiming under deeds from decedent, as reformed by judgment fraudulently obtained, *held* sufficient to support judgment quieting defendant's title.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by Judson H. Jordan against C. C. T. Clausen, his wife, and others, in which defendants filed a cross-complaint. Judgment for defendants, and plaintiff appeals.

Affirmed.

O. H. Myrick, of Los Angeles, and Harmon C. Brown, of Riverside, for appellant.

A. Heber Winder, of Riverside, for respondents.

SCOVEL, Justice pro tem.

For the purpose of this appeal the land involved may be considered as the east half of lot 1 in block 23 at Palm Springs, in Riverside county. In 1890, title to all of lot 1 was vested in Benjamin Browning. In 1891, he deeded the west half of lot 1 to S. A. Wood. On November 29, 1901, Browning deeded the west half of lot 1 to plaintiff. Plaintiff testified that in the year 1904 Browning told him that he should have conveyed to plaintiff the east half of lot 1 and that the 1901 deed was erroneous. Plaintiff's secretary prepared a new deed which Browning signed and recorded, but again the description referred to the west half of lot 1. The deed was returned to plaintiff from the recorder's office and placed in his file. Plaintiff paid no further attention to the property until the year 1930, paying no taxes thereon.

In April, 1911, Browning died testate. His will was duly admitted to probate in Placer county, the certificate of proof of will stating that he died on the 17th day of April, 1911, in Los Angeles county, but that at the time of his death he was a resident of the county of Placer. On June 4, 1912, the superior court of Placer county decreed distribution of the estate to the widow for life, appointing C. Roy Browning as trustee thereof and naming the five heirs of the deceased as remaindermen. The widow died on January 1, 1915, and on March 1st of the same year the Placer county court ordered distribution of the trust to the remaindermen. The executor of the last will and testament of Browning has never been discharged.

On July 30, 1920, the remaindermen above mentioned, the heirs of Browning, quitclaimed the east half of lot 1 of block 23 to Z. R. Bunker, and by mesne conveyances the property was acquired by defendants Clausen and McLeod; defendant Clausen acquiring McLeod's one-half interest therein on May 29, 1931. Since 1922 all taxes upon the property have been paid by Clausen and his cotenant. All of the deeds above set forth were promptly recorded.

In the year 1930 plaintiff was advised that the records did not show any interest vested in him to the east half of lot 1. He checked the records and consulted with an attorney, advising him of his claim and requesting him to take such proceedings as might be necessary to vest title to the east half of lot 1 in him. Accordingly, on February 21, 1931, his attorney filed a petition in the superior court of Los Angeles county for letters of administration upon the estate of Benjamin Browning, deceased, alleging that the deceased died in Los Angeles county, a resident thereof; that he left no will; and that the estate consisted solely of a contingent and worthless interest in Riverside county land. On March 17, 1931, he was appointed administrator of the estate and duly qualified as such. On March 9, 1932, plaintiff filed an action in the superior court of Los Angeles county against the administrator to reform the deed from Browning to plaintiff executed in 1904 so that the property therein described would convey to him the east half instead of the west half of lot 1. In this action plaintiff was represented by another attorney. On March 23, 1932, the admin-

istrator in proper person filed an unverified answer to the complaint containing a general denial, together with a stipulation reading as follows: "It is stipulated between plaintiff and defendant that specific denial of plaintiff's complaint, verification of the within and foregoing answer, notice of trial, findings of fact and conclusions of law, notice of entry of judgment and right of appeal be, and the same are hereby respectively waived."

On June 9, 1932, the matter was heard and judgment rendered as prayed for, reforming both the 1901 and 1904 deeds so as to read the east half of lot 1. On October 9, 1933, plaintiff filed the present action in Riverside county seeking to quiet title to the east half of lot 1. Defendants appeared by answer and cross-complaint seeking to quiet their title to the property.

To prove his title at the trial hereof, plaintiff introduced the deeds executed in 1901 and 1904, together with the judgment of the superior court of Los Angeles county, reforming the deeds. Defendants attack the chain of title on the ground that the judgment of the superior court of Los Angeles county is void: First, because it had no jurisdiction to appoint an administrator of the Browning estate; and, secondly, because the action to reform the deeds was a fraud upon the court.

As hereinbefore noted, the executor of the last will and testament of Benjamin Browning appointed by the superior court of Placer county was never discharged, and although many years had elapsed since his appointment he was still acting as executor of the estate. Can there be two representatives of the same estate at the same time serving under appointments of different courts in different counties? It is not questioned but that Browning died testate and that the superior court of Placer county first assumed jurisdiction over his estate.

[1] In *Estate of Relph*, 185 Cal. 605, 198 P. 639, it is held that the court first acquiring jurisdiction of the probate of an estate by granting letters of administration and adjudicating the fact of residence of the decedent in the county of which it has jurisdiction, acquires jurisdiction for all purposes thereof binding upon the whole world unless vacated or set aside on direct attack, including the probate of any subsequently discovered will. See, also, *Estate of Latour*, 140 Cal. 414, at page 425, 73

P. 1070, 74 P. 441. It follows as a necessary corollary that an adjudication of the fact of residence in the county of which the court first acquires jurisdiction for the probate of the will of a decedent is likewise binding upon the world for all purposes of administration of the estate, including a petition for letters of administration.

[2,3] And the superior court of Placer county having first appointed an executor to administer the estate of Benjamin Browning, deceased, no other court could appoint another to administer the same estate while such executor continued to act, particularly where the attack upon the order of the second court is direct. *Conlin v. Blanchard*, 219 Cal. 632, at page 635, 28 P.(2d) 12.

Appointment of the administrator by the Los Angeles superior court being void, a decree against such administrator could have no legal effect upon the heirs of the deceased from whom defendants claim title, and could not serve to perfect in plaintiff any record or color of title. *Conlin v. Blanchard*, supra.

[4] Defendants also contend and it was found by the trial court that the action instituted by plaintiff for the reformation of the deeds worked a fraud upon the court. We are of the opinion that the finding should be sustained. It will be recalled that prior to instituting the action, plaintiff searched the records. He must, therefore, have discovered the chain of title from the heirs of Browning to defendants. Notwithstanding this fact, without any notice to such claimants, the probate proceedings were taken and the action filed against the administrator in Los Angeles county. The administrator made but a nominal appearance and made no effort whatsoever to protect any claim the heirs of decedent had to the property involved, he, himself, waiving all notice of hearing and other matters connected therewith as set forth in the stipulation hereinbefore recited. Knowing that others claimed an interest in the property, the action of both plaintiff and the administrator in failing to have an actual appearance and defense made on behalf of the estate was a fraud upon the court, the heirs and their successors in interest. As set forth in *Conlin v. Blanchard*, supra, to permit such plaintiff "to come into a court of equity and to prevail solely on proof of a judgment obtained in that manner it

would be necessary to disregard all rules applicable to the equity side of the court."

[5] Defendants in support of their claim of title under the cross-complaint introduced certified copies of the proceedings had in the superior court of Placer county in the estate of Benjamin Browning, deceased, including the decree of distribution, the quitclaim deed from the remaindermen and heirs of Benjamin Browning, deceased, to Z. R. Bunker, together with the subsequent deeds completing the chain of title to defendants.

The decree of distribution distributes the "residue" of the estate to C. Roy Browning as trustee for the benefit of the widow of the decedent during her lifetime with directions to distribute the same to the remaindermen upon her death. The property involved in this action was not described in the decree, but it being a portion of the estate of decedent and not otherwise distributed, it necessarily fell into the residue and was thereby distributed in accordance with the provisions of the decree. The corpus of said trust having thereafter been ordered distributed to the remaindermen, their deed to Z. R. Bunker was sufficient to convey the title to him, and defendants having completed the chain of title from him to them made a sufficient showing to support the judgment in this action quieting their title as against any claims of plaintiff.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.



12 Cal.App.2d 712

**LEAF v. SUPERIOR COURT IN AND FOR
LOS ANGELES COUNTY et al.**

Civ. 10734.

District Court of Appeal, Second District,
Division 1, California.

March 26, 1936.

Appearance 25

Failure to include statement of place of recording of trust deed in notice of lis pendens given in proceeding under trust deed

moratorium act held waived by voluntary appearance of trustee and beneficial owner in proceeding, giving court jurisdiction to proceed therewith (St.1935, p. 1209, §§ 2, 3; p. 1210, § 4; Code Civ.Proc. §§ 416, 749).

Mandamus by Italja B. Leaf against the Superior Court of the State of California in and for the County of Los Angeles and Emmet H. Wilson, Judge thereof, wherein an alternative writ of mandate was issued.

Alternative writ made permanent, with directions.

John L. Mace, of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and Douglas De Coster, Chief Deputy Co. Counsel, both of Los Angeles, for respondents.

HOUSER, Presiding Justice.

The facts which form the basic reason for the issuance by this court of its alternative writ of mandate herein are substantially as follows:

As security for the payment of his promissory note, one Gregovich executed a deed of trust wherein was described certain real property. Thereafter he duly conveyed his remaining rights in said real property to the petitioner herein. Default having occurred in the matter of payment of the promissory note, the holder of the deed of trust gave the required notice of the said breach, together with notice of election to sell the said real property. Thereupon, acting under the provisions of the statute known as the "Mortgage and Trust Deed Moratorium of 1935" (Stats.1935, p. 1208), the owner of the real property filed in the superior court her petition for relief. Contemporaneously therewith, also in attempted compliance with the requirements of the statute, she caused to be recorded a notice of "lis pendens," a copy of which was mailed to the trustee and the beneficial owner that were named in the petition. Four days thereafter, at the instance of said trustee and said beneficial owner, and on their application therefor, the superior court set the said petition for hearing. On the date on which said petition came on for hearing in said court, on the ground that the notice of "lis pendens" contained no statement of the book and the page thereof in which the deed of trust was recorded in

the office of the county recorder, an order of dismissal of the petition was made and entered by the said court. Thereupon the trustee under said deed of trust posted and published a notice of the trustee's intended sale of the property described therein; whereupon, at the instance and request of the petitioner herein, this court caused its alternative writ of mandate to issue, directed to the said superior court, by which the latter was ordered either to proceed to a hearing of said "moratorium" petition, or to show cause why it should not do so. In response to said order the said superior court, as the respondent herein, has directed the attention of this court to sections 3 and 4 of the statute (Stats.1935, pp. 1208, 1209, 1210), and particularly to the provisions therein contained with reference to the purported necessity on the part of the petitioner for relief to record a notice of "lis pendens," which, among other statements, must contain "the book and page of the records of the county recorder in which the * * * deed of trust is recorded." And in that connection it is admitted by petitioner herein that the notice of "lis pendens" was defective, in that it contained no such direct statement, although the property affected by the deed of trust was correctly described in said notice of "lis pendens." Otherwise, said notice was in compliance with the requirements of the statutory provisions.

On the part of respondent, in substance it is contended that, because the relief sought by the petitioner in the superior court was statutory in origin, it was essential to the jurisdiction of the court that all the provisions of the statute be strictly followed; hence that because the petitioner filed in the office of the county recorder a defective notice of "lis pendens," the superior court had no jurisdiction to hear the petition and to determine it on its merits. On the other hand, in substance the petitioner asserts that the filing of the petition, and thereupon and thereafter, the voluntary appearance in the proceeding in the superior court by the trustee and the beneficial owner of the security represented by the trust deed, constituted a waiver by them and each of them of any defect that might or did exist in the notice of "lis pendens", and consequently that jurisdiction was complete in the superior court.

By the provisions of section 2 of the moratorium act (page 1209), the trustor in the deed of trust was authorized to file in the superior court her petition "praying for

an order postponing the sale" of the property described in said deed of trust. By the language contained in section 3 of the act the petitioner also was required to do certain things, to wit:

(1) In the manner provided by law for the service of a summons in a civil action, to serve the trustee and the beneficiary of the deed of trust with a copy of the petition;

(2) Immediately cause to be recorded "in each county in which any of such property is situated" a "notice of pendency of such petition";

(3) On the day of such recordation to mail, etc., "a copy thereof [the notice] * * * to such trustee and beneficiary."

In a separate paragraph of section 3 of the act it is provided that: "Such notice of pendency shall state the name of the petitioner, the nature of the petition, and the book and page of the records of the county recorder in which the mortgage or deed of trust is recorded."

By a separate paragraph of section 4 of the act (page 1210) it is provided that: "After the filing of such petition and the recording and mailing of the notice of the pendency thereof, as provided in sections 2 and 3 of this act, no sale under the power of sale conferred by such deed of trust or such mortgage shall be held until the court makes its order in the matter, but nothing herein contained shall prevent such sale at any time after February 1, 1937."

As hereinbefore has been indicated, the only question that is here at issue is as to whether, at the time the proceeding was brought on for hearing, the superior court had jurisdiction of the parties; that is to say, no question regarding the jurisdiction of the said court as far as the subject-matter of the proceeding was concerned is raised by either of the parties.

From a consideration of the statutory requirements, in order that jurisdiction of the person may be acquired, it becomes evident that the most that is necessary is (1) the proper service of a copy of the petition upon the trustee and the beneficiary; (2) a substituted service upon them by mail, etc., of a copy of the "notice of pendency," which in its contents should comply with the statutory requirements hereinbefore indicated.

Since the enactment of the Codes in 1872, it has been statutory law that "the voluntary appearance of a defendant is equivalent to personal service of the summons and copy

of the complaint upon him." Section 416, Code Civ.Proc.

With reference to statutory provisions in a different kind of proceeding, section 749 of the Code of Civil Procedure presents a situation that in the respect here in question, to wit, the necessity of filing a notice of "lis pendens," very closely resembles that which is included within the so-called moratorium act. By the provisions of that statute, the procedure for the maintenance of an action "to determine the adverse claims to and clouds upon title to real property" is outlined. The last paragraph of that statute is as follows: "Lis Pendens. Within ten days after the filing of the complaint, plaintiff shall file, or cause to be filed, in the office of the county recorder of the county where the property is situated, a notice of the pendency of the action, containing the matters required by section four hundred and nine of this code."

It will thus be noticed that as far as the requirement regarding the necessity of filing a notice of "lis pendens" is concerned, in substance the two statutes are identical, one with the other. In that regard, the case of Blackburn v. Bucksport, etc., R. Co., 7 Cal.App. 649, 95 P. 668, would seem to be decisive, not only of the question of whether the filing of a notice of lis pendens was jurisdictional, but as well, in the absence of such a filing, of the effect of a general appearance in court by a defendant in the action. With reference to those issues the syllabus of the opinion of the court is as follows: "The omission to file a notice of lis pendens provided for in an action to quiet title cannot affect the court's jurisdiction over the subject matter of the action; and one who has voluntarily appeared in the action cannot in any event complain that a notice of lis pendens was not filed."

In the instant matter, even though it might be conceded (but as a matter of law, not so decided) by this court that the filing of the lis pendens was essential to the establishment of jurisdiction in the lower court, nevertheless, in principle, the authorities are numerous to the effect that in such matters a statutory requirement in the nature of process by which a defendant may be brought into court is waived by his general appearance in the action or proceeding.

It follows that the alternative writ hereinbefore issued should be made permanent, and that the lower court be directed to pro-

ceed in and about a hearing and determination of the petition presented therein. It is so ordered.

We concur: YORK, J.; DORAN, J.



MORTGAGE GUARANTEE CO. et al. v.
CHOTINER et al. *
Civ. 10709.

District Court of Appeal, Second District,
Division 2, California.

March 25, 1936.

Rehearing Denied April 23, 1936.

Hearing Granted by Supreme Court
May 21, 1936.

1. Guaranty ⇨14

Coincidental execution of note and guaranty of payment thereof obviated necessity of any other consideration for guaranty (Civ. Code, § 2792).

2. Guaranty ⇨16(2)

Benefit derived from family corporation's execution of note by its officers and stockholders, who guaranteed payment thereof, held good consideration for guaranty.

3. Evidence ⇨441(12)

Parol testimony as to agreement that "extensions without notice," authorized in written guaranty of payment of note, applied to extensions to maker only, held inadmissible to vary and explain terms of guaranty, which was plain, unambiguous, and easily understood.

4. Evidence ⇨404

Guaranty ⇨9

Guarantors, expressly consenting in broad and unequivocal language, without qualification, to extensions of time for payment of note in written guaranty of payment thereof, cannot rely on asserted ambiguity in guaranty to avoid its consequences nor invoke parol evidence to vary or alter plain terms of writing.

5. Guaranty ⇨56

Person guaranteeing payment of note in writing, authorizing "extensions without notice," held not relieved from liability by granting of several extensions of obligations of note to original corporate maker's succe-

sors in violation of alleged parol agreement with payee corporation's representative that guaranty authorized extensions to maker only, in absence of adequate showing of such representative's authority to speak for payee.

6. Principal and surety ⇨101(4)

Original maker, transferring realty pledged as security for note to another, becomes surety for payment thereof, and cannot be held liable thereon beyond express terms of contract, and is exonerated by any alteration of original obligation by creditor's act without surety's consent (Civ.Code, §§ 2819, 2836).

7. Principal and surety ⇨159

Payee's written extensions of time for payment of principal installments due on note, without knowledge or consent of original maker, after latter became surety for payment of note by transferring realty pledged as security therefor to another, are presumed to be supported by consideration.

8. Guaranty ⇨56

Payee's written extensions of time for payment of principal installments due on note, without original maker's consent, after latter became surety for payment thereof by transferring realty pledged as security to another, exonerated original maker, and hence guarantors of payment, from liability, where sufficient consideration for extensions was shown (Civ.Code, §§ 2819, 2836).

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by the Mortgage Guarantee Company and another against Albert H. Chotiner and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Alvan M. Palmer and Harvey A. Harkness, both of Los Angeles, for appellants.

Charles J. Katz and Alfred Gitelson, both of Los Angeles, for respondents.

GOULD, Justice pro tem.

Defendants subscribed their names to the following writing, indorsed upon the back of a \$70,000 promissory note: "For value received, I guarantee payment of the within note, with interest, in accordance with its terms. I waive demand, or notice

of nonpayment, and I authorize extensions without notice. If suit is brought to enforce this guarantee, I will pay attorney's fees and costs of suit." Originally the note was secured by a deed of trust upon real property, but before commencement of the within action the security had been sold and the proceeds applied upon the note. This suit was then brought for the deficiency against the guarantors only. Judgment went for defendants, and plaintiffs, owners of the note, appeal.

[1,2] Several theories are advanced as justification for releasing respondents from their obligation as guarantors. In the first place, it is claimed that they received no consideration for their guaranty. Inasmuch as the execution of the note and guaranty was coincidental, no other consideration need exist. Civ.Code, § 2792. Furthermore, the guarantors were officers and stockholders of the family corporation which executed the note, and therefore they derived a benefit from the transaction, of itself a good consideration for the guaranty. *Seth v. Lew Hing*, 125 Cal.App. 729, 14 P.(2d) 537, 15 P.(2d) 190.

[3] Respondents claimed that the wording of the guaranty rendered its terms uncertain and ambiguous, and they were permitted over the objection of appellants to introduce testimony of a conversation had between them and a representative of the payee of the note at the time the document was signed, to the effect that the "extensions without notice" referred to in the guaranty "applied only to, and only authorized extensions to the maker." The trial court made a finding in accordance with this evidence, which would effectually preclude appellants from recovery because several extensions of the obligations of the note were granted, not to the original maker thereof but to its successors. In permitting this parol testimony to vary and explain the terms of the written guaranty we believe the trial court erred.

[4,5] The wording of the instrument is plain, free from ambiguity, easily understood, and presents no scope for explanation upon the ground of uncertainty. First National Bank v. Spalding, 177 Cal. 217, 170 P. 407. Respondents expressly consented in broad and unequivocal language to extensions of time without qualification of any kind, and it must be held that they

cannot rely upon any asserted ambiguity in the guaranty in this case to avoid its consequences, nor can parol evidence be invoked to vary or alter the plain terms of the writing. Moreover, no adequate showing was made that the person purporting to deal with respondents respecting the alleged restriction upon the extensions had authority to speak for the corporation payee of the note, or was even an official of or in any way authorized to bind the corporation as to any verbal understanding with relation to the written guaranty. Obviously, evidence should have been produced as to the authority of the person assertedly so speaking for the corporation. *Anderson v. Standard Lumber Co.*, 64 Cal. App. 410, 221 P. 686.

[6-8] But, while respondents may not be relieved upon the theory that the terms of their written guaranty may be altered by parol testimony, we are of the opinion that another consideration absolves them from liability. When the original maker of the note transferred to another the real property pledged as security, such original maker became the surety for the payment of the note, entitled to all the protection which the law gives to sureties (*Braun v. Crew*, 183 Cal. 728, 192 P. 531), including the Code provisions that he cannot be held beyond the express terms of his contract (Civ.Code, § 2836), and that he as surety is exonerated if by any act of the creditor, without the consent of the surety, the original obligation is altered in any respect (Civ.Code, § 2819). In the case here under consideration the payee of the note on more than one occasion granted extensions in the payment of principal installments, all without the knowledge or consent of the original maker of the note. Such extensions, being in writing, presume a consideration, and, in addition to such presumption, there was positive evidence as to one extension that it was given in consideration of the payment in advance of a certain principal installment. Such sufficient consideration for the extension being shown, and the extension altering the original terms of the obligation having been made without the consent of the original maker of the note, the original maker was exonerated. *Braun v. Crew*, supra. The original maker of the note being thus released, respondents as guarantors were also released. *Anderson v. Shaffer*, 98 Cal.App. 457, 277 P. 185.

It follows that upon this ground respondents are exonerated from liability.

Judgment affirmed.

We concur: CRAIL, P. J.; WOOD, J.



12 Cal.App.2d 639

ROSS et al. v. BAY CITY TRANSIT CO.
et al.

Civ. 9749.

District Court of Appeal, Second District,
Division 1, California.

March 24, 1936.

Hearing Denied by Supreme Court
May 21, 1936.

1. Carriers ⇨299

Bus driver's action, in driving within few feet of center of highway when there was unoccupied space the width of the bus to the right on the highway, constituted negligence as regards bus company's liability for passenger's injuries when bus was sideswiped by automobile (St.1931, p. 2124, § 122).

2. Appeal and error ⇨999(3)
Negligence ⇨136(14, 25)

Questions of negligence and proximate cause are questions of fact for trial judge or jury.

3. Carriers ⇨318(4)

Evidence held to sustain finding for bus passenger on ground that bus driver's negligence in driving unnecessarily close to center line of highway was proximate cause of passenger's injuries suffered when bus was sideswiped by automobile (St.1931, p. 2124, § 122).

4. Trial ⇨139(1)

Refusal of nonsuit is not reversible error if it appears from all evidence, including defendant's, that plaintiff's case was made out, even though plaintiff's evidence alone would not establish a case.

5. Carriers ⇨347(6)

Bus passenger who rested his elbow on window sill of bus and whose arm was not outside outer edge of sill held not as matter of law contributorily negligent so as to bar recovery from bus company for injury to arm resulting when bus and automobile sideswiped (St.1931, p. 2124, § 122).

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Judge.

Action by Kenneth Ross, a minor, by James F. Ross, guardian ad litem, and another, against the Bay City Transit Company and another. From an adverse judgment, the defendants appeal.

Affirmed.

Bryce P. Gibbs, of Los Angeles, for appellants.

Walter S. Coen, of Los Angeles, for respondents.

SHINN, Justice pro tem.

This is an appeal by defendants from a judgment in plaintiffs' favor after a trial of an action before the court, arising out of an injury sustained by plaintiff Kenneth Ross, a minor, while a passenger in a motorbus operated by defendant Bay City Transit Company.

The case presents the sole question whether the defendants were guilty of negligence contributing proximately to the accident, in the operation of the bus under the following circumstances: The bus was proceeding in a northerly direction on San Pedro road, a paved highway having a width of about 40 feet. It was traveling at about twenty-five miles per hour on the east half of the highway with its right wheels 7 or 8 feet from the right edge of the pavement and the left wheels within 2 or 3 feet of the center of the highway. Traffic was heavy in each direction. The bus driver testified that he observed a car coming from the opposite direction at a distance of about 300 feet and at a speed of 50 or 55 miles per hour; that it was "just straddling the center line half and half" and passed two other cars going in the same direction; that he did not alter the course of the bus; that the car returned to the west side of the highway after passing the other cars; that it came over to the east half of the highway when about 30 feet away from the bus; and that at that time he turned the bus slightly to the right. The side of the bus, about 10 feet from the front on the left side, was struck by the car, and plaintiff, who was riding with his arm on the sill of a window he had opened, was struck at or above the elbow, receiving serious and permanent injuries to his arm.

If there was negligence on the part of the driver of the bus, it is to be found in the evidence that the bus was driven close to the center line of the highway and pro-

ceeded straight ahead, with practically no deviation from its course, after the driver had observed the approaching car being driven at excessive speed and a part of the time on the east half of the highway.

[1] Under section 122 of the California Vehicle Act (St.1923, p. 557, § 122, as amended by St.1931, p. 2124), it was the duty of the driver of the bus to drive the same on the right half of the highway and close to the right edge of the highway, unless it was impracticable to do so, or unless he was overtaking and passing another vehicle. There was unoccupied space the width of the bus along the east edge of the highway; the bus was not in the act of passing another car; the entire highway was usable; and no reason was shown why the bus could not have traveled close to the edge as the law required. This violation of the law, which was clearly shown, was in itself an act of negligence.

Had the court believed the testimony of the bus driver in its entirety, it might be questioned whether the court would have found the evidence sufficient to establish this single act of negligence as the proximate cause of the accident. The driver's explanation of the accident was not corroborated, and we cannot say that the trial court was bound to accept it or did accept it. He testified that just before the approaching car struck the bus it swung out around another car which was just about opposite him and in doing so grazed the side of the bus and proceeded on without stopping. His testimony on cross-examination was susceptible of the construction that after the approaching car returned to the west side of the highway there was no other car ahead of it. Furthermore, he testified at the trial that his left wheels were 6 or 8 feet from the center line of the road, although he had testified in his deposition that they were not more than 2 or 3 feet from the center.

[2,3] In the face of the uncertainties and contradictions in the testimony of the bus driver, the court was not bound to believe and accept his explanation of the accident, and especially that part of his testimony in which he described the car as returning to its own side of the street and coming out again to pass another car. *Prickett v. Whapples* (Cal.App.) 52 P.(2d) 972. It might be that the testimony as given created a doubt in the mind of the trial court that the approaching car, after it was first observed, did return to its own

side of the road. The evidence showed that the bus and the car approached each other at a combined speed of 75 miles per hour or at the rate of 110 feet per second. This would allow the approaching car less than three seconds to travel from the point where it was first observed passing other cars to the point where it struck the bus. Whether it was reasonable to believe that the car in such an exceedingly brief period could have been driven back to its own side of the road and then again to the wrong side, where it struck the bus, is debatable. The trial court was required to weigh the improbability that the car could have been or was operated in this erratic and difficult manner against the assertions of the bus driver that it was so operated. There was ample time in which to move the bus over to a safer position after the driver first saw the approaching car on the wrong side of the highway. All of these considerations were for the trial court to weigh in determining the issues of negligence and proximate cause, and it is not for this court to say whether we would have reached the same conclusions of fact which the trial judge reached. We cannot say that the trial court could not reasonably have believed from the evidence that the car approached along or dangerously close to the center of the highway, in which event the court might have concluded that the bus driver should have driven the bus over to the right; nor can we say, as a matter of law, that the driver of the bus, upon his own statement of the case, exercised a high degree of care after seeing the approaching car. It is needless to say that the questions of negligence and proximate cause are questions of fact, resting with the trial judge or jury. The conclusion of the trial court upon these questions finds support in the evidence and inferences reasonably drawn therefrom, and this court cannot disturb its findings.

[4] There is much discussion in the briefs as to the application of the doctrine of *res ipsa loquitur* to the facts established by the evidence on behalf of plaintiff in which it was shown that plaintiff's injuries were suffered when his arm was struck by a passing car. If we should assume that a nonsuit should have been granted upon the ground that no inference of defendants' negligence nor that such negligence was the proximate cause of the accident arose from the facts established by plaintiff's evidence,

a reversal would not be justified if the deficiency of plaintiff's proof was supplied by that of the defendants. *Carter v. Canty*, 181 Cal. 749, 753, 186 P. 346; *Withey v. Hammond Lumber Co.*, 140 Cal.App. 587, 598, 35 P.(2d) 1080; *Russell v. Pacific Can Co.*, 116 Cal. 527, 48 P. 616; *Western California L. Co. v. Welch*, 41 Cal.App. 435, 183 P. 169. The basis of the decision is found in the testimony which described the accident and the manner of its occurrence, and not in the doctrine of *res ipsa loquitur*.

[5] It is contended that plaintiff was guilty of contributory negligence. It appears that he opened the window by which he was seated and rested his elbow on the sill. It does not appear that plaintiff's arm was at all outside of the outer edge of the window sill and frame. The court having decided that plaintiff was not guilty of contributory negligence, we are bound by that finding; there being nothing in plaintiff's conduct constituting negligence as a matter of law. *Strock v. Pickwick Stages System*, 107 Cal.App. 298, 290 P. 482; *Graff v. United Railroads of San Francisco*, 178 Cal. 171, 172 P. 603; *Seigel v. Eisen*, 41 Cal. 109.

The judgment is affirmed.

We concur: HOUSER, P. J.; DORAN, J.



12 Cal.App.2d 743

HUDSON et al. v. BECKER et al.

Civ. 10885.

District Court of Appeal, Second District,
Division 2, California.

March 27, 1936.

Hearing Denied by Supreme Court
May 25, 1936.

1. Appeal and error ☞931(1)

District Court of Appeal had duty to view evidence in light most favorable to party prevailing in lower court.

2. Mortgages ☞335

Where mortgagee had refused to grant extension of time for payment of installment of principal and mortgagors had made part payment only, mortgagors were in default.

3. Mortgages ☞335

Mortgagors, under a second trust deed providing that they should pay when due all encumbrances which appeared to be prior liens or charges upon mortgaged property, were in default when they failed to make full payment, when due, of installment of principal upon prior trust deed.

4. Quieting title ☞47(2)

Failure of trial court to find that mortgagors' default had not been waived held not fatal to judgment in quiet title action based upon finding of nonwaiver of default, where issue as to waiver arose merely in evidence at trial and was not raised by pleadings.

5. Trial ☞395(6)

Ordinarily, findings of fact are sufficient if they follow the language of the pleadings.

6. Quieting title ☞47(2)

In quiet title action wherein defendants set up affirmative defense of ownership of property, such ownership by defendants was ultimate fact to be found.

7. Appeal and error ☞1008(1)

In reviewing sufficiency of findings to support a judgment, regard will be had to the ultimate facts and not to mere probative facts.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by J. W. Hudson and another against Anna E. Becker and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

A. P. G. Steffes and Holbrook, Taylor, Tarr & Reed (by Joseph D. Taylor), all of Los Angeles, for appellants.

Lobdell & Watt (by Harold L. Watt), of Los Angeles, for respondents.

CRAIL, Presiding Justice.

[1,2] This is an appeal from a judgment against the plaintiffs in an action brought against the defendants for the purpose of quieting title to certain real property. At one time the defendants owned the property and during the period of their ownership executed a promissory note and a mortgage securing the same in favor of a Los Angeles bank. Thereafter they sold

the property to F. O. Paige and wife, who executed a promissory note and a second trust deed upon the property in favor of defendants. The trust deed was junior and subject to the mortgage. Thereafter the Paiges conveyed the property to the plaintiffs subject to the first mortgage and subject also to the second trust deed which the plaintiffs assumed and agreed to pay. Thereafter and on August 10, 1932, an installment of principal in the amount of \$750 became due upon the first mortgage note. The plaintiffs asked the bank for an extension of time within which to make the payment. The bank refused to grant an extension, and thereupon the plaintiffs made a payment of \$250 and said that they were not able to pay the entire balance then due, but that they expected to pay the balance shortly. Viewing the evidence in the light most favorable to the prevailing party, which it is our duty to do, there was no extension of time given to the plaintiffs and no waiver of the default. On the contrary, the bank forthwith notified the defendants of the default. Thereafter the defendants wrote a letter to the plaintiffs informing them of their default, i. e., that the \$500 had not been paid when due and advised them that unless this balance was paid it was the defendants' intention to exercise the option reserved in the second trust deed to declare all sums secured thereby immediately due and payable. The defendants waited a week and then, in order to protect their second lien, went to the bank and paid the \$500 which was in default, together with interest thereon, and thereupon they went to the trustee under their second trust deed and executed "a declaration of default and election to sell and instructions to the trustee." After the notice of default and election to sell had been recorded, the usual and legal notices of sale were given, and thereafter the trustee sold the property at public sale, defendants being the purchasers, and the trustee under the trust executed and delivered to defendants a deed conveying the real property to them.

The plaintiffs contend: "That the trustee's sale was invalid and that the defendants acquired no title * * *: First, because there was no default on the first mortgage held by the Security Bank and consequently no justification for making the advance and no obligation to repay it. Second, because, assuming there had been a default under the first mortgage and a

justification for making the advance, there had been no such failure to repay the advance as to constitute a default under the second trust deed. Third, because the defendant, by her conduct in noticing default and election to sell without giving the plaintiffs opportunity to repay the advance made, prevented the plaintiffs from meeting any obligation to repay the advance which may have existed and thus caused the default by the plaintiffs." Fourth, "the judgment must be reversed for a failure to find specifically that the Security Bank had waived any default which may have existed."

With regard to the plaintiffs' first contention that there was no default on the first mortgage, it is apparent from what we have said that plaintiffs were in default in not paying the \$500 which had become due. In this regard the plaintiffs claim that there was no default because the bank had waived the default. We are satisfied that there is substantial evidence in the record to sustain the implied finding that there was no such waiver. In this behalf it should be observed that the more important question is whether a default existed in the performance of the covenants of the second trust deed, for the reason that it was this trust deed which plaintiffs had assumed and which ran in favor of the defendants, and it was this trust deed which was foreclosed.

[3] By the terms of this second trust deed the plaintiffs agreed to pay *when due* all encumbrances which appeared to be liens or charges upon the said property or any part thereof prior to this deed of trust; that should they fail or refuse to make any such payments, then the defendants might, without notice to or demand upon plaintiffs and without releasing plaintiffs from any obligation thereof, make such payments in such manner and to such extent as might be deemed necessary to protect the security of their deed of trust; also to pay without demand all sums expended by the defendants under the terms thereof; and that, should default be made by the plaintiffs in the performance of any of their obligations therein contained, then the defendants might declare all sums secured thereby immediately due by the execution and delivery to the trustee of a written declaration of default and demand for sale, whereupon all sums secured thereby should become and be immediately due and payable. It is apparent from an examination

of the contract itself that the bank was not in a position to alter or change the rights of the defendants by waiving a default of the plaintiffs, even if it had waived the default as to itself, which it did not. It is apparent from what we have said that there was a default under the terms of the second trust deed.

The plaintiffs' third contention, that it was the defendants who caused the default by the plaintiffs because of their conduct in noticing default and election to sell without giving the plaintiffs opportunity to pay the advance made, is without merit on its face. The plaintiffs were in default before the defendants took any part in the transaction. Their activities were merely in an effort to protect themselves from plaintiffs' default. From August 10, 1932, to February 1, 1933, the date of the sale, the plaintiffs had ample opportunity to perform their covenants and cure the default. There exists in the case no element of fraud, deceit or inadequacy of consideration.

[4-7] With regard to the plaintiffs' contention that the judgment must be reversed because the trial court failed to find specifically that the bank had waived the default and because such finding, if made, must have been in favor of the plaintiffs, there are two answers: First, we have already said that there was substantial evidence that the default had not been waived; second, there was no allegation in the pleadings that the bank had waived the default and there was no issue in the pleadings with regard to the matter. The plaintiffs' complaint was the ordinary action to quiet title. The defendants set up an affirmative defense that they were the owners of the property. The issue as to waiver of the default arose merely in the evidence at the trial. Ordinarily, the findings of fact are sufficient if they follow the language of the pleadings. *Dam v. Zink*, 112 Cal. 91, 44 P. 331; *Vasey v. Campbell*, 4 Cal.App. 451, 88 P. 509; *Biurrun v. Elizalde*, 75 Cal.App. 44, 242 P. 109; also, see cases collected in 24 Cal.Jur. 984. Ownership of the property by the defendants was the ultimate fact which was alleged in the answer and which was set forth in the findings. *Hitchcock v. Rooney*, 171 Cal. 285, 152 P. 913; *Hannah v. Canty*, 175 Cal. 763, 167 P. 373. Plaintiff should remember that in reviewing the sufficiency of the findings to support a judgment, regard will be had to the ultimate facts and not to mere

probative facts. 2 Cal.Jur. 872, and cases cited in Ten Year Supp.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, Justice pro tem.



12 Cal.App.2d 695

**HEAVILIN v. WESTCHESTER FIRE INS.
CO. OF NEW YORK et al.**
Civ. 1395.

District Court of Appeal, Fourth District,
California.

March 25, 1936.

1. Courts ⇨170

Generally, jurisdiction of court is determined by prayer of complaint, but allegations of complaint may be scrutinized where necessary to determine court having jurisdiction of action.

2. Justices of the peace ⇨44(9)

Where insurer had issued automobile theft policy limiting liability to actual value of automobile, alleged to be \$500, and another insurer had issued \$300 theft policy, while third insurer had issued \$250 theft policy, action to recover from each insurer its proportionate share of \$500 loss held within exclusive jurisdiction of class B justice court and not superior court of county without class A justice court (Code Civ.Proc. § 112, as amended by St.1933, p. 1814, § 23).

3. Courts ⇨169(3)

Question as to court having jurisdiction of action is determined by maximum amount of separate recovery possible against each defendant and not by total of amounts which plaintiff hopes to recover from them.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Dean Heavilin against the Westchester Fire Insurance Company of New York and others. Judgment for plaintiff, and defendants appeal.

Reversed.

Harvey & Johnston, of Bakersfield, for appellants.

W. C. Dorris and R. W. Henderson, both of Bakersfield, for respondent.

MARKS, Justice.

Plaintiff brought this action to recover from each separate defendant its proportionate share of \$500, the alleged value of a stolen automobile upon which each defendant had issued a separate policy of insurance against theft. He had judgment against the Westchester Fire Insurance Company of New York for \$95.24 and \$8.88 accrued interest, the Home Insurance Company for \$57.14 and \$5.32 accrued interest, and the Great American Insurance Company for \$47.62 and \$4.44 accrued interest. The sole question we need consider on this appeal is whether the superior court of Kern county had jurisdiction of the action. There is no class A justices' court in that county.

[1] While, as a general rule, jurisdiction is determined by the prayer of the complaint, we may scrutinize the allegations of the complaint where necessary to determine the court having jurisdiction of the action. *Trinidad Bean & Elevator Co. v. Superior Court*, 128 Cal.App. 355, 17 P.(2d) 153; *Hammell v. Superior Court*, 217 Cal. 5, 17 P.(2d) 101.

We infer from the allegations of the complaint that plaintiff purchased the automobile in question on a conditional sales contract with title reserved in the seller, and refinanced the purchase with a similar contract. As the contracts were paid, that matter becomes immaterial, and we will treat the case as though plaintiff had been at all times the legal owner of the car.

The complaint alleges that on September 19, 1932, plaintiff was the owner of a 1928 Hupmobile sedan and was insured against theft of the car in the sum of \$300 by the Westchester Fire Insurance Company of New York; that on December 15, 1932, he was insured against the theft of the car by the Home Insurance Company for the actual value of the automobile; that on December 16, 1932, he was insured against the theft of the car in the sum of \$250 by the Great American Insurance Company; that each policy was for one year and the premiums were paid by plaintiff; that the three policies were in full force and effect on July 16, 1933, when the automobile was stolen, "totally wrecked," and rendered "utterly valueless"; that, when stolen, the automobile was of the value of \$500; that on

July 20, 1933, defendants, through a common agent, took possession of the car and still retain it; that immediately after the theft plaintiff notified defendants of it and made due proof of loss; that defendants repudiated their contracts and refused payments under them; that the policy issued by the Great American Insurance Company contained a clause to the effect that, if the insured had concurrent theft insurance on the automobile, it should be liable only for its proportionate amount of the loss which the sum insured bears to the total amount of the insurance; that plaintiff was unable to determine and apportion the respective liabilities of the separate defendants, and therefore joined all of them as defendants in the action. The complaint concludes with the following prayer: "Wherefore, plaintiff prays judgment in the sum of Five Hundred Dollars (\$500.00), apportioned against the several defendants as their respective liabilities may appear, and for such other and further relief as may be equitable and just in the premises; and for his costs of this action."

In determining issues of this kind we are concerned with the allegations and prayer of the complaint, as initial jurisdiction is there determined and not by the findings and judgment. *Gardiner v. Royer*, 167 Cal. 238, 139 P. 75.

[2] Section 112 of the Code of Civil Procedure (as amended by St.1933, p. 1814, § 23), as in effect at the time of the institution of this action on December 14, 1933, provided that class B justice's courts had original jurisdiction "in all cases at law in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars or less," subject to exceptions not material here.

It is clear that this action is one at law to determine the liability of each separate defendant upon its separate and individual contract with plaintiff. The primary liability of one defendant to plaintiff was in no way affected by the liability of either of the other two; it being affected only in the amount of possible recovery. The maximum of possible recovery against any defendant was the maximum amount of insurance specified in its policy. This being true, the recovery against the Westchester Fire Insurance Company of New York could not exceed \$300, and against the Great American Insurance Company, \$250, the maximum amounts of their respective liabilities specified in their respective contracts of insurance. It is immediately ap-

parent from the statement of these facts that exclusive jurisdiction of the actions against these defendants lay in the justice's court and not the superior court.

The liability of the Home Insurance Company was limited by its contract to the actual value of the stolen automobile. The complaint alleged this value at \$500. It follows that, if the action had been instituted against this defendant alone, with these allegations in the complaint, jurisdiction lay in the superior court.

Instead of suing each defendant separately, plaintiff chose to join them in one action. It is obvious that the judgment would have to be against each defendant separately for the amount of its liability, as their obligations were several and not joint or joint and several. In the prayer of his complaint, plaintiff sought to have the trial court determine the respective amounts of these several recoveries.

He had insured his automobile against theft by three separate policies with an aggregate liability of \$1,050. He alleged the amount of his loss as \$500. It is clear that he was asking, and expected, the trial court to apportion this loss among the insurance carriers in proportionate amounts. His loss of \$500 bore the proportion of $\frac{1}{2}$ to the aggregate amount of the insurance he carried. Applying that fraction as fixing the liability of each defendant, and by disregarding fractional cents, we have the following maximum liability of each defendant: Westchester Fire Insurance Company of New York, \$142.85; Great American Fire Insurance Company, \$119.05; and Home Insurance Company, \$238.10.

[3] The question of jurisdiction is not affected by the fact that plaintiff sought to recover an aggregate amount of \$500 from the three defendants; this amount being made up by the total of their several liabilities. As their liabilities were several and an independent recovery must be had against each, jurisdiction is determined by the maximum amount of the separate recovery possible against each defendant, and not by the total of the three amounts which plaintiff hoped to recover from them. This rule is well established in California. *Thomas v. Anderson*, 58 Cal. 99; *Winrod v. Wolters*, 141 Cal. 399, 74 P.(2d) 1037; *Colla v. Carmichael U-Drive Autos, Inc.*, 111 Cal.App. (Supp.) 784, 294 P. 378; *Derby v. Stevens*, 64 Cal. 287, 30 P. 820; *Hyman v. Coleman*, 82 Cal. 650, 23 P. 62, 16 Am.St.Rep. 178; *Myers v. Sierra, etc.*,

Ass'n, 122 Cal. 669, 55 P. 689; Miller v. Carlisle, 127 Cal. 327, 59 P. 785; Johnson v. Hinkel, 29 Cal.App. 78, 154 P. 487.

We have not discussed the propriety of plaintiff joining in a single count of one complaint three causes of action against three defendants upon separate contracts of insurance. The question was not presented to the trial court and is not argued here.

Judgment reversed.

We concur: BARNARD, P. J.; JENNINGS, J.



12 Cal.App.2d 717

BARNHARDT v. GRAY et al.

Civ. 5560.

District Court of Appeal, Third District,
California.

March 28, 1936.

1. Mandamus ☞187(8)

Where court could not say from record that school board's appeal from peremptory writ of mandamus declaring status of teacher as permanent was without merit, teacher's motion to dismiss appeal was denied (Rules for Supreme Court and District Court of Appeal, rule 5, § 3).

2. Schools and school districts ☞133

Classification as permanent employee in written contracts hiring teacher for two succeeding years to teach in school of daily attendance of less than 850 pupils was ineffectual to confer status of permanent teacher, where School Code provided that teachers in schools of that size might be classified as permanent employees only by governing board after having been employed in district for three complete consecutive school years (School Code, § 5.501, as added by St. 1931, p. 1394, § 4).

3. Schools and school districts ☞133

Teacher who had taught two years and was re-employed as a permanent teacher in school of daily attendance of less than 850 pupils by oral agreement of two of three school trustees not in regular meeting held not a permanent teacher, where no formal

affirmative action was ever taken by board of trustees as required by statute regulating classification of teachers in schools of that size (School Code, § 5.501, as added by St. 1931, p. 1394, § 4).

4. Schools and school districts ☞135(1)

Where power to employ teachers is in school board, valid contracts with teachers cannot be made by members of board without meeting and formal action (School Code, § 5.400, and §§ 5.500, 5.501, as added by St. 1931, p. 1394, § 4; Pol.Code, § 1607, subd. 1).

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Mandamus by Emilia J. Barnhardt against C. T. Gray and others, as members of and constituting the Board of Trustees of the Laws School District, in Plumas County, to determine her status as a permanent teacher of the school district. From a peremptory writ declaring plaintiff to have attained the status of a permanent employee of the district, defendants appeal, and plaintiff moves to dismiss the appeal.

Motion to dismiss the appeal or affirm the judgment denied.

M. C. Kerr, of Quincy, and A. M. Mull, Jr., of Sacramento, for appellants.

A. B. Reynolds and S. H. Jones, both of Sacramento, for respondent.

PER CURIAM.

[1] This is a motion to dismiss an appeal from a writ of mandamus which was issued declaring the status of a teacher in the Laws school district to be that of a permanent teacher in that school and directing the payment of her salary. The motion to dismiss the appeal is made under the provisions of rule V, section 3, Rules for Supreme Court and District Courts of Appeal, on the ground that the appeal was taken merely to delay and that the issues are unsubstantial, having been conclusively determined by the law.

We are unable to say from the record that the appeal is without merit, and the motion to dismiss should therefore be denied. Nor should the writ be affirmed without giving the respondent an opportunity of filing her brief and presenting her cause on appeal.

[2] June 14, 1930, Emilia J. Barnhardt was employed for the ensuing year by the Laws school district of Plumas county, by written contract, as a teacher of elementary grades therein. The contract provided that she was hired as a "permanent employee." In May, 1931, she was re-employed in the same capacity for the ensuing year by a similar written contract containing the same provision that she was classified as a "permanent employee." The classification in these two contracts as a permanent employee was premature and ineffectual. The school had a daily attendance of less than 850 pupils. The school district was represented at all times by a board of trustees consisting of three members.

It appears that, for two years following the employment of the teacher by written contract as previously recited, the school board never held a meeting. Both Mr. English and Mr. Hartley, who were then trustees, testified to that fact. There is no conflict of evidence on that subject. It is true that, prior to the beginning of the school years of 1932-1933 and 1933-1934, two of the trustees did confer unofficially outside of a regular school board meeting, and agreed orally to re-employ the teacher for the last-mentioned two years "as a permanent teacher" of the district. No record of any meeting of the school board appears during that period of time, and no record of the designation of the teacher as a permanent employee was made. For four consecutive years Mrs. Barnhardt successfully taught elementary grades in that school. In May, 1934, a regular meeting of the school board was called, and a resolution was then passed and signed by all of the members of the board dispensing with the services of Emilia J. Barnhardt as a teacher in that school. She then instituted this proceeding for a writ of mandamus to determine her status as a permanent teacher of the school district. The peremptory writ was granted, and she was thereby declared to have attained the status of a permanent employee of the district. From that decree the school district has appealed. After the appellants' opening brief on appeal had been filed, this motion to dismiss was made.

[3] Section 5.501 of the School Code was enacted and became effective August 14, 1931 (Stats.1931, p. 1394, § 4). At that time Mrs. Barnhardt had not attained permanent tenure as a teacher in the Laws

school district. That section requires affirmative action of the school board after an employment of three consecutive school years to classify a teacher as a permanent employee. This action was not taken by the school board in the present case. The board did not hold a meeting during that period for that or any other purpose. The section provides in that regard:

"5.501. Every employee of a school district of any type or class, having an average daily attendance of less than 850 pupils, who, after having been employed by the district for three complete consecutive school years in a position, or positions, requiring certification qualifications and is reelected for the next succeeding school year to a position requiring certification qualifications, may be classified by the governing board of the district as a permanent employee of the district. If said classification be not made the employee shall not attain permanent status and may be reelected from year to year thereafter without becoming a permanent employee until said classification is made."

Where a school has a daily attendance of 850 or more pupils, a different rule applies under the provisions of section 5.500 of the School Code (as added by St.1931, p. 1394, § 4). Under such circumstances, when a teacher is re-employed after three consecutive years of service in the same school, he is deemed to have been automatically classified as a permanent teacher therein. *Gastineau v. Meyer*, 131 Cal.App. 611, 22 P.(2d) 31; *Sherman v. Board of Trustees of Siskiyou Union High School District* (Cal.App.) 49 P.(2d) 350. In the present case, however, it is undisputed that the school had a daily attendance of less than 850 pupils.

Section 5.400 of the School Code confers the authority upon "boards of school trustees" to employ teachers requiring certification qualifications. Section 5.501 of the same Code authorizes the "governing board of the district" only to classify teachers as permanent employees of a school having a daily attendance of less than 850 pupils. It necessarily follows that the informal agreement of members of the school board to that effect outside of a regular school board meeting is ineffectual to confer upon the teacher permanent tenure. In the case of *Cloverdale Union High School District of Sonoma County v. Peters*, 88 Cal.App. 731, 264 P. 273, 276, it was said in that regard:

[4] "Where power to employ a teacher is in a school board, a valid contract with a teacher cannot be made by members of the board without a meeting and formal action." 24 R.C.L. 615; Pol.Code, § 1607, subd. 1; McGinn v. Willey, 6 Cal.App. 111, 91 P. 423; Ryan v. Humphries, 50 Okl. 343, 150 P. 1106, L.R.A.1915F, 1047, and note."

For the reason that it appears no formal action of the board of school trustees of the Laws school district was ever taken and that the teacher was merely informally accepted by two members of the board outside of a board meeting as a permanent employee, we are unable to say there is no merit in this appeal.

The motion to dismiss the appeal or affirm the judgment is denied.



13 Cal.App.2d 4

BLACK et al. v. CITY OF SANTA MONICA et al.
Civ. 10891.

District Court of Appeal, Second District,
Division 2, California.
March 30, 1936.

1. Municipal corporations Ⓒ354

City could not terminate contract under which plaintiffs were engaged in making alterations to street lighting system without notice and in disregard of provision that city might cancel and terminate contract upon ninety days written previous notice.

2. Contracts Ⓒ271

Notice of cancellation of contract declaring cancellation effective at a time short of that stipulated in contract is without effect and does not operate to work a cancellation.

3. Mandamus Ⓒ3(4)

Plaintiffs whose contract to make alterations to city street lighting system was canceled by city without notice held not entitled to writ of mandamus ordering city and officers to permit plaintiffs to resume work and decreeing that contract be terminated only as provided by its terms, since plaintiffs

had an adequate remedy at law (Code Civ. Proc. § 1086).

4. Mandamus Ⓒ3(4)

Municipal corporations Ⓒ253

Municipal corporations and their officers have no special duty to carry out terms of contracts or to refrain from breaches of contractual relations, and disputes arising out of contracts with municipal corporations are to be litigated in usual forms of legal actions rather than by extraordinary remedy of mandamus.

5. Mandamus Ⓒ12

Mandamus will not issue unless there be a clear case to compel performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Mandamus by Ralph B. Black and Glen H. Wallace, as individuals and as a co-partnership doing business under the fictitious name and style of Ralph B. Black & Glen H. Wallace, against the City of Santa Monica and others to order the city and its officers to perform the necessary acts to permit plaintiffs to resume work under a contract and to decree that the contract be terminated only as provided by its terms. From an order overruling defendant's demurrers and from a judgment ordered for plaintiffs when defendants refused to answer the complaint, defendants appeal.

Reversed, with directions to sustain defendants' general demurrer without leave to amend.

Boyd C. Barrington and Robert N. Baker, both of Santa Monica, for appellants.

Walter H. Sprague and Charles Greenberg, both of Los Angeles, for respondents.

GOULD, Justice pro tem.

Plaintiffs, acting under a contract with defendant city of Santa Monica, were engaged in making alterations in the municipality's street lighting system. By its terms the contract provided that the city should be the sole judge as to the satisfaction and performance of the work done by the contractors and that it might at any time "upon ninety days written previous notice" cancel and terminate said contract.

The within action is a proceeding in mandamus against the city and its officers, alleging that the contract was canceled by defendants without any notice whatsoever, and that by reason of that act and by the failure and refusal of defendants to make certain electrical circuit releases and permits, plaintiffs were prevented from carrying out their contract according to its terms. Relief was asked in the nature of a judicial mandate directed to the city and its officers ordering them to perform the necessary acts to permit plaintiffs to resume work under the contract and decreeing that the contract be terminated only upon ninety days' notice as provided by its terms. Defendants interposed general and special demurrers, which were overruled by the court; defendants in open court declined and refused to answer the complaint and judgment thereupon was ordered for plaintiffs. Defendants appeal.

[1,2] Appellants' contention that the contract might be terminated by the city without notice and in disregard of the ninety-day provision is untenable. A notice of cancellation declaring cancellation effective at a time short of that stipulated in the contract is without effect and does not operate to work a cancellation. *Oldfield v. Chevrolet Motor Co.*, 198 Iowa, 20, 199 N.W. 161, 35 A.L.R. 889; *Cline v. Smith*, 96 Cal.App. 697, 274 P. 761.

[3-5] But even assuming that respondents were entitled under the terms of their contract to a ninety-day notice and that appellants disregarded respondents' legal rights by the immediate termination of the contract without notice, it does not follow that the extraordinary remedy of mandate may be invoked herein. It is difficult to discover vital points of difference between the situation presented herein and that obtaining had respondents been working under a contract with a private corporation instead of with a municipal corporation. For failure on the part of the private corporation to observe the terms of its contract respondents would have resorted to an action at law, as, for example, damages for breach of contract. Here the same remedy is available against the municipality, and it is elemental that mandamus may not be invoked where there is a plain, speedy, and adequate remedy in the ordinary course of law. Code Civ.Proc. § 1086. Furthermore, the law imposes upon municipal corporations and their officers

no special duty to carry out the terms of contracts or to refrain from breaches of contractual relations. They are not singled out, as distinguished from other corporate entities or other individuals, as especially enjoined to observe contractual obligations; and as stated in *Perrin v. Honeycutt*, 144 Cal. 87, 77 P. 776, 777, "when [the writ of mandate] is applied for, there must be a clear case to 'compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station.'" In our opinion disputes arising out of such a contract with a municipal corporation are to be litigated in the usual and ordinary forms of legal actions rather than by calling upon the extraordinary remedy of mandamus.

The judgment is reversed, with directions to the trial court to sustain the general demurrer without leave to amend.

We concur: CRAIL, P. J.; WOOD, J.



13 Cal.App.2d 130

LA FOUNTAIN v. INDUSTRIAL ACCIDENT
COMMISSION et al.

Civ. 5585.

District Court of Appeal, Third District,
California.

April 7, 1936.

1. Master and servant ☞388

Wife of deceased employee who had, prior to husband's death, left husband resisted all efforts toward a reconciliation, and instituted annulment proceedings *held* not entitled to compensation for husband's death, since wife had "abandoned" husband, who was therefore at time of his death under no legal obligation to provide for wife (Civ.Code, §§ 96, 99, 175; St.1919, p. 917, § 14).

[Ed. Note.—For other definitions of "Abandon; Abandonment," see Words & Phrases.]

2. Master and servant ☞416

Finding by Industrial Commission that claimant had deserted husband and was not living with her husband at time of injury

causing husband's death, and that husband was not liable for her support, and that she was not a dependent constituted finding of ultimate facts sufficiently specific to support order denying compensation.

3. Master and servant ☞405(5)

Proof that wife was not dependent on husband for support as term "dependency" is used in compensation act supports Industrial Commission's order denying compensation for widow on account of husband's death, it being unnecessary to establish "desertion" of wife as that term is defined in divorce statutes (Civ.Code, §§ 96, 99, 175; St.1919, p. 917, § 14).

Proceeding under the Workmen's Compensation Act by Emeline La Fountain for the death of Alfred La Fountain, her husband, claimant, opposed by the Montezuma-Apex Mining Company, employer, and Industrial Indemnity Exchange, insurance carrier. To review an order of the Industrial Accident Commission denying an award of compensation, the claimant brings certiorari.

Order affirmed.

Robert H. Schwab and Chas. H. Crocker, both of Sacramento, for petitioner.

Everett A. Corten and R. P. Wisecarver, both of San Francisco, for respondents.

Mr. Justice THOMPSON, delivered the opinion of the court.

By means of certiorari the petitioner seeks to review an order of the Industrial Accident Commission denying her claim for compensation on account of the death of her husband, which was refused on the ground that she was not dependent for support on the deceased at the time of his death, since she had previously deserted him and they were living separate and apart from each other.

The petitioner and Alfred La Fountain were husband and wife at the time of his death, December 28, 1934, which occurred in the course of his employment by a fall into the shaft of a mine where he was working. Both spouses were under the age of majority. Their married life was brief and turbulent. Wild parties and excessive drinking contributed to their lack of harmony. November 13, 1934, they separated. He sought a reconciliation, which she refused. Her mother tried to adjust their

differences, but failed. The claimant was keeping company with another young man. The morning of their separation the spouses were quarreling and the wife was heard to say "she wouldn't stay with him because Ed Brobeck had made a better proposition to her and was going to take her up to Utah." November 19th she wrote her husband a letter saying, "I have concluded that we cannot live together any longer; therefore I am addressing you for the purpose of ascertaining whether or not it will be convenient for you during the present week to call with your father so that we can proceed with an annulment of our marriage." On December 26th, two days before the death of her husband, she went to Sacramento in company with the young man Brobeck to see a lawyer, who at her request then commenced a suit for annulment of the marriage. The father of the deceased signed the complaint, but the claimant paid the fees for conducting the litigation. It is evident that she voluntarily left her husband on account of her interest in the other young man. The evidence shows that she willfully left her husband and resisted all efforts toward a reconciliation. The commission found that: "Emeline La Fountain was the wife of Alfred La Fountain at the time of the injury and had deserted him and was not living with her husband at the time of the injury, and he was not liable for her support, and she is not a dependent within the presumption of section 14 [of the Workmen's Compensation Act]. The employee was not contributing to the support of Emeline La Fountain at the time of the injury and she was not in fact dependent."

Upon the preceding finding the petitioner's claim was rejected. An application for rehearing was denied. This petition for a writ of certiorari was then filed.

The petitioner contends that the evidence fails to support the findings and denial of award for the chief reason, as it is asserted, that neither desertion nor abandonment of her husband is shown on the part of the claimant.

[1] We are of the opinion the evidence adequately supports the findings and the denial of the compensation. There is ample evidence from which the commission was justified in finding that the claimant had abandoned her husband and that she was not living with him at the time of his

death. The evidence also warrants the finding that she was not then dependent upon him for support, and that because of her abandonment he was then under no legal obligation to provide for her support. There is substantial evidence that she became interested in another young man; that she was not living with her husband; that she told him "we cannot live together any longer"; that both she and the other young man were active in procuring an annulment of her marriage; that her husband offered to provide a home for her, which she refused to accept; and that he desired and sought a reconciliation, to which she would not consent.

[2] The above-quoted finding is sufficiently specific to support the order of the commission denying compensation. It constitutes the finding of ultimate facts, which is all that is required. *Frankfort General Ins. Co. v. Pillsbury*, 173 Cal. 56, 60, 159 P. 150; *Clarke v. Ind. Acc. Comm.*, 87 Cal.App. 766, 771, 262 P. 471.

[3] It is not necessary to establish desertion on the part of a wife, as that term is defined by the Civil Code, to sustain an order of the Industrial Accident Commission denying compensation to her on account of the death of her husband. It is sufficient to prove that she was not then dependent upon him for support, as the term "dependency" is used in the Workmen's Compensation Act. Section 14 of that act (St.1917, p. 844, as amended by St.1919, p. 917) does provide that a wife shall be conclusively presumed to be dependent for support on her husband when she is living with him at the time of the injury sustained, or if he was then legally liable for her support. Section 99 of the Civil Code does provide that: "Separation by consent, with or without the understanding that one of the parties will apply for a divorce, is not desertion."

However, section 96 of the same Code provides that: "The refusal of either party to dwell in the same house with the other party, when there is no just cause for such refusal, is desertion."

Section 175 of the same Code further provides that: "A husband abandoned by his wife is not liable for her support until she offers to return, unless she was justified, by his misconduct, in abandoning him; nor is he liable for her support when she is living separate from him, by agree-

ment, unless such support is stipulated in the agreement."

In the present case the evidence supports both desertion on the part of the wife and an absence of legal liability on the part of the husband to support the claimant. The spouses were separated. They were not living in the same home. He proposed to provide a home for her and sought to obtain a reconciliation, both of which she refused to accept. She wrote him that, "We cannot live together any longer," and she insisted on instituting annulment proceedings to cancel their marriage.

The order denying the award of the petitioner is affirmed.

I concur: PULLEN, P. J.



13 Cal.App.2d 121

JOHNSTON v. ASSOCIATED TERMINALS

CO. et al.

Civ. 9977.

District Court of Appeal, First District,
Division 2, California.

April 7, 1936.

Automobiles Ⓒ244(59)

Owner of trailer drawn by tractor and operators thereof *held* not liable under last clear chance doctrine for death of boy who was killed while being propelled along on skates by holding on to trailer, after having been warned to keep away, in absence of evidence showing that boy was in position of danger from which he could not have escaped by ordinary care.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Elliott J. Johnston against the Associated Terminals Company and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Carl A. Onkka and Cedric L. Brash, both of San Francisco, for appellant.

Bronson, Bronson & Slaven and John H. Painter, all of San Francisco, for respondents.

SPENCE, Justice.

Plaintiff brought this action seeking to recover damages for the alleged wrongful death of his minor son. At the close of the testimony the trial court directed a verdict in favor of defendants, and from the judgment entered upon the directed verdict plaintiff appeals.

The deceased, a boy of about twelve years of age, met his unfortunate death while he was skating with three companions on the Embarcadero in San Francisco. He fell beneath the rear wheel of a trailer which was being drawn by a tractor operated by defendants. While there was some conflict in the evidence on minor points, there was no conflict on any points which are material in this discussion.

The truck and trailer were proceeding between pier 24 and pier 20 at a rate of speed which was not in excess of 7 miles per hour. The trailer, which was about 6 feet wide and 20 feet long, was heavily loaded with canvas tents. Defendant Stone was driving the tractor and defendant Murphy was seated on the front of the trailer. As the boys approached the vehicles, they were warned to keep away by one or both of these men. They nevertheless took hold of the trailer or the load thereon at various points and were being propelled along on their skates. The deceased was at the side of the trailer in front of the rear wheel and in some manner fell and was crushed.

Appellant contends that the trial court erred in directing a verdict in favor of respondents, but we find no merit in this contention. The uncontradicted evidence shows that respondents were lawfully operating the tractor and trailer upon the streets and the boys were trespassers when they either boarded or took hold of the trailer. The rules covering such situations have been frequently discussed and there appears to be no necessity of further elaborating upon them. *Allred v. Pioneer Truck Co.*, 179 Cal. 315, 176 P. 455; *Norland v. Gould*, 200 Cal. 706, 254 P. 560; *Bakos v. Shell Co.*, 115 Cal.App. 142, 300 P. 982; *Gamble v. Uncle Sam Oil Co.*, 100 Kan. 74, 163 P. 627, L.R.A.1917D, 875. As was said in *Allred v. Pioneer Truck Co.*,

supra, 179 Cal. 315, at page 318, 176 P. 455, 456: "It is a matter of common knowledge that boys are prone to steal rides on all sorts of vehicles propelled along the streets, but it would be an intolerable rule that imposed upon the owner of vehicles the duty of employing guards to keep boys so inclined to trespass, at a safe distance therefrom."

As we read the argument of appellant, his main claim seems to be that the cause should have been submitted to the jury upon instructions covering the last clear chance doctrine. We cannot sustain this claim. Both Stone and Murphy testified that they warned the boys to keep away as the boys approached the vehicles from the curb, but that they did not see the boys thereafter as their view was obstructed. Appellant points to certain evidence to show that it might be inferred that the men could and did see the boys thereafter. Appellant then argues that the driver should have stopped the vehicles. Assuming, without deciding, that the doctrine of last clear chance might be invoked on behalf of a trespasser in the absence of wanton or willful conduct causing injury, we believe it clear under the facts in the present case that there was no evidence warranting the submission of the cause to the jury upon instructions covering that doctrine. If it may be said that there was evidence from which it might be inferred that the men were aware of the fact that the boys were in a position of danger, there was no evidence whatever to show that the deceased or any one of the boys was in a position of danger from which he could not escape by the exercise of ordinary care. In the absence of such evidence, the last clear chance doctrine could not apply under the rules set forth in *Chappell v. San Diego & Arizona Railway Co.*, 201 Cal. 560, 258 P. 73, upon which case appellant relies.

A reading of the record clearly shows that the death of the deceased was the tragic result of a boyish prank, but it fails to show that such death resulted from any act or omission on the part of respondents for which liability could be fastened upon respondents. The trial court therefore properly directed a verdict in their favor.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

13 Cal.App.2d 12

**GOLDIE v. SUPERIOR COURT IN AND
FOR SAN DIEGO COUNTY et al.**

Civ. 1959.

District Court of Appeal, Fourth District,
California.

March 30, 1936.

Hearing Denied by Supreme Court
May 28, 1936.**1. Courts** ⇨483

Statute authorizing transfer of cause to another court, where complaint on its face shows court has no jurisdiction of subject-matter of action, is procedural only and acts retrospectively (Code Civ.Proc. § 396, as amended).

2. Justices of the peace ⇨64

Where action was commenced in justice court having no jurisdiction over subject-matter prior to enactment of statute authorizing court having no jurisdiction to transfer cause to court having jurisdiction, justice court had jurisdiction after such statute became effective to transfer action to superior court which had jurisdiction and which was therefore required to retain jurisdiction and try the case (Code Civ.Proc. § 396, as amended).

3. Limitation of actions ⇨120

Where action was timely commenced in justice court having no jurisdiction over subject-matter prior to enactment of statute authorizing court having no jurisdiction to transfer cause to court having jurisdiction, action which was transferred to superior court having jurisdiction after enactment of such statute and after statutory period had expired held not barred by limitation (Code Civ.Proc. § 396, as amended).

Petition by Joseph Goldie for writ of mandate prayed to be directed to the Superior Court in and for San Diego County, and the Honorable L. N. Turrentine, Judge of Department 5 thereof.

Peremptory writ issued.

Morey S. Levenson, of San Diego, for petitioner.

Thomas Whelan, Dist. Atty., and Carroll H. Smith, Deputy Dist. Atty., both of San Diego, for respondents.

MARKS, Justice.

This is an original proceeding instituted here for the purpose of requiring the respondent judge to vacate an order made

by him transferring the case of Joseph Goldie v. J. E. Chilberg to the justice's court of San Diego township and commanding him to proceed with the trial of that action in the superior court.

The action in question was instituted in the justice's court of San Diego township on May 17, 1933, and sought to recover judgment in the sum of \$1,304 on two promissory notes. Summons was served on defendant on April 3, 1935. On April 29, 1935, Goldie filed his notice of a motion to transfer the action from the justice's to the superior court. The motion was granted on May 3, 1935, and the case was transferred. The case came on for trial in the superior court on October 17, 1935, at which time Chilberg moved for a dismissal of the action on the ground of lack of jurisdiction in the superior court. On November 21, 1935, the respondent judge ordered the case transferred to the justice's court. This is the order under attack here. The promissory notes in suit in the case of Goldie v. Chilberg were dated May 25, 1928, and became due and payable May 25, 1929.

Petitioner urges two reasons for the issuance of the peremptory writ: (1) Does section 396 of the Code of Civil Procedure, as amended in 1933 (St.1933, p. 1841, § 7) and again in 1935 (St.1935, p. 1947, § 1), operate retrospectively? and (2) Does the filing of an action in a court lacking jurisdiction over the subject-matter toll the running of the statute of limitations?

The justice's court of San Diego township was at the commencement of the action, and is now, a class A justice's court with jurisdiction of actions at law to recover money in a sum not in excess of \$1,000. Section 112, Code Civ.Proc., as variously amended; Stats.1931, p. 409; Stats.1933, c. 743, p. 1814, § 23), Stats. 1935, c. 74, p. 409, § 2. Petitioner does not contend that the justice's court ever had jurisdiction of the action, but maintains that, as the amendments of 1933 and 1935 were procedural only, that court had power to transfer the cause to the superior court under authority there given it. As the amendment of 1935 did not become effective until more than four months after the transfer was made, the authority to make such a transfer must be found, if at all, in the 1933 amendment. The 1935 amendment did not purport to attempt to ratify any prior transfer of a case rightly

or wrongly made by a court, but merely gave a present and future power to transfer a case under circumstances there specified.

Prior to 1933, a justice's court had no power to transfer a cause to another court where the complaint on its face showed that the court had no jurisdiction of the subject-matter of the action. At that time its only power was to dismiss the action. *Dickson v. Parker*, 59 Cal.App. 778, 212 P. 42. This was the state of the law when the complaint was filed in the justice's court on May 17, 1933.

The important questions involved here have been decided for us in the case of *Bershon v. Municipal Court of Los Angeles County*, 5 Cal.App.(2d) 519, 42 P. (2d) 649, in which a petition for hearing in the Supreme Court was denied on May 6, 1935. The opinion of the District Court of Appeal is as follows: "The petition for writ of prohibition is denied. The order of the superior court, transferring to the municipal court the action described in the petition, was made under authority of section 396 of the Code of Civil Procedure as amended in 1933 (St.1933, p. 1841, § 7). The matter was purely procedural, and the order did not constitute an attempt to give retroactive effect to the statute. Under such order and transfer the municipal court has jurisdiction over the action. *McClurg v. McClurg*, 212 Cal. 15, at page 18, 297 P. 27."

The materiality of that case here is only suggested in the opinion itself.

We have before us the original record in the *Bershon* Case, and an inspection of it shows that the questions involved in the instant case have been decided there either directly or by necessary inference. That record discloses the following facts: That on March 5, 1930, an action was commenced in the superior court of Los Angeles county wherein H. C. Gorman sought to recover from David Bershon and others a judgment for money in the aggregate sum of \$1,388.88; that the action was set for trial in the superior court on November 4, 1931, but was continued and never tried; that on February 2, 1935, and after the effective date of the 1933 amendment to section 396 of the Code of Civil Procedure, the presiding judge of the superior court transferred the action to the municipal court on the ex parte application of Gorman; that a petition for a peremptory writ of prohibition was filed in the

District Court of Appeal of the Second Appellate District, Division 1, on March 25, 1935, seeking to prohibit the municipal court from proceeding with the trial of the action upon the ground that the superior court, not having original jurisdiction of the subject-matter of the action, had conferred no jurisdiction to try it on the municipal court, as the only action the superior court was empowered to take was to dismiss the action. At that time the superior court of that county had original jurisdiction of actions at law for the recovery of money where the amount involved was more than \$2,000 and the municipal court had original jurisdiction in like actions to recover \$2,000 or less. It appears in the *Bershon* Case, as here, that, prior to the effective date of the 1933 amendment to section 396 of the Code of Civil Procedure, the statute of limitations had run in favor of the defendants.

As grounds for issuance of the writ of prohibition *Bershon* argued, (1) that, as the 1933 amendment to section 396 of the Code of Civil Procedure was not made expressly retroactive, it could not be held to apply to pending actions, and (2) that, as the statute of limitations had run in favor of the defendants prior to the effective date of the 1933 amendment to section 396 of the Code of Civil Procedure, it could not be construed retroactively and thereby deprive him of a vested right. The identical arguments are presented to us in the instant case. In his petition for hearing by the Supreme Court *Bershon* presented the same arguments and particularly stressed the second.

Because in the *Bershon* Case the complaint was originally filed in the superior court, which transferred the cause to the municipal court, and in the instant case the action was started in the justice's court and transferred to the superior court, cannot afford a ground upon which to distinguish the two cases. The provisions of section 396 of the Code of Civil Procedure as amended are not by their terms made applicable to any particular court.

[1-3] As the *Bershon* Case holds that the 1933 amendment to section 396 of the Code of Civil Procedure was procedural and applied to actions formerly filed and pending in a court without jurisdiction of the subject-matter of the action and permitted such court to transfer the action to another state court having such jurisdiction, and as a hearing of that case was

denied by the Supreme Court, we feel bound by that decision. It follows that we must conclude that, although the justice's court of San Diego township had no jurisdiction of the subject-matter of the case of Joseph Goldie v. J. E. Chilberg at the time the complaint was filed, it did have jurisdiction on May 3, 1935, to transfer that case to the superior court of San Diego county. That court, having jurisdiction of the subject-matter of the action, must proceed to retain jurisdiction and try the case. The order of the respondent judge attempting to divest the superior court of its rightful jurisdiction by transferring the case to the justice's court was in excess of the jurisdiction of the superior court and should be annulled. *Bershon v. Municipal Court of Los Angeles County*, supra.

It is ordered that the peremptory writ of mandate issue as prayed for.

We concur: BARNARD, P. J.; JENNINGS, J.



12 Cal.App.2d 557

TAYLOR v. NATIONAL SUPPLY CO. OF CALIFORNIA.

Civ. 9830.

District Court of Appeal, Second District,
Division 1, California.

March 19, 1936.

**Hearing Denied by Supreme Court
May 18, 1936.**

Corporations §30(1)

Corporation, purchasing majority of another corporation's stock, including incorporators' shares, on condition that price of such shares should be payable only when they were released from escrow by corporation commissioner's permission, did not impliedly agree never to exercise power to dissolve latter corporation, and hence was not liable to incorporator for price of his escrow stock on ground of breach of contract in voting its stock for dissolution.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by Charles A. Taylor against the National Supply Company of California.

Judgment for defendant, and plaintiff appeals.

Affirmed.

Macfarlane, Schaefer, Haun & Mulford, of Los Angeles, for appellant.

Flint & MacKay and Wesley L. Nutton, Jr., all of Los Angeles, for respondent.

DESMOND, Justice pro tem.

Appeal from a judgment in favor of defendant in an action for damages for breach of contract.

The plaintiff was engaged with one F. W. Jordan in the business of manufacturing patented oil well machinery and equipment, which business they transferred to a California corporation known as Jordan & Taylor, Inc. The capital stock of that corporation consisted of 2,000 shares of the par value of \$100 each. At the time of incorporation, the commissioner of corporations authorized issuance of stock as follows: 16 shares outright to the two incorporators; 250 shares to be sold for cash; 250 shares to the incorporators "whenever and as often as a share or shares of its capital stock are sold," these shares to be held in escrow subject to the further order of the commissioner. The financial statement of the business on January 23, 1929, the date the permit was issued for disposal of the stock, showed gross tangible assets \$23,000.51; liabilities, \$21,497.02.

On June 26, 1929, a supplemental permit authorized issuance of an additional 500 shares, 250 shares for sale and a total of 250 in escrow to the incorporators "whenever and as often" as stock was sold to the public. A sufficient amount of stock was sold for cash to warrant the issuance in escrow to the incorporators, Taylor and Jordan, of 250 shares each. Besides, they each owned the eight shares issued and delivered to each of them at the time of incorporation. Sales to the public and issuance of shares to the incorporators brought the total of outstanding stock to 1,016 shares, a point that was never exceeded. The defendant became interested in the corporation after the supplemental permit was issued and between March 18, 1930, and May 1, 1930, bought from the corporation 156 shares for \$15,600 cash; this purchase exhausting the entire amount of stock authorized to be sold to the public. In order to secure control of the corporation, defendant purchased 91 shares from stockholders other than plaintiff and

Jordan, and entered into identical agreements with both these men by which it agreed to buy 131 (or alternatively 128 or 123) shares of the escrowed stock belonging to each. In the agreements it was provided that the incorporators would obtain permission from the corporation commission for the transfer and reissue to the defendant, in escrow, of the 131 shares, and as to the purchase price of such stock, the agreement provided as follows: "The Second Party agrees to pay the First Party for the stock hereby agreed to be purchased, at the rate of \$100.00 per share, which sum shall be due and payable to the First Party only at the time and on conditions hereinafter specified. For the eight shares not in escrow, as aforesaid, the aforesaid purchase price shall be due and payable to the First Party upon the transfer and reissue thereof to the Second Party * * *. For the 128 shares in escrow, as aforesaid, the aforesaid purchase price shall be due and payable to the First Party only when, after the transfer and reissue thereof in escrow to the Second Party * * * said shares shall be released from said escrow by permission of said Corporation Commissioner, free and clear of all limitations and conditions imposed by the aforesaid permits, and no part of said purchase price shall be due or payable unless and until all of the escrowed stock hereby agreed to be purchased shall be so released from said escrow. No interest shall in any event be payable by the Second Party on any part of the purchase price of any of the stock hereby agreed to be purchased," etc.

After defendant made its investment in the early part of 1930, at a time when the corporation was in serious financial difficulties, Jordan & Taylor, Inc., continued for a period of three years to do business under the management of plaintiff, but despite all his efforts, failed to make money. While there was a net profit for a few months after defendant bought its stock, the balance of the period produced a discouraging record of losses. The net loss for 1931 was more than \$7,000, for 1932 was about \$10,000, and in the first four months of 1933, amounted to \$2,568.72. By April, 1933, things were in a bad way, as reflected by the minutes of a special stockholders' meeting held on the 28th day of that month: "The chairman explained the purpose of the meeting, reported upon the condition of the company, and explained the alternative courses which presented themselves, that is by way of dissolution or by way of assessment on the stock.

A general discussion ensued in which the opinion expressed by those who spoke was that the company should be wound up and dissolved, except that Mr. Charles A. Taylor stated, in effect, that although there was no business immediately in sight, he felt that the business should be continued, if possible, and that he hoped that an assessment on the stock might enable the business to go on for a time at least and hoped that a sufficient proportion of the stockholders might be willing to order an assessment and a sufficient number be willing to pay the same. The other speakers expressed the view that an assessment would be only a temporary measure; that it would not solve the difficulties under which the company labored and would undoubtedly labor during the present business depression, and that a sufficient number of stockholders would not be willing to order an assessment or to pay the same if ordered; and that an assessment would only mean a further loss to the stockholders without affording any prospect of ultimate relief to the company."

Of the total authorized issue of stock, namely, 1,016 shares, 967 shares were represented personally or by proxy at that meeting, and a resolution providing for the immediate dissolution of the corporation was passed, the plaintiff casting the only dissenting vote, his fellow incorporator, Frank W. Jordan, seconding the motion by which the resolution was adopted.

When the corporation, Jordan & Taylor, Inc., was formed, the corporation commissioner required the incorporators, Messrs. Jordan and Taylor, to waive their right to participate in any distribution of capital assets of the company, occurring while the shares were held in escrow, until the owners of all other securities should have been paid the full face or par value thereof; also required them to waive their right to payment and accrual of dividends while the shares were held in escrow "until such time as all stockholders who have paid money for their shares shall have received dividends at the rate of 7 per cent. per annum for two consecutive years." By an agreed statement of facts under which this case went to trial, it was stipulated as follows: "That the Commissioner of Corporations of the State of California has made from time to time certain rules, regulations, and practices of his office pertaining to shares of the capital stock of corporations deposited in escrow under permits issued by said Commissioner, which shares are to be held as an escrow

pending the further order of the Commissioner of Corporations. That at all times since the 18th day of March, 1930, the said rules, regulations, and practices of the Commissioner of Corporations pertaining to escrowed stock provided that no order would be granted by him releasing shares of stock from such escrows unless in his opinion the financial condition of the issuing corporation was such that it had earned and paid as dividends an amount equivalent to seven per cent. (7%) per annum upon all its issued and outstanding capital stock for a period of at least two years. That between the 18th day of March, 1930, and the voluntary dissolution of Jordan and Taylor, Inc., its financial condition has not been such as to fulfill said rules, regulations, and practices of the Commissioner of Corporations, and that said Corporation Commissioner would not have released said shares of capital stock of Jordan and Taylor, Inc., from escrow during that time had an application been made by either plaintiff or defendant; that owing to the fact that Jordan and Taylor, Inc. had been dissolved the said Corporation Commissioner will not now release said shares of stock or any portion thereof from escrow and said shares of stock can never be released from escrow." Because "said shares of stock can never be released from escrow" and because this condition resulted directly from dissolution of the corporation, plaintiff sued defendant in this action for \$12,800, the price of 128 shares at \$100 each, but it is now agreed between the parties that the final number of shares that would have passed under their contract was 123 or \$12,300 worth at par.

Appellant contends that when defendant, by its action in voting its majority of all outstanding stock for dissolution, made it impossible for the contingency to arise under which the agreed price of the escrowed stock would be payable, that the amount agreed upon became payable immediately, relying upon the rule stated by Bishop: "If one voluntarily puts it out of his power to do what he has agreed, he breaks his contract, and is immediately liable to be sued therefor, without demand, even though the time specified for performance has not arrived." Bishop on Contracts (2d Ed.) § 1426. There was no express agreement by the defendant, in its contract to purchase stock, that it would not vote for dissolution, but appellant asserts that such a promise was made impliedly. As stated in his brief, "to make the contract reasonable and oper-

ative there is an implied stipulation that the defendant would do no act voluntarily which would prevent performance or prevent the occurrence of the condition upon which performance depended."

Respondent counters with various contentions among which we note the following: "If agreement to continue operation of corporation can be implied, performance thereof can only be expected to continue for a reasonable time, and such period had elapsed when dissolution of the corporation occurred." Emphasis is laid upon the fact, too, that appellant knew that respondent wished to acquire control of the corporation and having assisted it in that plan was chargeable, in making his contract to sell stock to respondent, with the knowledge that control carried with it the power of dissolution; therefore, "not having protected himself against this eventuality, he cannot now be heard to complain." It is further urged: "That it would be unreasonable and absurd to find that it was the intention of the parties that defendant should operate the corporation in any event until bankruptcy under the penalty of paying plaintiff the purchase price of the stock for its failure to do so; that such an assumption fails to take into consideration the rights of all the other stockholders owning 889 shares, and operates to protect only one stockholder, the plaintiff, owning only 127 shares."

Summing up, it appears that appellant's position is this: That respondent, when it acquired a majority of the stock of Jordan & Taylor, Inc., impliedly agreed that no matter what happened, the power to dissolve the corporation would never be exercised voluntarily. In the case of *Foley v. Eules*, 214 Cal. 506, pages 511, 512, 6 P.(2d) 956, 958, cited by appellant, where an attempt was made unsuccessfully to recover under a claimed implied promise, the court said:

"Courts have been careful not to rewrite contracts for parties by inserting an implied provision, unless, from the language employed, such implied provision is necessary to carry out the intention of the parties. No implied condition can be inserted as against the express terms of the contract or to supply a covenant upon which it was intentionally silent. The rule is thus stated by the Court of Appeals of New York in *Genet v. Delaware & Hudson Canal Co.*, 136 N.Y. 593, 19 L.R.A. 127, 32 N.E. 1078, 1081: 'I know very well that implied promises are to be cautiously and not hastily raised.

What they are was very well stated in *Scrantom v. Booth*, 29 Barb.(N.Y.) [171], 174, in *Allamon v. Albany*, 43 Barb.(N.Y.) [33], 36, and in *Booth v. Cleveland Roll Mills Co.*, 6 Hun.(N.Y.) [591], 597. They always exist where equity and justice require the party to do or to refrain from doing the thing in question; where the covenant on one side involves some corresponding obligation on the other; where by the relations of the parties and the subject-matter of the contract a duty is owing by one not expressly bound by the contract to the other party in reference to the subject of it. In this court we have thrown some safeguards about the doctrine to secure its prudent application, and have said that a promise can be implied only where we may rightfully assume that it would have been made if attention had been drawn to it (*Dermott v. State*, 99 N.Y. 101, 1 N.E. 242), and that *it is to be raised only to enforce a manifest equity, or to reach a result which the unequivocal acts of the parties indicate that they intended to effect* (*King v. Leighton*, 100 N.Y. 386, 3 N.E. 594).’ [Italics ours.]

“This rule was recognized in the case of *Loyalton, etc., Co. v. California, etc., Co.*, 22 Cal.App. 75, 133 P. 323, 324, where it was said: ‘Where parties have entered into written engagements which industriously express the obligations which each is to assume, the courts should be reluctant to enlarge them by implication as to important matters. The presumption is that, having expressed some, they have expressed all, of the conditions by which they intended to be bound.’”

We cannot rightfully assume in the instant case that if the proposal had been made that this respondent should bind itself never to wind up a losing business, it would have been accepted. Quite possibly such a requirement would have been rejected, and in that situation no agreement to sell and purchase the escrowed stock would have been entered into. Manifestly, then, it would be unfair to read into this contract a provision which may never have been in contemplation of the parties. The most that can be said in support of appellant’s claim of an implied contract appears in the language which we have italicized above in the quotation from Mr. Justice Finch’s opinion in *Genet v. Delaware & Hudson Canal Co.* Under that fair and lucid reasoning, we believe the respondent in this case was impliedly bound to make a bona fide effort for a reasonable length of time to make a

success of the business in which it acquired, at least for voting purposes, a majority interest. That the learned trial judge considered such an obligation appears from the findings entered in this case as follows: “* * * even though by the execution of said contract of March 19, 1930, there could be implied an agreement that it would not do anything to cause a dissolution of such corporation, such agreement, if it could be so implied, would have required defendant to refrain from causing the dissolution of said corporation for a reasonable time only, and the Court expressly finds that a reasonable time had elapsed when the defendant voted for the dissolution of said corporation on April 28, 1933.”

It is true, as appellant points out, that upon dissolution the respondent bought the assets of the corporation at the sale that was held, the proceeds being divided among all the holders of unescrowed stock. However, the sale was advertised in the *Los Angeles Daily Journal* and *The Oil World*, and, at a directors’ meeting, attended by appellant, the resolution providing for the sale also instructed the secretary of the corporation “to mail notice of such sale to such persons or corporations as may be designated to him by any director or directors or any stockholder or stockholders.” There is no suggestion that there was anything irregular, secretive, or underhanded about the sale, and the fact that the escrowed stock could not participate in the proceeds was due to the waiver required by the corporation commissioner and given by the incorporators, appellant and Jordan. In the excellent and exhaustive briefs filed by counsel for both parties in this case, various points of law other than those here discussed have been touched upon, and the authorities cited have had our careful consideration. However, in view of the conclusion we have reached on the main issue, namely, that any implied provision created by the conditions under which the contract was signed has been fulfilled, we deem it unnecessary to take up the other questions.

It seems proper to say that in April, 1930, the respondent as a majority stockholder was faced with the problem of assessing stock, possibly running the corporation seriously into debt, or dissolving the corporation and saving something for all owners of unescrowed stock. Forgetting for the moment the parties to this action, we observe

that these owners were unanimously in favor of dissolution.

Judgment affirmed.

We concur: HOUSER, P. J.; DORAN, J.



13 Cal.App.2d 114

BUNNELL v. WYNNS et al.

Civ. 9715.

District Court of Appeal, Second District,
Division 1, California.

April 6, 1936.

1. Garnishment ⇨149

Statutory inquiry as to property belonging to attachment defendants which is subject to plaintiff's demand and reference provided therein is for information of court and not for purpose of trying questions of title (Code Civ.Proc. §§ 544, 545).

2. Garnishment ⇨149

Where garnishee claims interest in property or denies debt, court or referee has no power to enter summary order or judgment adjudicating validity of claims, but such adjudication must be made in independent action (Code Civ.Proc. §§ 544, 545, 719, 720).

3. Garnishment ⇨149

Judgment entered by judge pro tempore against garnishee for amount referee found garnishee owed defendant *held* not binding on garnishee where garnishee disputed debt, was not party to action, was not in court, and had no notice of trial, and judge pro tempore had not been designated to try case with consent of garnishee (Code Civ.Proc. §§ 544, 545, 719, 720).

4. Appearance ⇨26

Appearance of garnishee by motion to vacate void judgment *held* not to confer jurisdiction on court which it did not have when judgment was given (Code Civ.Proc. §§ 544, 545, 719, 720).

5. Appearance ⇨26

Void judgment is not rendered valid by appearance of defendant by motion to vacate judgment.

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Judge.

Action by F. O. Bunnell against B. Wynns, Sr., and others, wherein a writ of attachment was served on the Basich Bros. Construction Company as garnishee. From an order vacating a judgment against the Basich Bros. Construction Company, and an order granting a new trial, the plaintiff appeals.

Appeal from order granting new trial dismissed and order vacating judgment affirmed.

L. E. Dadmun, of Los Angeles, for appellant.

Stephen Monteleone, of Los Angeles, for respondent.

SHINN, Justice pro tem.

Appeal from an order vacating a judgment against a garnishee.

In this action to recover the value of the use of certain automobile trucks and trailers and upon an account stated against the defendant B. Wynns et al., a writ of attachment was issued and served upon Basich Bros. Construction Company, a corporation, attaching any money or property of the defendants and any credits due to defendants from the garnishee. The garnishee made a return that it had no money or property belonging to any of the defendants under its control or in its possession and that it was not indebted to any of said defendants. Thereafter an order was made for the garnishee to appear before a referee to be examined in connection with the garnishment, and after service thereof a hearing was had at which the garnishee was represented, following which the referee made findings and a report that the garnishee was indebted to one of the defendants in the sum of \$3,362.44. Thereafter, and without notice to the garnishee, this action was tried before a judge pro tempore of the superior court upon stipulation of plaintiff and defendants that it might be so tried, but without the stipulation or consent of the garnishee. Upon the trial plaintiff recovered a judgment of \$5,229.25, against the defendants, and a judgment in the sum of \$3,362.44, against the garnishee. Thereafter the garnishee made a motion to vacate and set aside the judgment, which motion was granted, and a motion for new trial, which was not ruled upon by the court.

[1,2] After the hearing before the referee, the court or a judge thereof could have ordered personal property capable of manual delivery to be delivered to the sheriff. Code Civ.Proc. § 545. What the referee attempted to do was to make an adjudication that the garnishee was indebted to the defendants in the sum of \$3,362.44. There is no provision of the Code authorizing such an adjudication in a summary proceeding where the garnishee denies the debt. While section 544 of the Code of Civil Procedure provides that a garnishee who fails to deliver property or pay debts to the sheriff after attachment is liable to the plaintiff for the amount thereof, neither that section nor section 545 authorizes the court or referee to make an adjudication as to the matter of the indebtedness of the garnishee to a party whose property is attached. The procedure under sections 544 and 545 is in the nature of an inquiry as to the property belonging to the attachment defendants. The reference is had in such matters for the information of the court and not for the purpose of trying questions of title. Procedure to subject property in the hands of third persons to judgments is provided by sections 719 and 720, Code of Civil Procedure. Where the garnishee claims no interest in the property or does not deny the debt, an order may be made to subject the property to the judgment under section 719, but if he claims an interest in the property or denies the debt, the court or referee has no power to enter a summary order or judgment adjudicating the validity of his claims, but such adjudication must be made in an independent action. *Hartman v. Olvera*, 51 Cal. 501; *G. Cavaglieri Mortgage Co. v. Superior Court*, 79 Cal.App. 655, 250 P. 700; *Hibernia Savings & Loan Society v. Superior Court of Inyo County*, 56 Cal. 265.

[3] *Basich Bros.* was never before the court in any proceeding in which the court had jurisdiction to determine whether any of the defendants were creditors of *Basich Bros.*, or to determine the amount of the latter's indebtedness. The judgment rendered by the judge pro tempore was not binding upon *Basich Bros.* for several reasons: *Basich Bros.* was not a party to the action and was not in court; no notice of trial was given to *Basich Bros.*; the debt was disputed and therefore could not be adjudicated in a summary manner, and the judge pro tempore, not having been desig-

nated to try the case with the consent of *Basich Bros.*, was without jurisdiction to try an issue involving any rights of the latter. The judgment was void or voidable for each and all of these reasons.

[4,5] It is contended by appellant that the appearance of *Basich Bros.* by motion to vacate the judgment conferred jurisdiction on the court which it did not have when the judgment was given, but this, of course, could not be so. A void judgment is not rendered valid by the appearance of the defendant by motion to vacate the judgment. *Gray v. Hawes*, 8 Cal. 562.

The order vacating the judgment against *Basich Bros. Construction Company* is affirmed; the attempted appeal from an order granting a new trial is dismissed, no such order having been made.

We concur: HOUSER, P. J.; DORAN, J.



12 Cal.App.2d 501

**KING v. SUPERIOR COURT IN AND FOR
SAN DIEGO COUNTY et al.**

Civ. 1777.

District Court of Appeal, Fourth District,
California.

March 17, 1936.

Rehearing Denied April 13, 1936.

Hearing Denied by Supreme Court
June 4, 1936.

1. Judgment ☞375

Court has inherent power to vacate order or judgment procured by extrinsic fraud.

2. Dismissal and nonsuit ☞7(1)

Statutory right of plaintiff to dismiss before "trial" allows dismissal at any time before case is taken under advisement at close of evidence and argument (Code Civ. Proc. § 581, as amended by St.1933, p. 1868).

[Ed. Note.—For other definitions of "Trial," see Words & Phrases.]

3. Dismissal and nonsuit ☞7(1)

Where order of submission was vacated generally and it was understood that any new evidence available to either party might be offered and that case might be reargued, plaintiff's written order of dismissal which was filed with clerk before any other order of submission was made was filed before

"trial" within statute giving plaintiff right to dismiss before trial (Code Civ.Proc. § 581, as amended by St.1933, p. 1868).

4. Dismissal and nonsuit ☞42

Dismissal of action has effect of terminating it, and rights of parties as affected by that particular action are concluded as though case had been determined on its merits, though dismissal is not bar to new action (Code Civ.Proc. § 581, as amended by St. 1933, p. 1868).

5. Dismissal and nonsuit ☞40

Court clerk's entry in his register of dismissal filed by plaintiff has effect of "final judgment" (Code Civ.Proc. § 581, as amended by St.1933, p. 1868).

[Ed. Note.—For other definitions of "Final Decree or Judgment," see Words & Phrases.]

6. Dismissal and nonsuit ☞43(5)

Evidence held not to justify order vacating prior order reopening case on ground of fraud on part of counsel for plaintiffs (Code Civ.Proc. § 581, as amended by St.1933, p. 1868).

7. Certiorari ☞28(1)

Prohibition ☞10(1)

Writs of prohibition and review are only available to petitioner when lower court has acted without jurisdiction or has exceeded its jurisdiction.

8. Dismissal and nonsuit ☞40

Court clerk's failure to perform ministerial duty of entering in register dismissal filed by counsel for plaintiffs could not change rights of parties, but court would regard that done which should have been done and measure rights of parties as though required entry had been made (Code Civ.Proc. § 581, as amended by St.1933, p. 1868).

9. Judgment ☞336, 403

New trial ☞1/2

Ordinary ways in which judgment may be set aside by court rendering it are by motion for new trial, by motion made in due time under statute, by motion at any time when judgment is void on its face, and by suit in equity, where judgment is regular in form but void for extrinsic fraud or other proper causes (Code Civ.Proc. § 473).

10. Courts ☞39

When jurisdiction to inquire and act depends upon existence of certain facts, ab-

sence of proof of such facts limits power to that of inquiry only, and, if action is attempted, it is in excess of jurisdiction.

11. Prohibition ☞10(1)

Upon filing of proper application to vacate order reopening case on ground of extrinsic fraud on part of counsel for plaintiffs who filed motion to reopen case, court had power to inquire into existence of extrinsic fraud, but, upon failure of proof of such fraud, any action taken which could only be supported by existence of fraud was in excess of court's jurisdiction and subject to annulment in prohibition proceeding (Code Civ.Proc. § 581, as amended by St. 1933, p. 1868).

12. Dismissal and nonsuit ☞43(2)

Judgment of dismissal is reviewable on appeal, and, except on proper showing and in recognized manner, cannot be vacated in trial court (Code Civ.Proc. § 581, as amended by St.1933, p. 1868).

13. Prohibition ☞3(1)

Writs of prohibition will not generally lie where there is plain, speedy, and adequate remedy at law.

14. Prohibition ☞3(5)

Prohibition held to lie to restrain trial court from entering judgment for defendant pursuant to order vacating prior order reopening case, which vacating order was made after plaintiffs filed dismissal of action without prejudice, notwithstanding judgment which defendant sought to be entered was appealable, where judgment on appeal could not become final before plaintiffs' cause of action would become barred by limitation (Code Civ.Proc. § 581, as amended by St. 1933, p. 1868).

Petition for writ of prohibition by Joseph King, directed against the Superior Court in and for San Diego County and Hon. Clarence Harden, a Judge thereof.

Petition granted.

Fred Kunzel, Adam Thompson, Renwick Thompson and Stearns, Luce, Forward & Swing, all of San Diego, for petitioner.

Noon & Noon and Glen H. Munkelt, all of San Diego, for respondents.

MARKS, Justice.

Joseph King was one of the plaintiffs in an action brought in the superior court

of San Diego county to recover damages from Franklin P. Chapman for the deaths of Rose King and Mariano King. The plaintiffs were heirs at law of the two deceased persons. The case was tried before the court without a jury. The trial was concluded and the case submitted on November 18, 1935. At that time the trial judge announced his decision for defendant and directed his counsel to prepare findings of fact and conclusions of law. Before these were served or filed, plaintiffs' counsel filed a notice of motion to reopen the case for the purpose of receiving further evidence and hearing further argument. Attached to the notice of motion were affidavits of one of plaintiffs' counsel and of William D. Stenhouse. The latter set forth the evidence Stenhouse was expected to give. The motion was noticed for December 9, 1935, and was continued for hearing to December 13th. Defendant filed objections to the granting of the motion. The minutes of the trial court show the following disposition of the motion on December 13, 1935: "This being the time set for hearing plaintiffs' motion for leave to reopen the above entitled case for the purpose of receiving further evidence and to hear further argument. Said motion is presented to the Court, argued by respective counsel, submitted for decision, and by the Court it is ordered that said motion be granted. Notice waived. Case set for further hearing on Tuesday, December 17th, 1935, at 10 o'clock A. M. thereof."

The reporter's transcript shows that, after argument and submission of the matter, the following colloquy occurred between the court and counsel:

"The Court: The motion is granted, nevertheless. I will reopen the case.

"Mr. Munkelt: That of course will give the defendant an opportunity to present evidence in the way of impeachment.

"The Court: If the new evidence brought on by the plaintiffs seems by the defense to require an answer, the defense will have plenty of opportunity to answer. * * *

"Mr. Kunzel: In view of what has been said in regard to impeaching testimony, we of course would not be precluded from putting on corroborative testimony. We may have some corroborative testimony by other witnesses corroborating Stenhouse's testimony.

"The Court: After I have opened it up, I will hear all the evidence anybody has that bears on the case."

The trial court was otherwise engaged on December 17, 1935, and the case was heard on December 24, 1935. William D. Stenhouse was produced as a witness for plaintiffs and testified in accordance with the summary of his evidence set forth in his affidavit. At the conclusion of his direct examination counsel for plaintiffs filed a dismissal of the action without prejudice which was dated December 24, 1935.

On December 30, 1935, counsel for Chapman filed a notice of motion: "1. To rule upon the objection of the defendant, now pending, to the dismissal, by the plaintiffs, of this action, without prejudice. 2. To vacate and set aside the order made and entered by this Court on December 13, 1935, wherein the Court granted the plaintiffs' motion, dated December 2, 1935, to take the testimony of William D. Stenhouse. 3. To strike from the record all of the testimony of William D. Stenhouse as taken on December 24, 1935. 4. To strike from the record and files the purported dismissal of this action without prejudice, filed by plaintiffs' attorneys on December 24, 1935, and to vacate and set aside said purported dismissal. 5. That judgment in this action be entered in favor of the defendant on the merits." The notice specified, as grounds for the motion, fraud on the part of counsel for plaintiffs in all the proceedings which followed the submission of the case on November 18th, including the dismissal of the action on December 24th. The motion was granted in all particulars and counsel for Chapman instructed to prepare findings of fact and conclusions of law preparatory to the entry of judgment in his favor. We will hereafter refer to this motion and order as the motion or order vacating the order reopening the case. A petition was filed here, and the proceedings were ordered before this court by writ of review, and the respondent judge was prohibited from signing any findings of fact and conclusions of law, or judgment, in the case of *King v. Chapman* until further order of this court.

[1] It is not questioned that a court has inherent power to set aside and vacate any order or judgment procured by extrinsic fraud. *Rowland v. Kreyenhagen*, 24 Cal. 52; *Trumpler v. Trumpler*, 123 Cal. 248, 55 P. 1008; *McGuinness v. Superior Court*, 196 Cal. 222, 237 P. 42, 40 A.L.R. 1110; *Aldrich v. Aldrich*, 203 Cal. 433, 264 P. 754; *Williams v. Reed*, 43 Cal.App. 425,

185 P. 515; *McKeever v. Superior Court*, 85 Cal.App. 381, 259 P. 373; *Kronman v. Kronman*, 129 Cal.App. 10, 18 P.(2d) 712.

Three questions are presented for our consideration: (1) Was there any evidence before the trial court to sustain the implied finding of fraud on the part of counsel for plaintiffs? (2) If there was no evidence of fraud, was the trial court without jurisdiction to grant the motion of counsel for Chapman? (3) Will a writ of review and prohibition lie where the order sought to be annulled can be reviewed on appeal from a judgment entered in accordance with such order?

[2] Section 581 of the Code of Civil Procedure (as amended by St.1933, p. 1868) provides that a case may be dismissed by the plaintiff at any time before the trial, upon written request to the clerk, filed with the papers in the case. The expression "before the trial" has been construed to mean before submission of the case. "A case is submitted after the court, trying the case without a jury, has taken the case under advisement, at the close of the evidence and argument." *MacDermot v. Grant*, 181 Cal. 332, 184 P. 396. See, also, *Strupelle v. Strupelle*, 59 Cal.App. 526, 211 P. 248; *Provencher v. Los Angeles City School District* (Cal.App.) 52 P.(2d) 983.

[3] It must be admitted that the order of December 13, 1935, was general in its terms and was not limited to the reception of the testimony of a particular witness. That it was so understood by all parties concerned is clear from the remarks made at the time, which we have already quoted. This being true, the order of submission having been vacated generally and not specifically, it having been understood that any new evidence available to either party might be offered, and that the case might be reargued should counsel so desire, it is clear that the dismissal was filed "before the trial" as required by section 581 of the Code of Civil Procedure. As no other order of submission was made prior to the filing of the written order of dismissal with the clerk, that document was filed before the trial, and the filing was a matter of right under the provisions of section 581 of the Code of Civil Procedure and the cases already cited. The following cases support this conclusion: *Westbay v. Gray*, 116 Cal. 660, 48 P. 800; *Jones v. Currier*, 65 Iowa, 533, 22 N.W. 663; *National Bank of Commerce v. Butler*, 163

Mo.App. 380, 143 S.W. 1117; *Knight v. Illinois Central R. Co.* (C.C.A.) 180 F. 368; *Van Sant v. Wentworth*, 60 Ind.App. 591, 108 N.E. 975.

[4] A dismissal of an action has the effect of terminating it, and the rights of the parties as affected by that particular action are concluded as though the case had been determined on its merits, though it is not a bar to a new action. Section 581, Code Civ.Proc.; 9 Cal.Jur. 524, and cases cited.

In the case of *Fisch & Co., Ltd., v. Superior Court*, 6 Cal.App.(2d) 21, 43 P.(2d) 855, 856, the court, in discussing a judgment of dismissal under a subdivision of the Code section other than the one involved here, said: "While such a judgment is reviewable on appeal and also when inadvertently made may be set aside under section 473 of the Code of Civil Procedure, it is not subject to change by the trial court in the manner indicated by the record as presented to us. A judgment can be nullified by the court which rendered it only: (1) On motion for a new trial; (2) by a motion under the provisions of section 473 of the Code of Civil Procedure, where application is made to set it aside within six months; (3) by motion therefor at any time where the judgment is void on its face; or (4) by an independent suit in equity, where the judgment is regular on its face but extrinsically void for want of jurisdiction or by reason of fraud or mistake. *Benning v. Superior Court*, 34 Cal. App. 296, 167 P. 291; *In re Estate of Soboslay* (Cal.App.) 39 P.(2d) 871; *Robinson v. Southland Produce Co.*, 112 Cal.App. 106, 296 P. 303." *In re Estate of Soboslay* (Cal.Sup.) 47 P.(2d) 714.

[5] It does not appear from the record before us that the clerk performed his ministerial duty and entered the dismissal in his register as required by section 581 of the Code of Civil Procedure, which entry has the effect of a final judgment. *Southern Pac. R. Co. v. Willett*, 216 Cal. 387, 14 P.(2d) 526.

No evidence was offered by Chapman in support of his motion to vacate the order reopening the case. The respondents must rely upon the conduct of counsel for plaintiffs and the evidence offered by them on the hearing of the motion to vacate the order of submission to support the inference of fraud drawn by the trial judge at the time the order under attack here was made.

This evidence consisted of the testimony of two of the attorneys for plaintiffs and the associate of one of them. This evidence may be summarized as follows: That the evidence of Stenhouse was discovered after the case was submitted to the trial judge on November 18, 1935, and before the notice of motion to vacate the order of submission was given; that it occurred to one attorney that, if the order of submission was vacated generally, the action might be dismissed; that, after the order of submission was vacated on December 13, 1935, counsel received information that there might be another witness whose testimony might be of great value to plaintiffs; that the details of this testimony could not be obtained and the witness could not be secured for the hearing on December 24, 1935; that after that date and before the hearing of Chapman's motion to vacate the dismissal this witness was found, and it was discovered that his evidence would be very valuable to plaintiffs in another trial of the case; that between December 13 and December 24, 1935, counsel for plaintiffs held several conferences with their associates, two of whom were formerly judges of the superior court, on the question of their duty to the plaintiffs, in view of the probability that this new evidence might be available at a future date; that it was determined at these conferences that, as several of the parties plaintiff were minors, and the evidence of the new witnesses, if it could be developed, might lead to a judgment in their favor, it became the duty of their counsel to dismiss the action, as the evidence could not be obtained for the hearing on December 24, 1935; that to show their good faith in making the motion to vacate the order of submission the witness Stenhouse was to be produced and examined by them; that prior to the time it seemed probable that new evidence for plaintiffs might be developed, which time was after the motion to vacate the submission was granted on December 13, 1935, they had no intent to dismiss the case; that the idea of dismissing the case was not entertained by any of them prior to December 13, 1935.

Respondents lay stress on two bits of testimony which they urge support the inference of fraud on the part of counsel for plaintiffs: (1) The admission of one of them that it occurred to him that the plaintiffs had a right to dismiss the case should a general order reopening the case be

made; and (2) that in the testimony of one of the associates of counsel for plaintiffs the witness stated that the first conference on the matter of the dismissal of the action was held on December 10 or 12, 1935.

We can attach little importance to the admission of counsel that it occurred to him, prior to December 13th, that the case could be dismissed should a general order reopening it be made. He is an attorney at law, and as such is learned in the law, both theoretically and actually. Certainly an attorney is presumed to know the law, and because he recalls the rather elemental rule of the law that a case may be dismissed at any time before the trial and that "before the trial" means at any time before it is submitted for decision, should not in itself be held to be evidence of fraud.

It is true that one of the attorneys testifying for the plaintiffs stated that the first conversation concerning the dismissal was held on December 10th or 12th. This attorney was not in active charge of the case. At his own request he resumed the stand to correct his testimony, and then stated positively that the conversation occurred after the case was reopened, and that he had been mistaken in giving the dates, and that, if the case was reopened on December 13th, the conversation occurred after that date and before December 17th, the day first set for taking evidence. This corresponded with all the other evidence produced. We have studied the record, and are left with the conviction that the conversation in question occurred after the case was reopened. This attorney was not actively connected with the case and was not sure of the dates of the different proceedings. When he mistakenly fixed dates because he was under the mistaken impression that the date of an order was prior to the time it was actually made, and then voluntarily corrected this mistake, and swore positively that the conversation occurred subsequent to the making of the order, we are of the conclusion that there was no substantial conflict in his evidence. A record should be construed fairly in order that the truth may be ascertained, and we feel that in fairness to all parties concerned no other interpretation could be placed upon the record.

Counsel for respondents urge that the motion to reopen the case should not have been granted, because there was no suffi-

cient showing of diligence in searching for the evidence of Stenhouse before the trial, and because his evidence, as they maintain, conflicted with the theory of plaintiffs on the trial. They attempt to draw the inference of fraud from these facts. This argument was available to counsel in resisting the motion to reopen the case, but cannot avail them here. The motion was granted after a full hearing. If no sufficient showing was made in support of the motion, the order granting it was an error of the trial court. To predicate fraud of counsel on the showing made in support of the order would necessitate the inference of either weakness or complicity on the part of the trial judge. We are sure counsel would disclaim any such inference, and there is nothing in the record to justify a suspicion of it.

There remains only the cold record of the sequence of events from which to draw the inference of fraud. These may be summarized again as follows: November 18th, case submitted; December 2d, affidavits of Stenhouse and one counsel verified and notice of motion to reopen dated and filed; motion first noticed for December 9th; December 9th, same continued to December 13th; December 13th, hearing of motion and order reopening case generally and case reset for hearing of evidence December 17th; between December 13th and 17th discovery of the probability of there being another important witness for plaintiffs and conversations of counsel for plaintiffs concerning dismissal; December 17th, cause continued to December 24th; December 24th, direct evidence of Stenhouse taken and case dismissed without prejudice by written order of attorneys for plaintiffs.

[6] We can find nothing in the sequence of the foregoing events upon which to predicate fraud. Following the order of December 13th, reopening the case generally, its dismissal by plaintiffs was a matter of right. The exercise of a legal right in a legal manner is in itself, and in the absence of other proven facts, insufficient to support an inference of fraud under the circumstances here disclosed.

[7] In approaching the question of the power of this court to inquire into the regularity of the order of the superior court in question here, we are first confronted with the general rule that writs of prohibition and review are only available to a petitioner when the lower court has acted

without jurisdiction or has exceeded its jurisdiction. We are of the firm opinion that a court should have inherent power to correct, in any orderly and expeditious manner, a judgment or order obtained by extrinsic fraud. This power is not drawn from any statute, but is included in the right of every judicial tribunal to protect the sanctity of its judgments.

[8] In the instant case it does not appear that the order of dismissal had been entered in the clerk's register. The duty to so enter it was ministerial, and the failure to perform this duty should not be held to change the rights of the parties. We should regard that done which should have been done and measure the rights of the parties as though the required entry which amounted to a final judgment in the case had been made.

[9] The usual and ordinary ways in which a judgment may be set aside by a court rendering it are: (1) By motion for new trial; (2) by motion made in due time under section 473 of the Code of Civil Procedure; (3) by motion at any time when the judgment is void on its face; (4) by suit in equity where the judgment is regular in form but void for extrinsic fraud or other proper causes.

In the instant case the defendant did not choose to follow the usual and ordinary procedure, but invoked the inherent power of the court to protect the sanctity of its judgment against extrinsic fraud by means of a motion. It is established that a court has such power. *McGuinness v. Superior Court*, *supra*.

[10] We believe the right to invoke this special remedy should depend on the existence of extrinsic fraud properly alleged and proven. This right should be analogous to the power of the court to punish for contempt in which the court exercises a recognized jurisdiction, but which cannot be called into action except upon proper charge and upon sufficient evidence of an actual contempt, and must be supported by a proper finding. This forms a limitation upon or defines the extent of the rule that, where a court has jurisdiction to decide, it has jurisdiction to decide wrongly, and is based upon the rule that, where contempt is neither charged nor found and is not proved, the court exceeds its jurisdiction in inflicting punishment. The rule in such cases may thus be stated: When jurisdiction to inquire and act depends upon

the existence of certain facts, the absence of proof of such facts limits the power to that of inquiry only, and, if action is attempted, it is in excess of jurisdiction. The same reasoning is applied to cases before the Industrial Accident Commission. It is thus stated in *Re Lake*, 65 Cal.App. 420, 224 P. 126, 127:

"While neither writ is one of error, both extended to the entire record of the court below and to the evidence itself when necessary to determine jurisdiction. *Hotaling v. Superior Court* [191 Cal. 501] 217 P. 73, 75 [29 A.L.R. 127]. This inquiry, of course, cannot go beyond the question of jurisdiction, and the review of the evidence is limited to the sole purpose of determining, first, whether jurisdiction existed; and, second, whether jurisdiction was exceeded. Thus, where the question is whether jurisdictional facts were or were not proved, the review extends, not only to the entire record, but to the evidence itself. *Stumpf v. Board of Supervisors*, 131 Cal. 364, 367, 63 P. 663, 82 Am.St.Rep. 350; *McClatchy v. Superior Court*, 119 Cal. 413, 419, 51 P. 696, 39 L.R.A. 691; *In re Estate of Paulsen*, 179 Cal. 528, 529, 530, 178 P. 143; *Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 185, 149 P. 35; *Van Hoosear v. Railroad Com.*, 189 Cal. 228, 207 P. 903, 907; *Hotaling v. Superior Court* [191 Cal. 501] 217 P. 73, 75 [29 A.L.R. 127]. In *Van Hoosear v. Railroad Com.*, supra, the Supreme Court, on this point, say (189 Cal. [228] 236, 207 P. [903] 906): 'That under a writ of review, the evidence of facts upon which the lower court or tribunal depended for its jurisdiction may be considered, and its judgment set aside if jurisdiction is without support in the evidence, is beyond dispute.' In the same case (189 Cal. [228] 236, 207 P. [903] 907) the court quoted with approval the following passage from *McClatchy v. Superior Court*, supra: 'While the writ of certiorari is not a writ of error, "it is nevertheless," as suggested in *Schwarz v. Superior Court*, 111 Cal. [106] 112, 43 P. 580, "a means by which the power of the court in the premises can be inquired into; and for this purpose the review extends, not only to the whole of the record of the court below, but even to the evidence itself, when necessary to determine the jurisdictional fact." If, then, by looking at the evidence we can see that the court exceeded its power, we have a right to examine the evidence for that purpose.'

"The next question which presents itself for consideration is: Does the inquiry whether a contempt has in fact been committed go to the jurisdiction of the lower tribunal? Upon the weight of authority this question must be answered in the affirmative. *Van Hoosear v. Railroad Com.*, supra; *Hotaling v. Superior Court*, supra; *Commercial Bank, etc., v. Superior Court*, supra [192 Cal. 395, 220 P. 422]. In these cases the judgment of contempt was annulled by the Supreme Court and in the *Hotaling Case* it was said: 'But we think that, if all the facts alleged in the affidavits constituting the complaint had been proved by competent and conclusive evidence, this order should still be annulled *because those facts do not amount to a contempt of court.*' (Italics ours.) * * * Following this statement of principles the court then announces the rule in such clear and succinct language that we can do no better than quote it in full: 'While the writ of certiorari is not a writ of error, it nevertheless extends to the whole of the record of the court below, and even to the evidence itself where necessary to determine jurisdiction. *Schwarz v. Superior Court*, supra; *McClatchy v. Superior Court*, supra; *Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 149 P. 35. * * * *If the record of the proceedings, reviewed in the light of the foregoing rules, fails to show affirmatively upon its face the existence of all the necessary facts upon which jurisdiction depended, the order must be annulled. Frowley v. Superior Court* [158 Cal. 220, 110 P. 817], *In re McCarty* [154 Cal. 534, 98 P. 540], and other cases above cited.' (Italics ours.)"

[11] In the case of *McGuinness v. Superior Court*, supra, the Supreme Court went into the question of extrinsic fraud alleged in the petition and admitted by a demurrer to it. The facts thus admitted furnished an important and controlling reason for the conclusion reached. We conceive the correct rule to be applied to cases of this kind is that a court has inherent power and jurisdiction to vacate, on motion, an order or judgment obtained by extrinsic fraud, but, if such fraud is not proved, it must be held to have exceeded its jurisdiction in vacating an order or judgment. Upon a proper application being filed, it had the power to inquire into the existence of extrinsic fraud, but, upon the entire failure of any proof of such fraud, any action taken which could only be sup-

ported by its existence was in excess of its jurisdiction and subject to annulment in a proceeding of this kind.

[12] A judgment of dismissal is reviewable on appeal, and, except on a proper showing and in a recognized manner, it cannot be vacated in the trial court. An attempt to do so is beyond the power of the trial court. *Holtum v. Greif*, 144 Cal. 521, 78 P. 11; *Robinson v. Southland Produce Co.*, 112 Cal.App. 106, 296 P. 303; *Kaufman v. Superior Court*, 115 Cal. 152, 46 P. 904; *Hopkins v. Superior Court*, 136 Cal. 552, 69 P. 299.

[13] Counsel for respondents urge that writs of prohibition and review cannot be invoked here because the order sought to be annulled may be reviewed on appeal from the final judgment in favor of Chapman which the trial court ordered entered. It is true that these writs will not generally lie where there is a plain, speedy, and adequate remedy at law. However, what is such a remedy has received frequent and careful attention from the courts. In the case of *Davis v. Superior Court*, 184 Cal. 691, 195 P. 390, 392, an action had been dismissed under the provisions of section 581 of the Code of Civil Procedure. The trial court sought to vacate the judgment of dismissal, and Davis applied for a writ of prohibition to prohibit further action in the case. In opposing the granting of the writ, it was urged that appeal was available, and that therefore prohibition was not the appropriate remedy. In granting the peremptory writ the Supreme Court said: "With regard to the remedy by appeal the facts are that the order vacating the judgment of dismissal was made on January 2, 1920; that it was a special order made after final judgment and was appealable; and that the right of appeal expired on March 2, 1920. Code Civ.Proc. § 963, subd. 2. On that day the present proceeding in prohibition was begun in the district court by the filing of the petition upon which that court issued an order to show cause. While the existence of the right of appeal at that time might have been a sufficient reason for that court to have then refused to entertain the petition (*Glougie v. Superior Court*, 169 Cal. 675, 147 P. 972), yet, in view of the fact that the superior court was then and ever since has been without power or jurisdiction to proceed further in the action, as we have shown, but nevertheless proposes to do so, and that further proceedings of

any kind, except to again dismiss the action, would be void, we are disposed to grant the writ, rather than put the parties to further vexation and useless expense by further attempts to prosecute it. The question is largely one of discretion, and we deem it the better policy to terminate the proceedings forthwith."

To the same effect is *Fletcher v. Superior Court*, 79 Cal.App. 468, 250 P. 195, 200, where it is said: "In view of what we have heretofore stated, there remains but one question for determination: Should the court exercise its discretion herein and issue a writ of prohibition as prayed for? * * * Section 1103, Code Civ.Proc., relating to the issuing of the writ of prohibition, reads: 'It may be issued by any court * * * to an inferior tribunal. * * * in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law.' A long list of cases might be cited where it is held prohibition will not issue, and a correspondingly long list of cases might be cited where the writ has been issued. The rule may be stated in general language as follows: If the party aggrieved by the act in excess of jurisdiction has a plain, speedy, and adequate remedy at law, prohibition will not lie, but, if an appeal lies, and yet does not afford the parties such a remedy, the court, in the exercise of its discretion, may grant the writ. In the following cases, notwithstanding the fact that an appeal would lie, the writ has been issued on the ground that an appeal afforded neither a speedy nor adequate remedy. *Dungan v. Superior Court*, 149 Cal. 98, 84 P. 767, 117 Am.St.Rep. 119; *Glide v. Superior Court*, 147 Cal. 21, 81 P. 225; *Ophir Mining Co. v. Superior Court*, 147 Cal. 467, 82 P. 70, 3 Ann.Cas. 340; *Reclamation Dist. v. Superior Court*, 171 Cal. 672, 154 P. 845; *Consolidated, etc., Co. v. Superior Court*, 189 Cal. 92, 207 P. 552; *Craycroft v. Superior Court*, 18 Cal.App. 781, 124 P. 1042. In the *Glide Case* a writ of prohibition was granted to prevent a superior court from proceeding to a trial in a case where the issue was whether certain lands were reclaimed, on the ground that the jurisdiction to determine this matter was vested exclusively in the supervisors. While an appeal would lie in that cause, the Supreme Court, however, held that the aggrieved party should not be put to the delay and expense of an appeal. In the concurring opinion in that case it is said: 'The question whether or not the remedy

by appeal is adequate is, even in cases where jurisdiction is plainly lacking, a matter resting in the sound discretion of this court upon the particular circumstances of each case.' In the case of *Reclamation Dist., etc., v. Superior Court*, 171 Cal. 672, 154 P. 845, the writ was granted to prevent the superior court from entertaining an application for an injunction to enjoin the trustees of a reclamation district from exercising certain functions in building levees. In one of the cases cited the writ was issued to prevent a superior court from trying a case to recover a sum of money less than \$300, notwithstanding an appeal lay to the District Court of Appeal. In the *Craycroft Case* the question involved was the determination of the rights to certain school lands. The writ was issued notwithstanding the remedy by appeal might have been availed of by the aggrieved party." See, also, *Hall v. Superior Court*, 198 Cal. 373, 245 P. 814; *Commercial Bank v. Superior Court*, 192 Cal. 395, 220 P. 422; *Stevens v. Superior Court* (Cal.App.) 52 P.(2d) 939.

In the case of *Quevedo v. Superior Court*, 131 Cal.App. 698, 21 P.(2d) 998, the same rule was applied in the case of a writ of review when part of an order granting a new trial in a case tried before a jury was annulled. See, also, *Delmuto v. Superior Court*, 119 Cal.App. 590, 6 P. (2d) 1007; *Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 149 P. 35; *McClatchy v. Superior Court*, 119 Cal. 413, 51 P. 696, 39 L.R.A. 691.

[14] In the instant case the cause of action accrued August 14, 1935, and will be barred at the expiration of one year. If the petitioner and his coplaintiffs are required to seek their relief from the order in question by means of appeal, it is evident that a judgment on appeal could not become final before their cause of action becomes barred by the statute of limitations. If the judgment which the trial court proposes to enter in favor of Chapman should be reversed on such appeal on the grounds which we have taken here, the dismissal of the action already filed would become effective and any rights the plaintiffs might have would be lost. It is evident from what we have just said that the remedy by appeal is entirely inadequate

and, if successfully taken, would result in a complete defeat of plaintiffs' cause of action.

It is ordered that a writ of review and prohibition issue annulling the order of the respondent court and judge made and filed on January 9, 1936, in the case of *Alice King et al. v. Franklin P. Chapman*, and peremptorily prohibiting respondents from signing and filing any findings of fact and conclusions of law and judgment in favor of *Franklin P. Chapman* in that case.

We concur: BARNARD, P. J.; JENNINGS, J.



RICHARD LIVINGSTON, Inc., v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.

Civ. 10182.

District Court of Appeal, Second District,
Division 2, California.

July 11, 1935.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

On rehearing.

Modifying judgment.

Prior opinion, 46 P.(2d) 195.

Louis Ferrari, of San Francisco, and Edmund Nelson and G. L. Berrey, both of Los Angeles, for appellants.

Chapman & Chapman, of Los Angeles, for respondent.

STEPHENS, Presiding Justice.

Pursuant to stipulation, it is ordered that the judgment against defendant Bank of America National Trust & Savings Association entered in the above-entitled action be reduced to the sum of \$9,944.14, which includes costs of suit in the trial court and interest to July 15, 1935, and, as so reduced, the judgment is affirmed, but neither party shall recover costs of appeal, and remittitur shall issue forthwith.

13 Cal.App.2d 752

**PACIFIC STATES SAVINGS & LOAN CO.
v. SANTA BARBARA BILTMORE COR-
PORATION et al. (LICK et al., Intervener-
ers).**

Civ. 10888.

District Court of Appeal, Second District,
Division 2, California.

April 1, 1936.

Mortgages ⇨417

Holders of minority of defaulted bonds, secured by trust deed giving majority holders power to control and direct trustee's policy for protection of all holders, *held* not entitled to foreclose trust deed, which majority holders instructed trustee not to foreclose.

Appeal from Superior Court, Santa Barbara County; H. S. Schaffer, Judge.

Action by the Pacific States Savings & Loan Company against the Santa Barbara Biltmore Corporation and others, in which Charles J. Lick and others intervened as parties defendant. From a judgment for the original and intervening defendants, plaintiff appeals.

Affirmed.

O'Melveny, Tuller & Myers and Pierce Works, all of Los Angeles, Heaney, Price & Postel, of Santa Barbara, for appellant.

Cosgrove & O'Neil, of Los Angeles, for respondent Citizens Nat. Bank.

Gibson, Dunn & Crutcher and H. F. Prince, all of Los Angeles (Frederic H. Sturdy, of Los Angeles, of counsel), for respondent interveners.

GOULD, Justice pro tem.

This contest between plaintiff as a minority holder of about 27 per cent. and interveners as majority holders of about 51 per cent. of defaulted bonds of an issue of \$1,250,000 upon the hotel properties of the Santa Barbara Biltmore Corporation presents facts strictly analogous to, and a trust indenture almost identical with, that involved in Pacific States, etc., Co. v. Hollywood Knickerbocker, Inc., et al. (Cal. App.) 52 P.(2d) 1014. There, as, here, the trial court held that under the terms of the trust indenture considered as a whole the majority bondholders were given power to control and direct the policy of the

trustee for the protection of all, and that viewpoint was approved by the appellate tribunal.

Upon the reasoning and authority of the hereinabove cited case, the judgment of the lower court in the within action is affirmed.

We concur: CRAIL, P. J.; WOOD, J.



13 Cal.App.2d 43

BRIGGS et al. v. SCRIPPS et al.

Civ. 1607.

District Court of Appeal, Fourth District,
California.

April 1, 1936.

Rehearing Denied April 29, 1936.

**Hearing Denied by Supreme Court
May 28, 1936.**

1. Corporations ⇨426(1)

Where managing director and treasurer of several corporations with approval of various directors canceled obligation of his mother owing to all but one of the corporations, a holding corporation, and accepted holding corporation's note secured by shares of its stock, and stockholders of other corporations adopted customary annual blanket resolution ratifying treasurer's acts, fact that treasurer was a director of all corporations and actively engaged in transaction did not make it void or subject to attack by minority stockholders, where evidence showed no fraud or damage to them.

2. Corporations ⇨393

Court may not interfere with financial policy of corporation nor attempt to dictate its management, unless there be showing of fraud or damage to complaining stockholders.

3. Corporations ⇨316(1)

Where one of several corporations assumed obligation owing to others through transaction negotiated by managing director and treasurer of all the corporations, transaction was not a loan by corporation to its director or officer which was prohibited by statute (Civ.Code, § 366).

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Action by H. B. R. Briggs and others against E. W. Scripps, trustee, and others. From a judgment for defendants, plaintiffs appeal.

Affirmed.

McAdoo & Neblett, of Los Angeles, for appellants.

S. S. Hahn and W. O. Graf, both of Los Angeles, for respondents.

SCOVEL, Justice pro tem.

Plaintiffs are minority stockholders in all of the defendant corporations excepting Scripps Newspapers, Inc. Defendant E. W. Scripps is the son of Mrs. Josephine S. Scripps. In 1932 she was indebted to the defendant corporations excepting Scripps Newspapers, Inc., in the sum of some \$316,000. E. W. Scripps was the managing director and treasurer of all defendant corporations, and after talking the matter over with the various directors of defendant corporations, canceled the obligation of Mrs. Josephine S. Scripps and in lieu thereof accepted a note of Scripps Newspapers, Inc., for the same amount, secured by 1,000 shares of Scripps Newspapers, Inc., the book value of such collateral being \$450,000. Scripps Newspapers, Inc., is a holding corporation, at least 90 per cent. of its assets consisting of shares of stock in the other defendant corporations. The stock of Scripps Newspapers, Inc., is owned by defendants E. W. Scripps, James G. Scripps, Josephine L. Scripps, and Ellen Browning Scripps, brothers and sisters, Mrs. Josephine S. Scripps having no interest whatsoever therein. The evidence fails to show that the exchange of indebtedness from Mrs. Josephine S. Scripps to Scripps Newspapers, Inc., in any way injured the other corporations, nor that there was any fraud involved in the transaction. For many years, it was the custom among the various defendant corporations at the annual stockholders' meetings to adopt a blanket resolution ratifying and confirming all of the acts theretofore done by E. W. Scripps, as manager and treasurer of the various corporations. Subsequent to the cancellation of the Josephine S. Scripps loan and the acceptance of the Scripps Newspapers, Inc., note in lieu thereof, such a resolution was adopted by the stockholders of the various corporations ratifying and confirming all acts of E. W. Scripps, as manager and treasurer. Subsequent thereto, plaintiffs filed this action seeking to set aside the transfer of indebtednesses. Judgment was

entered in favor of defendants, from which plaintiffs appeal.

[1,2] Appellants maintain that the so-called loan to Scripps Newspapers, Inc., is a misappropriation of moneys by E. W. Scripps as treasurer of other defendant corporations for the benefit of E. W. Scripps and his brother and sisters, the sole stockholders of Scripps Newspapers, Inc. The evidence shows, however, that in truth and in fact no actual moneys were received by Scripps Newspapers, Inc., the transaction consisting in the assumption by Scripps Newspapers, Inc., of the indebtedness of Josephine S. Scripps and the cancellation of her indebtedness represented thereby. While the directors of the various corporations took no formal action approving the same, it was done with their knowledge and approval. The new obligation was amply secured, and from all that appears in the transcript the new debtor may be more financially responsible than the old. The fact that E. W. Scripps was a director of all of the corporations and actively engaged in the transaction does not make it void or subject to attack by minority stockholders in the absence of fraud or damage to them. *Buck v. Tuxedo Land Company*, 109 Cal.App. 453, at page 458, 293 P. 122. It is not within the province of a court to interfere with the financial policy of a corporation nor attempt to dictate its management unless there be a showing of fraud or damage to the complaining stockholders.

Appellants cite *People v. Talbot*, 220 Cal. 3, 28 P.(2d) 1057, and *People v. Epstein*, 118 Cal.App. 7, 4 P.(2d) 555, to the effect that officers or directors of corporations taking money from their companies under the guise of loans are guilty of embezzlement or misappropriation of corporate funds. In the case at bar, however, it is not shown that E. W. Scripps or any officer or director of any of the corporations profited in any manner whatsoever through the transaction complained of; in fact, if any injury ensued it was to the stockholders of Scripps Newspapers, Inc., through its assumption of the indebtedness of Josephine S. Scripps, and they are not complaining.

[3] Appellants also seek the protection of Civil Code, § 366, prohibiting loans to directors or officers of their respective corporations. As hereinbefore pointed out, however, no loan was actually made to any officer, director, or shareholder in any of the corporations involved, the whole transaction consisting merely of an assumption

of indebtedness by Scripps Newspapers, Inc.

Certain findings are also attacked by appellants as not supported by the evidence. We have read the entire transcript and are satisfied that the findings are amply supported or are made on matters not material to the appeal and which would be insufficient to change the judgment had they been made in accordance with appellants' contentions.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.



13 Cal.App.2d 87

MARTIN v. HUNTZINGER et al.

Civ. 10844.

District Court of Appeal, Second District,
Division 2, California.

April 3, 1936.

Appeal and error ⇨624

Plaintiff's appeal was dismissed, where certificate of clerk of trial court and affidavit of defendants' attorney showed that stipulation extending time to plaintiff in which to file printed transcript had expired and that there was no further stipulation or order extending time (Rules for Supreme Court and District Courts of Appeal, rule 6).

Appeal from Superior Court, Los Angeles County.

Action by Edgar L. Martin against Harvey W. Huntzinger and another. From an adverse judgment, the plaintiff appeals. On motion to dismiss appeal.

Appeal dismissed.

Harry Goldman, of Los Angeles, for appellant.

Harvey W. Huntzinger, and W. Cloyd Snyder and John C. Stick, both of Los Angeles, for respondents.

CRAIL, Presiding Justice.

This case comes before us on a motion of the respondent to dismiss the appeal up-

on the ground that the printed transcript was not and has not been served and filed within the time prescribed by law and the Rules of the Supreme and District Courts of Appeal, nor within the time provided by any written stipulation on file herein. The motion is made upon the certificate of the clerk of the trial court as provided by rule 6 of said rules, and upon the affidavit of the attorney for the respondent that the stipulation extending time to appellant within which to file said printed transcript expired on February 3, 1936, and that there exists no stipulation or order extending the time for filing such transcript beyond said date. Respondent is entitled to a dismissal of the appeal.

Appeal dismissed.

We concur: WOOD, J.; McCOMB, Justice pro tem.



12 Cal.App.2d 699

ELLWOOD v. NIEDERMEYER.

Civ. 9939.

District Court of Appeal, Second District,
Division 1, California.

March 25, 1936.

Rehearing Denied April 23, 1936.

Hearing Denied by Supreme Court

May 21, 1936.

1. Vendor and purchaser ⇨8

Vendor may contract to convey realty which he does not own, but must be able to make good title at time fixed by his contract

2. Exchange of property ⇨8(4)

Evidence that defendant, who owned only one-half undivided interest in realty which he contracted to convey within certain time failed to deliver deed conveying marketable title within five days' additional time allowed by plaintiff, but only deed of his interest, held not to show that defendant had performed his contract for exchange of realty.

3. Exchange of property ⇨8(4)

Evidence that defendant, whose wife held one-half undivided interest in realty he had contracted to convey and who knew that court's approval was necessary for consummation of such contract, did nothing to secure required order until served with notice

requiring him to perform *held* to show "bad faith" within statute relating to breach of agreement to convey realty (Civ.Code, § 3306).

[Ed. Note.—For other definitions of "Bad Faith," see Words & Phrases.]

4. Evidence ⇨571(7)

Opinion of expert appraiser as to value of mortgaged realty *held* of no evidentiary value where appraiser, upon cross-examination, testified that appraisal made was assuming clear property, and that he did not believe appraisal could be made on property with such mortgage on it.

5. Exchange of property ⇨8(4)

Evidence *held* not to show that plaintiff was not entitled to damages for breach of contract for exchange of realty on ground that value of property which plaintiff was to receive under contract for exchange of realty was not in excess of value of property which he was to convey (Civ.Code, § 3306).

6. Appeal and error ⇨1011(1)

Appellate court will not reverse finding where there is substantial conflict in evidence, but evidence must be such as to present reasonable ground for difference of opinion.

7. Exchange of property ⇨7

Provision in contract for exchange of realty that, in event of errors appearing in title, agreement should be extended for reasonable time for their correction *held* not to relieve defendant of liability for failure to convey realty because he had only undivided one-half interest in such realty, since provision related to error in title and not to absence of title.

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

Action by Harriet Ellwood against Arthur Niedermeyer. Judgment for defendant, and plaintiff appeals.

Reversed.

Prior opinion, 52 P.(2d) 975.

Alfred T. Cluff, Allan F. Bullard, and Sawyer & Cluff, all of San Francisco, for appellant.

Felix F. Bangs, John Beardsley, and Charles E. Beardsley, all of Los Angeles, for respondent.

EDMONDS, Justice pro tem.

In the instant appeal, on December 19, 1935, a decision was made and an opinion

filed by virtue of which the judgment that theretofore had been rendered in the action by the superior court was reversed. Thereafter, for the asserted reason that in reaching its conclusion herein, this court inadvertently had failed to give due consideration to certain issues that had been presented in the appeal, by order made by this court with reference thereto, a petition for rehearing of the appeal was granted.

The entire matter having again received careful consideration by this court, especially so as to the particular issues to which, in his petition for rehearing the respondent has directed attention, the following opinion and order correctly represents a statement of the essential facts in the cause and the conclusions of law reached thereon, together with the underlying reasons for the present decision, to wit: This action is for damages for breach of a contract for the sale of real estate.

In her complaint plaintiff pleaded a contract entered into between herself and the defendant. Under it she was to receive some lots in exchange for a furnished house owned by her. By a further provision defendant agreed to loan \$10,000 to her upon the security of the lots she was to acquire. Plaintiff alleged that she had performed all of the conditions of the contract; that defendant in bad faith and without just cause had refused to perform within the 45 days limited by its terms for performance, or at all, notwithstanding her demand therefor; and that the value of the property she would have received had the exchange been carried out was some \$12,000 more than that of her own. The defendant alleged that the contract had been entered into by him because of certain misrepresentations of the plaintiff, but that he had, notwithstanding them, performed all of the conditions required of him. He also denied plaintiff's allegations of value.

The court found that at the time the contract was made plaintiff was the owner of the property agreed to be conveyed by her, but that the property to be conveyed by the defendant was owned by him and his wife, for whom he was guardian, in joint tenancy; that prior to the expiration of the 45 days fixed for the consummation of the exchange defendant had not deposited either his deed or money in the designated escrow; that plaintiff then gave defendant notice requiring him to perform within

five days, but that this notice did not allow defendant sufficient time to perform. By a further finding the court declared that it was the intention of the plaintiff at the time of giving such notice and demand to withdraw from the agreement if the exchange could not be completed within the five days fixed by her notice and to sell her furniture, although she had been able and willing to perform at all times before. Other findings are that within the five days fixed by plaintiff's notice, defendant deposited \$10,000 in escrow with a deed to the lots executed by him; that he immediately thereafter commenced proceedings for authority to sell his wife's interest in the lots, and some two months thereafter deposited in the escrow a deed executed by him as guardian of his wife's estate, conveying her interest therein under an order of court confirming the sale; that appellant had made no misrepresentations; that the value of the properties plaintiff was to receive under the contract was not in excess of that which she was to give; and that defendant had acted in good faith at all times. Judgment was entered in favor of defendant.

The evidence shows that at the time the contract was made the appellant was the owner of a furnished house, and that the real property was subject to a deed of trust to secure a note for \$25,000 made by a previous owner. She entered into a written contract with Mr. Niedermeyer to exchange the house and furniture for three vacant lots. The lots which he was to convey to her were owned by him and his wife. Two days after the contract was signed Mrs. Ellwood signed escrow instructions at a bank, and thereafter deposited with the bank a deed to her property and other papers.

The 45-day period provided for in the exchange agreement expired on January 10. On that date Mr. Niedermeyer had not signed any escrow instructions nor deposited any documents nor otherwise indicated any intention to carry out his part of the agreement. On January 19th, Mrs. Ellwood, by written notice, informed Mr. Niedermeyer that she had deposited in the escrow instruments of conveyance of her property, and stated that she required him "on or before the close of business on January 24, 1933, to complete and perform the said exchange on your part, and to execute and deliver to me proper instruments of conveyance of your said three lots, and to pay to me the sum of \$10,000.00."

At that time the note secured by the deed of trust on Mrs. Ellwood's property was in default, and the trustee was about to make a sale of the security. Pressed by her financial difficulties, she had arranged for a sale of her furniture at auction on January 25th, the day following the expiration of the five-day period. On the afternoon of January 24th, the last of the five days fixed in Mrs. Ellwood's notice to Mr. Niedermeyer, he deposited in the escrow the sum of \$10,000 and a grant deed to the three lots executed by him alone. He gave notice of this to Mrs. Ellwood, calling her attention to the fact that their exchange agreement provided "that in the event errors appear in the titles to either or any of the properties, then the agreement shall be extended for a reasonable time that the same may be corrected." He demanded "an extension for a reasonable time to cure any defect which such title certificate when secured, may show in the title to the three lots * * * conveyed."

It is conceded by the defendant and impliedly found by the court that the deed which Mr. Niedermeyer deposited in the escrow only conveyed an undivided one-half interest in the lots. Title to the remaining interest was in his wife. She was under disability at the time, and her estate was being administered by Mr. Niedermeyer as her guardian. On the following day, Mr. Niedermeyer, as guardian, caused proceedings to be commenced in his wife's estate for an order confirming a sale of an undivided one-half interest in the lots to one D. H. Carleton. On March 17th Mr. Niedermeyer's attorney deposited in the escrow a deed executed by Carleton conveying his interest in the lots, the sale to him having been confirmed by the probate court. However, Mrs. Ellwood's property had in the meantime been sold under the provisions of the deed of trust, and none of the deeds was ever delivered.

As the basis of her appeal from the judgment, appellant contends that respondent did not perform his contract within the time limited for performance and made no valid tender of performance. She insists that where one who has agreed to convey property in which he only has an undivided one-half interest fails to acquire the outstanding interest within the time limited for performance, he may not thereafter perform by tendering a deed executed only by himself but purporting to convey the full title, and claim further time for performance

under the guise of correcting an error in the title. Specifically, her claim is that the evidence on the issue of performance does not support the findings. She also makes the point that the evidence does not support the finding of the court that the value of the property which she was to receive by the exchange was not in excess of that which she was to convey.

[1] It was not necessary for the respondent in this case to have owned the fee-simple title to the property which he agreed to convey to appellant in order to enter into the contract with her. But in such a case the vendor must be able to make good title at the time fixed by his contract. In the early case of *Burks v. Davies*, 85 Cal. 110, 24 P. 613, 20 Am.St.Rep. 213, the court quoted from and followed a Minnesota case (*Goetz v. Walters*, 34 Minn. 241, 25 N.W. 404) holding that the vendor under a contract for the sale of land which he did not own must be prepared at all times within the period fixed by his contract to convey a good title. When the vendee complied with his contract, the vendor, the Minnesota court said, "would have been entitled to no more time than was reasonably necessary for the execution of the papers." In the later case of *Hanson v. Fox*, 155 Cal. 106, 99 P. 489, 490, 20 L.R.A.(N.S.) 338, 132 Am.St.Rep. 72, which is one of the leading cases on the subject, being widely cited, it was declared to be the settled rule in this state that "it is perfectly legal for one to contract to convey title to land which he does not own, and he is in default under such contract only when the vendee has performed his part of the contract and made demand for a title which the vendor is unable to furnish." This language was quoted with approval in *Lemle v. Barry*, 181 Cal. 6, 183 P. 148, and states the general rule.

Thus in *Haight v. Salter*, 260 Mich. 6, 244 N.W. 209, 210, the court said: "The fact that a person lawfully may contract to sell real estate which he does not own does not extend the contract time for delivery of a deed. He must take steps to acquire title in anticipation of his duty to deliver. After payment of the contract price, the vendor is not entitled to time to make title. He is entitled only to a reasonable time to execute the proper conveyance. 39 Cyc. 1326 et seq.; 27 R.C.L. 524."

In *Myers v. Fidelity-Philadelphia Trust Co.*, 290 Pa. 283, 138 A. 834, 835, the court had occasion to pass upon a case where several joint owners were sued to recover

money paid on an unconsummated agreement for the purchase of real estate. The defendants could not deliver title to the property at the time called for by the contract because it was subject to a lien for debts. The court said: "Defendants frankly admit that plaintiff was entitled to have a marketable title, and that, at the time of settlement, they were unable to give it, because of the lien of those debts. They claim, however that plaintiff had no right to rescind the contract at that time, because (1) he should have given them an opportunity to apply to the orphan's court, * * * for leave to sell the property free from the lien of those debts; and (2) he had made no tender of performance on his part. These objections are unavailing." The obligation of the vendor is succinctly stated in *Walsh v. Colvin*, 53 Wash. 309, 101 P. 1085, 1086, 1088, as follows: "While a vendor may have a reasonable time in which to prepare and deliver a deed, he does not have a reasonable time in which to acquire title to the property to enable him to perform his contract. If a vendor agrees to convey title at a given time and has no title when the date for performance arrives, the question of a reasonable time for preparing a deed does not enter into the case."

[2] In the case at bar respondent agreed to convey property to which he only had title to an undivided one-half interest. The time which he asserts he was entitled to was used by him for the purpose of procuring by purchase title outstanding in another individual. Under the authorities, in such a case, he was entitled only to the time reasonably necessary to execute and deliver the deed. The time fixed by the appellant was manifestly sufficient for this purpose because respondent delivered his deed conveying all the title in him, as demanded by the vendee. Respondent contracted at his peril for the delivery of title to property he did not own, and having so contracted, appellant was entitled to call for delivery of a deed conveying a marketable title in fee simple at any time she complied with her part of the agreement and within the period provided for performance. The court found that Mrs. Ellwood was able and willing to deliver title to her property at all times up to the expiration of the period fixed by her notice and demand. This finding is not challenged by respondent. It follows that the evidence does not support the finding that respondent performed his contract.

[3] But respondent asserts that if he breached the provisions of the contract to be performed by him, appellant is faced with the findings of the trial court that there was no bad faith on his part, and that the value of the property which appellant was to receive under the contract was not in excess of the value of the property which she was to convey. Appellant's answer to this contention is that these findings are not supported by the evidence.

By the allegations of the complaint appellant charged that the respondent in bad faith and without just cause failed and refused to carry out the provisions of the contract. By these allegations appellant evidently sought to bring herself within the provisions of section 3306, Civil Code, reading as follows: "The detriment caused by the breach of an agreement to convey an estate in real property, is deemed to be the price paid, and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon; but adding thereto, in case of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach, and the expenses properly incurred in preparing to enter upon the land."

The record shows that the case was tried upon the theory that the damages, if any, recoverable, were to be measured accordingly. From respondent's testimony, it appears that he had previously sold property belonging to his wife through proceedings in the matter of her estate. He admitted that he knew that the approval of the court was necessary for the consummation of the contract which he had made. Yet he did nothing definite towards securing the required order of court until after appellant had served him with notice requiring him to perform. His failure to place himself in a position where he could carry out the contract which he had made clearly amounts to bad faith within the meaning of the statute, and a finding to the contrary is not sustained by the evidence. *Haight v. Marin Municipal Water Dist.*, 208 Cal. 753 -756, 284 P. 926.

The next point to be considered is the finding concerning value. Two witnesses were called by the appellant to place a value on the real estate, which, it will be recalled, was at the time subject to a mortgage to secure a note of \$25,000. Each testified that the value did not exceed the amount of the mortgage note. The highest value placed upon the furniture was \$3,000. Re-

spondent testified that the value of the lots which he agreed to convey was \$8,000. Two other witnesses placed their value at \$8,750 and \$15,000, respectively. It therefore appears from this evidence that the property which appellant was to receive in the transaction was worth at least \$5,000 more than that which she was to give. If it is necessary, as contended by respondent, to deduct taxes and unpaid interest of some \$1,500 on her property she would still have the advantage by about \$3,500.

But respondent relies upon the testimony of an expert appraiser called by him that appellant's property was worth \$30,000. This figure would make the values equal, taking the lowest value placed upon respondent's property. However, this witness so qualified his answers that they have no evidentiary value. Upon cross-examination he said: "The appraisal I made was assuming a clear property. * * * I don't know what it might sell for, assuming it had upon it a \$25,000 mortgage which was past due. * * * I don't believe anybody could put a value on it. I don't believe anybody could give a figure that would represent the clear market value."

[4,5] It therefore appears that his testimony should have been entirely disregarded by the trial court, and without it there is no basis for a finding that the values of the properties to be exchanged were equal.

[6] It is of course true "that an appellate court will not reverse a finding if there is a substantial conflict in the evidence; but the evidence, in order to raise a conflict, must be such as to present a fair and reasonable ground for a difference of opinion. The finding or verdict must have meritorious support in the evidence. A few general statements without substantial reasons is not sufficient to raise a conflict." *United States F. & G. Co. v. Ind. Acc. Comm.*, 95 Cal.App. 186, at page 190, 272 P. 589, 591. In that case the opinion of a physician was the sole basis for a finding of disability. The court said: "We have no hesitancy in saying that the opinion here is so unsatisfactory in itself, and so at variance with the whole current of the testimony, as to raise no conflict, and therefore entirely insufficient to give the respondent power to render the finding complained of."

In another case it was said "that the statement of a mere opinion or conclusion by a witness in his direct examination could have no weight as against facts stated by him in his cross-examination which are nec-

essarily opposed to such opinion." *Burns v. Jackson*, 53 Cal.App. 345, at page 347, 200 P. 80, 81. The same court examined and considered the testimony of a plaintiff who, upon cross-examination, referred to certain records as the basis for his statements on direct examination. From these records, which were before the court, it was evident that the witness' testimony on direct examination was incorrect. In holding plaintiff's testimony insufficient to support a finding, the court said: "It is plain that, in considering plaintiff's testimony we are not dealing with the question of the weight to be accorded a witness' testimony, which is the exclusive function of the court or the jury, according to the mode of the trial, but a case where the face value of the testimony constitutes the full measure of its evidentiary force." *Bruno v. Severini*, 51 Cal.App. 163, at page 171, 196 P. 501, 504.

In the more recent case of *County Sanitation District, etc., v. Averill* (Cal.App.) 47 P.(2d) 786, 790, appellant urged that the opinion of an expert as to value had been erroneously stricken out by the trial court. The court said: "A brief analysis of the basis of the opinion as to values will show it to be wholly intangible and fanciful. * * * Since damage from this source is not recoverable in this action, if it is recoverable at all, we find nothing in the stricken testimony that would support a tangible claim for damages."

[7] Respondent contends that he has a complete defense to this action, notwithstanding his failure to deliver title, by the following provision of the exchange agreement: "In the event that errors appear in the titles to either or any of said properties, then this agreement shall be extended for a reasonable time that the same may be corrected. In the event any error cannot be corrected, this agreement shall be null and void, except as to the payment of commissions, unless the title to the property affected is accepted subject thereto." However, this provision relates to "errors" in the title. It would be an unusual construction of this language to apply it to an absence of title. It obviously refers to some defect in the title which is subject to correction, or, at least, one which it might reasonably be assumed could be corrected even though it was afterward found that the assumption was erroneous. It is not so broad as the language of the contract in the case of

Crosby v. Wynkoop, 56 Wash. 475, 106 P. 175, which is relied upon by respondent, which provided that the agreement there considered should be void "if said abstract does not show such title, or cannot be made to do so within ten days from notice of defects."

The judgment is reversed.

We concur: HOUSER, P. J.; DORAN, J.



12 Cal.App.2d 686

ENGLE v. ÆTNA CASUALTY INS. CO. et al.

Civ. 1589.

District Court of Appeal, Fourth District,
California.

March 25, 1936.

1. Hospitals ⇐5

Automobile liability insurer *held* not estopped to deny liability to hospital proprietor for care of injured child because of adjuster's agreement with physician to pay such expenses, where undeterminable part of services was rendered before agreement and there was no showing of connection between physician and hospital or that adjuster's statements were communicated to proprietor.

2. Hospitals ⇐5

Adjuster's statement, answering hospital proprietor's request for written agreement by automobile liability insurer to pay hospital bill of injured child, which was made some time after child was received in hospital, that hospital bill would be paid regardless of outcome of possible suit by child's parents, could not be regarded as agreement by insurer to pay entire hospital expense.

3. Hospitals ⇐5

Alleged agreement by automobile liability insurer to pay hospital proprietor for care of injured child regardless of outcome of possible suit by child's parents *held* without consideration.

4. Hospitals ⇐5

Automobile liability insurer *held* not estopped to deny liability to hospital proprietor for care of injured child because of adjuster's agreement to pay such expenses, as

respects hospital expenses incurred before agreement was made.

5. Principal and agent ☞169(3)

Statement by automobile liability insurer's branch office manager that insurer would be responsible for physician's bill for care of injured child was not ratification of adjuster's prior agreement to pay hospital and medical charges, where statement related only to charges for medical services.

6. Principal and agent ☞169(3)

Alleged agreement made by automobile liability insurer's branch office manager to pay for medical services to injured child would not render insurer liable for entire services as ratification of adjuster's agreement to pay such charges, where undetermined part of services had been rendered when adjuster's agreement was made.

7. Principal and agent ☞169(3)

Oral agreement by automobile liability insurer's branch office manager, to pay medical charges for services to injured child regardless of outcome of suit against insurer by child's parents, was not a ratification of adjuster's agreement to pay such charges, since manager's agreement was unenforceable as oral agreement to answer for debt of another (Code Civ.Proc. § 1973).

8. Principal and agent ☞169(3)

Statement of automobile liability insurer's branch office manager that insurer would be responsible for physician's bill for services to injured child held not a ratification of adjuster's agreement to pay such charges, absent showing that insurer was obligated to pay claim, knew of claim or received benefit from services, or that manager was authorized to ratify prior unauthorized contract by another agent.

Appeal from Superior Court, San Bernardino County; Chas. L. Allison, Judge.

Action by Gertrude M. Engle against the Ætna Casualty Insurance Company and others. From a judgment for plaintiff, named defendant appeals.

Reversed.

Swing & Swing, of San Bernardino, for appellant.

Hert & Withington, of San Bernardino, for respondent.

JENNINGS, Justice.

The plaintiff instituted this action to recover from the defendants the sum of \$355.50 for charges made for hospital care and nursing furnished to one Anna Angjelic. The complaint alleged that the defendants had employed plaintiff to furnish hospital care and nursing to the above-mentioned person and to pay the reasonable value thereof and that the sum specified was a reasonable charge for the services rendered. Subsequent to the filing of the above-described pleading, a supplemental and amended complaint was filed wherein it was alleged that the defendants had employed a certain physician to furnish and perform professional services for "Anna Angjelic, minor child of the defendant, Sam Angjelic," and agreed to pay to said physician the reasonable value of such medical services as he should render to said child; that, pursuant to such agreement, the physician rendered services to the minor which were of the reasonable value of \$550 and prior to the institution of the action sold and assigned to plaintiff his claim against the defendants. The prayer of the last-mentioned pleading was for judgment against the defendants for the total amount of the two claims. The defendants named in the action are Mrs. N. B. Jones, the Ætna Casualty Insurance Company, and the parents of Anna Angjelic. The record shows that prior to the trial of the cause, the parents of the minor had failed to make an appearance in the case, their default had been entered, and judgment by default had been taken against the defendant Sam Angjelic, and that the action had been dismissed as to the defendant Mrs. N. B. Jones. The trial, which was had before the court without a jury, resulted in the entry of a judgment against the insurance company for the full amount demanded in the supplemental and amended complaint. From the judgment thus rendered the insurance company appeals.

Examination of the transcript on appeal discloses that on June 14, 1932, in the city of Colton, Anna Angjelic was struck by an automobile which was owned by Mrs. N. B. Jones, and as a result thereof the said minor sustained personal injuries which necessitated hospital care and medical attention. It further appears that on the above-mentioned date the injured child was taken to respondent's hos-

pital in the city of Colton where she remained for approximately two and a half months, during which time nursing care and services usually rendered in such an institution were furnished to her. It also appears that medical attention was required by the injured child and that such services were rendered by Dr. D. B. Williams. It further appears that Mrs. N. B. Jones, the owner of the automobile which caused the injuries, held an insurance policy issued by appellant, presumably of the type popularly known as a "public liability policy." The evidence presented during the trial disclosed that, on September 18, 1933, the said minor, through her father as guardian ad litem, brought an action against Mrs. N. B. Jones, the owner of the automobile, and Leonard M. Walker, who was operating the car at the time of the accident, whereby she sought to recover general damages in the amount of \$50,000 for the personal injuries suffered by her and special damages in the amount of \$905.50, consisting of \$550 for medical services and \$355.50 for hospital care; that this action proceeded to trial on February 20, 1934, and resulted in the entry of a judgment in favor of the defendants based on the trial court's findings that the defendants were in no respect guilty of negligence in the operation of the automobile and that plaintiff's injuries were caused solely by her own negligence.

Respondent by this action sought to impose liability on appellant for the expenses of hospitalization and medical care on the basis that an agent of appellant had orally agreed to pay such expenses. It was also claimed that after the services had been performed appellant ratified the agreement.

The evidence concerning the making of the agreement and its ratification by appellant consisted of the testimony of Dr. Williams and of the respondent. The former testified that, approximately four days after the child had suffered the injuries which necessitated hospitalization and medical care, a Mr. Cameron called on the physician at his office in the Colton Hospital, introduced himself as a representative of the Aetna Casualty Company, and inquired concerning the injuries; that the witness explained the nature of them and told Cameron that the child's father was poor and had no money to pay for the services that would be required; that the witness then said to Cameron, "And I want

to know if your company will stand for it because it is going to be a long and expensive thing for me and the hospital"; that Cameron instructed the witness to go ahead "because we feel that our insured was definitely at fault, and therefore I think it would be best for you to go ahead and take care of the case in the best way you possibly can, giving the girl an anæsthetic to set the leg and thigh, if necessary, and take all the necessary precautions, and we will pay for those services and X-rays." This witness further testified that he again saw Cameron about a week after the accident, at which time Cameron informed him that he had visited the home of the injured child and had verified the physician's prior statement regarding the poverty of the child's father and said: "And therefore it looks like we are definitely, * * * stuck for this bill, and I have made inquiry of the Mashburn Grocery Store, which was at the corner where the accident occurred, and apparently our insured was at fault." The same witness testified that on December 10, 1932, a Mr. Thiele called upon him and represented himself as the manager of the branch office of the Aetna Casualty Company at 810 South Spring street in the city of Los Angeles; that the witness said to Thiele: "Mr. Angjelic has definitely said he could not pay for the care of the child in any way, that he was out of work and was not able to pay, and therefore whom should I look to for the money?" To which inquiry Thiele replied: "I understand Mr. Angjelic is going to bring suit against the company, but regardless of that you have done your work with the child and have produced a cure as near as we can tell, and we will be responsible for the bill regardless of whether the case is lost or not in court."

The respondent testified that the child was brought to her hospital on June 14, 1932, and remained there until discharged on September 2d of the same year; that the witness went to the office of appellant in the city of Los Angeles some time during the month of July, 1932, and inquired for Mr. Cameron; that she was directed to Cameron's office by a stenographer; and that she then had a conversation with Cameron in which she stated that the hospital bill would be an unusually large bill and for this reason she wished a written agreement by the company to pay the bill, to which request Cameron replied that it was

not at all necessary because there was not the slightest doubt that the hospital bill would be paid regardless of suit and regardless of the outcome of any possible suit that the parents might bring against the insurance company.

It may properly be observed at this point that the above-described evidence did not in the slightest degree establish the necessary element of authorization on the part of Cameron to make the agreement which forms the basis of respondent's cause of action or of Thiele's authority to ratify it. This was recognized by respondent for, after the above evidence had been introduced, counsel for respondent requested a continuance of the case "for the purpose of getting further information, either by deposition or otherwise, as to the authority of those men to make the promises that were made in this case." The requested continuance was granted, and Mr. Thiele's deposition was taken and produced in evidence by the respondent. This witness testified that he was the superintendent of the claims department of appellant with an office in Los Angeles and that his duties consisted of supervising the investigation and adjustment of claims against the company and that occasionally he adjusted such claims. The witness testified that Cameron was employed by appellant as an investigator and adjuster, and that his duties were to investigate and adjust claims against policyholders "according to the contracts they held" under the control of the witness, and that he was authorized to issue checks for the payment of claims "for which the company was liable under the policy but for no others." The witness further testified that checks in payment of claims issued by Cameron were paid by the insurance company "if they were for claims for which the company was liable under the policy." On cross-examination the witness testified that Cameron did not determine the liability of appellant under policies of insurance issued by the company, but that this duty devolved upon the witness who determined it with the assistance of the company's attorneys; that Mrs. N. B. Jones was a policyholder of appellant at the time the accident occurred and that the matter of the policyholder's liability for hospital and medical expenses was determined in the action brought by the injured minor against the policyholder; that prior to the trial of the last-mentioned action the witness was advised that appellant was not

liable for any damages which had been sustained as a result of the accident. The witness also testified that Cameron had no authority to settle any claim growing out of the accident in which Mrs. Jones was involved and that he was not authorized to make preliminary arrangements for the care of any one injured by a policyholder of appellant as the policy contained no provision for making such payments.

Upon the completion of the trial and after the case was submitted for decision, the trial court found "that all the allegations contained in the plaintiff's complaint are true, as to the Ætna Casualty Insurance Company," and "that all the allegations contained in the plaintiff's supplemental and amended complaint are true, as to the Ætna Casualty Insurance Company." From the findings thus made the court drew the conclusion that the appellant is indebted to respondent in the amount of \$550 on the claim assigned to her by the physician and in the further amount of \$355.50 for hospital care furnished to the minor.

Examination of the complaint and supplemental complaint whose allegations were thus generally adopted by the court as its findings of fact discloses that in the former pleading it is alleged "that on or about the 14th day of June, 1932, the said defendants, and each of them employed the plaintiff herein to nurse, board and room one Anna Angjelich, and to give to said Anna Angjelich such hospital care, treatment and hospitalization as the said Anna Angjelich should require, and that pursuant to said employment the said plaintiff furnished nursing, board, room, hospital care and hospitalization to the said Anna Angjelich of the reasonable value of \$355.50, and that said defendants and each of them agreed to pay this plaintiff the reasonable value thereof." The latter pleading alleges that within three years prior to its filing all of the defendants in the action employed Dr. D. B. Williams to furnish and perform professional services for the minor and that each of said defendants agreed to pay the above-named physician the reasonable value of such medical services as he should render to said child, and that "pursuant to said agreement" the said physician performed services for said minor between June 14, 1932, and October 15, 1932, of the reasonable value of \$550, and that prior to the institution of the action the physician assigned

his claim for such services to the respondent.

Analysis of the above-described allegations adopted by the trial court as its findings of fact in the light of the undisputed evidence produced during the trial of the action impels the conclusion that they are not supported by the evidence.

[1-4] In the first place, no evidence was produced which tended to show that any obligation rested upon appellant to furnish medical attention or hospitalization to Anna Angjelic. The policy of insurance which appellant had issued to its insured, Mrs. N. B. Jones, was not produced. Respondent obviously did not rely on the provisions of the insurance policy in her endeavor to fasten liability on appellant for the expenses of hospitalization and medical attention. What she did rely on was an independent agreement to pay such expenses allegedly made by an agent of appellant who was authorized to enter into such a contract. At first blush, it might seem that the judgment permitting recovery for the full amount of the two claims may be sustained under the familiar doctrine of equitable estoppel. Analysis of the evidence, however, demonstrates the futility of such a course. If it be assumed that the court was justified in concluding that it was within the apparent scope of the authority conferred by appellant on its agent Cameron to enter into an agreement to pay the expenses, it is nevertheless clear that no such agreement was made until four days after the child was received in the hospital, at which time, according to the physician's testimony, Cameron, in response to the doctor's inquiry as to whether the company would "stand for" the expenses, instructed the physician to go ahead and take care of the case "and we will pay for those services and X-rays." However, the allegedly reasonable amount of the physician's claim was for services performed between June 14, 1932, and October 15, 1932. What part of these services was rendered between June 14th and the time four days later when, for the first time, appellant's agent instructed the doctor to go ahead, does not appear and there is no possibility of discovering it from the evidence submitted. Whether the physician during this four-day period had performed no services for the injured child or services of slight value or, on the contrary, had performed services of considerable value, is impossible of determi-

nation. In any event, it is apparent that no recovery for whatever services had been performed by the physician during the four-day period would be recoverable under the allegations of the supplemental complaint and the doctrine of estoppel would not render appellant liable for what had been done at the time the representation was made by the agent. Furthermore, it must be observed that no connection between the physician and the hospital was shown by the evidence, and it does not appear that the statements which were made to the physician were communicated to the respondent. The evidence shows that at some indefinite date in the month of July, 1932, respondent first saw the agent Cameron, at which time she requested a written agreement by appellant to pay the hospital bill, whereupon Cameron stated that a written agreement was not at all necessary because there was not the slightest doubt that the hospital bill would be paid regardless of the outcome of any possible suit which the parents of the child might bring against appellant. The indefiniteness of this statement precludes the possibility of its being regarded as an agreement by appellant to pay the entire expense of hospitalization. Further, the important element of consideration is entirely lacking. Additional difficulty is encountered in attempting to sustain the trial court's finding that appellant agreed to pay the hospital expenses on the theory of estoppel. Appellant may not be estopped to deny liability for the expenses of hospitalization which had been incurred prior to the time the statement was made. It is impossible to determine from the evidence what part of the total charge for hospital care had been incurred prior to the time the agent's statement was made. Respondent was the sole witness who testified regarding the making of the statement and was unable to fix the time when it was made more definitely than that it was made sometime during the month of July, 1932.

[5-8] Consideration should be given to certain evidence admitted by the trial court regarding a statement purportedly made by the superintendent of the claims department of appellant to Dr. D. B. Williams on December 10, 1932. The physician testified that on the above-mentioned date Mr. S. C. Thiele, who represented himself as the manager of appellant's branch office at 810 South Spring street in the city of Los Angeles, came to the office of the witness in

the city of Colton and in response to the physician's inquiry as to whom he should look for the charges made for medical services rendered the injured child whose father was unable to pay such charges, replied: "I understand Mr. Angjelic is going to bring suit against the Company, but regardless of that you have done your work with the child and have produced a cure as near as we can tell, and we will be responsible for the bill regardless of whether the case is lost or not in court."

The record shows that the above-quoted evidence was admitted under the theory that it constituted a ratification of the original contract made by the agent Cameron. Without regard to whether the evidence was properly admitted or not, it is apparent that it could not constitute a ratification of a prior agreement by appellant to pay hospital and medical charges. In the first place, the evidence related solely to charges made for medical services and obviously could not be considered as amounting to a ratification of any prior agreement to pay hospital expenses. In the second place, it could only be regarded as ratification of a prior agreement to pay charges for medical services an undetermined part of which had been rendered at the time the agreement was made. In the third place, it is plainly an oral agreement to answer for the debt of another and unenforceable because not in writing. Section 1973, Code Civ.Proc.; *Flournoy v. Van Campen*, 71 Cal. 14, 12 P. 257; *Swim v. Juhl*, 72 Cal.App. 363, 237 P. 552; *Huntoon v. Powell*, 88 Cal.App. 657, 263 P. 1030. Finally, the evidence did not purport to establish ratification by appellant. It went no further than to show that an agent of appellant recognized the claim of the physician for medical services furnished to the child and declared that appellant would pay such claim. There is no showing that there was any obligation on appellant's part to pay such a claim. There is no showing that appellant had any knowledge of the claim. There is no showing that appellant received any benefit from the services which the physician rendered to the child. There is not a scintilla of evidence which tends in the slightest degree to prove that the agent possessed any authority to ratify a prior unauthorized contract entered into by another agent. The conclusion is inescapable that the evidence did not in the slight-

est degree establish ratification by appellant.

Nothing said herein is to be construed as an expression of opinion that no recovery may properly be had from appellant because of a lack of showing that the agent Cameron possessed actual authority to make an agreement to pay hospital and medical expenses. It may be that a recovery may be had on direct contract for such expenses as were incurred subsequent to the dates of statements made by Cameron to respondent and to her assignor. As herein noted, the basis of this opinion is that the trial court's findings are not supported by the evidence adduced during the trial of the action.

For the reasons stated the judgment is reversed.

We concur: BARNARD, P. J.; MARKS, J.



13 Cal.App.2d 88
COCKE et al. v. IWANAGA et al.

Civ. 10889.

District Court of Appeal, Second District,
Division 2, California.

April 3, 1936.

1. Vendor and purchaser ☞299(3)

Evidence in suit to quiet title by vendor of realty against purchasers who had made all payments required by contract of purchase, who had made payments on certain loan procured by brother of vendor who actually owned realty at time of contract, and had paid all taxes on realty held to sustain judgment rendered in accordance with finding that vendor was overpaid by purchasers.

2. Vendor and purchaser ☞299(4)

Purchasers of realty, which was one-half of larger tract covered by mortgage securing loan for \$10,000 at time of contract, held entitled to credit of \$5,000 on purchase price, where payments reducing lien had been made by purchasers.

3. Vendor and purchaser ☞299(4)

Where title to property contracted to be sold was defective, court held authorized

to make accounting adjusting payments on purchase price in order to protect purchasers against such defects in title.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Suit by Joseph Richard Cocke and wife against K. Iwanaga and others, wherein William Lewis and others were made cross-defendants. From the judgment rendered, plaintiffs and cross-defendants appeal.

Affirmed.

Guy Lewis, of Hawthorne, for appellants.

Louis B. Stanton, of Los Angeles, for respondents.

CRAIL, Presiding Justice.

This is an appeal by the plaintiff and cross-defendants from a judgment in favor of the defendants. The action started as a suit to quiet title, but when it developed that the defendants had paid to plaintiff all or substantially all of the purchase price of the land, it turned into one for an accounting and for specific performance.

The plaintiff and the defendant Iwanaga entered into a written contract on June 24, 1926, under the terms of which the plaintiff agreed to sell and Iwanaga agreed to buy 33 acres of land for \$30,400, payable \$8,000 in cash on execution of the agreement and thereafter at the rate of \$3,000 per annum on May 1st of each year, the vendee to pay the annual taxes. The \$8,000 was paid in hand. The plaintiff agreed to give a deed to the property together with a certificate of title upon full payment. Payments were made through the years.

However, it developed that on January 28, 1925, the plaintiff had made a contract to sell the same land to Masaki and there never has been a clearance of the Masaki agreement. At the date of the defendants' contract and prior thereto and for years thereafter, the 33 acres was a one-half part of a larger tract, the legal title to all of which was vested in the plaintiff's brother. Prior to the contract, also, this brother had procured a loan of \$10,000 from the Federal Land Bank and had placed a mortgage on the entire tract to secure the same. The loan is payable in semiannual installments of \$150, including interest. This mortgage still remains a lien upon the entire tract including the 33 acres.

Because the legal title was vested in the plaintiff's brother, who disputed the plain-

tiff's claims, it was necessary for the plaintiff to bring an action against him for the determination and recovery of the plaintiff's title, and a judgment in favor of the plaintiff and against the brother was entered December 29, 1927. The judgment appointed a commissioner to execute a deed to plaintiff for his one-half of the lands, but execution of the deed was never obtained until October 28, 1932.

Other facts must be stated in this complicated situation. Prior to entering into the contract with defendants, plaintiff had executed two deeds to the cross-defendants, Lewis and Smith, for 2½ acres each. Each of these deeds has the singular characteristic of making a grant of an undivided 2½ acres in the 36.999 which went to the plaintiff under the judgment and commissioner's deed. So far as we can find in the record, these 5 acres were not located upon any particular parcel of the plaintiff's land. The contract of sale between the plaintiff and the defendant, by its terms, excludes "a certain strip of land of 5 acres adjacent to that premises owned by" the brother. The defendants have paid the taxes upon the whole of the lands of plaintiff, including these 5 acres, since the contract was entered into. Furthermore, the plaintiff's brother had a prior lien on the plaintiff's portion of the land, and on June 11, 1929, brought an action to foreclose this lien. He obtained judgment and purchased the property at execution sale. Plaintiff was unable to pay the judgment or redeem from the sale and requested defendants to effect such redemption. The plaintiff agreed orally at this time that in case defendants should redeem the property the plaintiff would turn over to defendants the title to the property and in case any balance remained due the balance could subsequently be adjusted. Thereupon defendant Iwanaga borrowed the necessary money from the Yokohama Specie Bank, Limited, and executed to that bank an assignment of the purchase contract, and the commissioner issued his certificate of redemption from the sale, but issued the same to the plaintiff. The next day, October 15, 1931, the parties hereto assembled and went over the accounts and the plaintiff signed a written statement acknowledging payment of all interest to date and of \$24,883.91 upon the principal of the contract price. The statement also contained the following: "You may start title search upon the property and upon the completion of the same, we will take the matter up in regard to transferring title to the

property to yourself and the matter of payment of the balance due to me under said contract. Of course, the charges of title search and for costs attached to the perfection of title will be paid by me as provided in said contract." Acting under this authorization, defendants ordered a title search, but it developed that the record title still remained in the plaintiff's brother. Thereupon conferences were held with the Cocke brothers in an effort to get a settlement. On January 28, 1932, the plaintiffs delivered to the defendants a written order to the brother to bring down title to defendant Iwanaga. However, difficulties arose between the two brothers and it became necessary to obtain the commissioner's deed, heretofore referred to. The commissioner's deed ran in favor of the plaintiff. The title, for the first time being in the plaintiff, he thereupon refused or, at least, failed to convey the title to the defendants. The defendants made all of the payments as required under the contract since the commencement of their contract, and also all of the semiannual payments on the federal bank loan which were made, and also all of the taxes on the undivided one-half of the property, including those on the so-called "floating" 5 acres.

This was the situation on January 5, 1933, when the plaintiff served upon the defendants a notice and demand for a payment of \$2,000 on the principal and \$643.02 interest and other sums, and notified defendants that unless such sums were paid plaintiff would cancel the agreement of sale. On January 26, 1933, plaintiff served on defendants a notice of cancellation of contract, and plaintiff's action was filed on February 10, 1933.

[1] As already stated, the case turned into a suit for an accounting and specific performance as the equities were all with the defendants. Crediting defendants with \$5,000, which was only one-half of the original lien of the Federal Farm Land Bank, as a part of the purchase price, the court found and held, after making an accounting, that plaintiff was overpaid by the defendants and gave judgment accordingly. It is from this judgment that the plaintiff and cross-defendants appeal.

It is the first contention of the plaintiff that the evidence does not support the findings with regard to several of the items of the account. It would serve no useful purpose to discuss in detail the evidence with regard to the accounting. We have viewed

the evidence in the light most favorable to the parties which were successful in the trial court, which it is our duty to do when such contention is made. It is sufficient to say that there is substantial evidence to support the findings of the trial court.

[2, 3] It is a further contention of the plaintiff that the court had no authority to credit the defendants on the purchase price with \$5,000 with reference to the lien of the Federal Farm Loan Bank, for the reason that the sum of \$2,250 had been paid on said mortgage, reducing the lien to that extent. The trial court found, however, and there was substantial evidence to sustain the finding, that these payments were all made by the defendants and were in addition to the sums which were accounted for and acknowledged in the written statement of October 15, 1931, and that the defendants were therefore entitled to a credit of the full \$5,000. The plaintiff also contends that the judgment in this regard amounts in effect to creating a new contract between plaintiff and defendants. There is no merit in this contention. The action of the court was merely an adjustment of the payments on the purchase price in order to protect the vendee against the defects in the title. In a case where the facts were essentially similar, our Supreme Court said in the case of *Smiddy v. Grafton*, 163 Cal. 16, 124 P. 433, 435, Ann.Cas.1913E, 921, that the vendee "has his election * * * either to insist on a good title and refuse to exercise the option if it is not offered, or to accept such title as the vendors have, and demand an adjustment of the payments, in such a manner as may be just, to protect him as far as may be against loss from the defects in the title. * * * In such cases, where the defect consists of a lien on the land, the purchaser may compel the vendor to perform upon a tender of the amount due on the price, less a sum sufficient to discharge the liens."

There is no merit in any of the plaintiff's contentions. Courts are organized for the purpose of dispensing justice—not for the purpose of splitting hairs over intricate legal distinctions. The sad thing is that as yet the defendants have not received full and complete justice by the decree in this case. There is still a suit before defendants to quiet title against Masaki. There is still a lien upon the defendants' land—not for the \$5,000 for which the defendants have been credited, but for \$7,750. The plaintiff's financial condition is indicated by his

inability to meet the brother's judgment and his appeal to the defendant to redeem the land. Defendants still face a lawsuit with the plaintiff's brother unless an adjustment can be reached with him. Plaintiff has raised additional points for the first time in appellants' reply brief, but we have not discussed them.

Judgment affirmed.

We concur: WOOD, J.; GOULD, Justice pro tem.



In re ARMSTRONG'S ESTATE.*

ROBSON v. GROSS et al.

Civ. 5518.

District Court of Appeal, Third District,
California.

March 30, 1936.

Hearing Granted by Supreme Court
May 25, 1936.

1. Wills Ⓒ358

Order granting new trial following judgment upon will contest *held* appealable (Probate Code, §§ 1231, 1233; Code Civ.Proc. § 963).

2. Appeal and error Ⓒ854(6)

Reviewing court may not go outside grounds specified in motion for new trial, but order granting new trial will be sustained if supported by any ground assigned (Code Civ. Proc. § 657).

3. Wills Ⓒ337

Alleged errors in form of special verdicts supporting judgment revoking probate of will *held* not ground for new trial, where answer to second special verdict showed that will was not signed by one of witnesses either in presence or at request of testator, since such verdict alone required revocation of probate of will (Probate Code, § 50).

4. Appeal and error Ⓒ977(3)

Where party appealing from order granting new trial contends that new trial should not have been granted because alleged errors did not result in miscarriage of justice, appellate court may review evidence to determine whether trial court's discretion was abused in granting new trial (Const. art. 6, § 1½).

Appeal from Superior Court, Los Angeles County; H. Parker Wood, Judge.

Proceeding in the matter of the estate of Maria Armstrong, deceased, wherein George Robson filed a petition to revoke the probate of the will of Maria Armstrong, which was opposed by R. F. Gross and another. From an order granting a new trial after entry of judgment for plaintiff, plaintiff appeals.

Order reversed.

Torchia & Sefman, of Los Angeles, for appellant.

Minton & Minton, of Los Angeles, for respondents.

LEMMON, Justice pro tem., delivered the opinion of the court.

Appellant filed a petition to revoke the probate of the will of Maria Armstrong, deceased. Judgment was entered in favor of appellant upon special verdicts of the jury impaneled to try the issues. This appeal is prosecuted from an order granting a new trial following a motion to that end made by respondents.

The contention is made by respondents that an appeal does not lie from such an order. Section 963 of the Code of Civil Procedure provides that an appeal may be taken from an order granting a new trial, in an action or proceeding, where a trial by jury is a matter of right.

[1] Beginning with *In re Estate of Bauquier*, 88 Cal. 302, 26 P. 178, 532, it has been uniformly held that an order granting a new trial following a judgment upon a will contest is appealable. This is in conformity with, and in amplification of, sections 1713 and 1714 of the Code of Civil Procedure, as these sections read before the repeal thereof by the adoption of the Probate Code. Sections 1231 and 1233 of the Probate Code are in substance a re-enactment of the former sections 1713 and 1714 of the Code of Civil Procedure, in so far as they apply to appeals from orders granting new trials in proceedings involving will contests. It follows that the appeal was properly taken.

The order granting the new trial does not specify the grounds upon which it was granted. Under the provisions of section 657 of the Code of Civil Procedure the question of the sufficiency of the evidence to support the verdict is eliminated from consideration, as that section declares the pre-

ⒸFor other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 64 P.2d 1093.

sumption that the order was not made upon that ground when the order is general. *Phillips v. Wheeler*, 55 Cal.App. 684, 203 P. 413.

[2] The notice of motion and the motion for a new trial were predicated upon all of the statutory grounds. Although an appellate court may not go outside the grounds specified in the motion, the order will be sustained if it is supported by any ground assigned. *Rahmel v. Rost*, 178 Cal. 15, 171 P. 1068.

[3] Respondents point out asserted irregularities in the proceedings, and errors at law occurring at the trial, and it therefore becomes our duty to determine whether such irregularities and errors occurred, and if they did occur, whether the trial court abused its discretion in granting the new trial.

An alleged witness to the will was one George Potter. He testified that he was, on the day the will bears date, an employee of the Mortgage Guarantee Company, in Los Angeles, and that he signed the document at the request of a fellow employee; that he was unacquainted with, and had never seen Maria Armstrong; that she neither signed the will, nor declared it to be her will, in his presence; and that it was presented to him by the employee of the company, with the request that he sign it. The name of Renata T. Middleton is signed to the will as the other subscribing witness. Although she testified to facts which, if believed by the jury, would have justified a finding that the will was executed in accordance with the required formalities, it is apparent that her recollection of the transaction was vague, and that her testimony was based upon the premise that it was customary, in the preparation and execution of wills in the business of the company, that the witnesses and the testator all be present at the time of the signing of a will by the testator and the witnesses and the acknowledgment of the will by the testator.

Respondents assert that certain instructions and the special verdicts were erroneously given to the jury. The special verdicts were in the following forms:

"1. Did George Potter sign said will in the presence of the said Maria Armstrong, the decedent, and in the presence of the other witness?"

"2. Did George Potter sign the will in the presence of Maria Armstrong, the decedent, and at her request?"

The interrogatories contained in these verdicts were both answered by the jury in the negative. The attack upon the form of the first special verdict and the criticized instructions is based primarily upon the ground that the jury was informed that it is requisite that the witnesses sign as such in the presence of each other. Section 50 of the Probate Code, which is a re-enactment of sections 1276 and 1278 of the Civil Code, and which provides the manner in which witnessed wills must be executed and attested, does not require that the witnesses sign in the presence of each other. In *re Estate of Dow*, 181 Cal. 106, 183 P. 794; In *re Estate of Lawrence*, 196 Cal. 321, 237 P. 738. The error, however, did not affect the result. The second special verdict is a finding that the will was not signed by one of the two subscribing witnesses, either in the presence or at the request of the testatrix. This verdict alone required the revocation of the probate of the will. There is no merit in respondents' point that the second special verdict is faulty in that it failed to inquire as to whether Potter signed the will as a witness. The one issue to which all of the evidence was directed was upon the question as to whether Potter did sign with the necessary formalities as a witness. Obviously, the jury could not have misunderstood the purpose of the question, nor have been misled by the form in which it was couched.

[4] When appellant contends that errors in instructions relied upon by respondents did not result in a miscarriage of justice, and that under section 4½, article 6, of the State Constitution, a new trial should not have been granted, the appellate court may review the evidence to determine whether the trial court's discretion was abused in granting a new trial. *Olinger v. Pacific Greyhound Lines* (Cal.App.) 46 P.(2d) 774. Our conclusion is that the errors complained of did not result in a miscarriage of justice.

The order granting a new trial is reversed.

We concur: PULLEN, P. J.; THOMPSON, J.

TELFORD v. NEW YORK LIFE INS. CO.*

Civ. 10207.

District Court of Appeal, Second District,
Division 2, California.

April 3, 1936.

Hearing Granted by Supreme Court
June 1, 1936.**1. Insurance ⇨292**

Answers of insured to questions in application as to surgical operations and hospital treatment, which failed to disclose amputation of breast and 10-day hospital stay, constituted false representations sufficient to defeat recovery on policy and entitle insurer to rescission.

2. Insurance ⇨665(8)

In action on life policy, where insurer pleaded concealment in application of amputation of insured's breast, evidence held insufficient to show that insurer's medical examiner must have discovered amputation.

3. Insurance ⇨646(1½)

As respects claim of fraud in application, person is presumed to have knowledge of insurance contract, executed by him or in his possession.

4. Insurance ⇨379(5)

In action on life policy, beneficiary could not avoid defense of false representations in application on ground that applicant, his wife, was ignorant of contents of application when she signed it, where policy was delivered to beneficiary in presence of applicant and kept by beneficiary in trunk for two or three weeks, and thereafter placed in safe deposit box, in view of presumption of knowledge and opportunity of applicant to learn contents of application.

5. Insurance ⇨655(2)

Failure to attach to life policy copy of medical examiner's report and of several questions and answers not relied on by insurer held not to deprive insurer of right to defend action on policy on ground of misrepresentation, although policy provided that no statement should avoid policy unless contained in application and unless copy of application was indorsed upon or attached to policy.

CRAIL, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by William R. Telford against the New York Life Insurance Company,

wherein defendant filed a cross-complaint. Judgment for plaintiff, and defendant appeals.

Reversed, with directions.

Meserve, Mumper, Hughes & Robertson, of Los Angeles (E. Avery Crary, of Los Angeles, of counsel), for appellant.

Cannon & Callister, by David H. Cannon, all of Los Angeles, for respondent.

WOOD, Justice.

Plaintiff recovered judgment upon an insurance policy issued on January 7, 1933, upon the life of Catherine H. Telford, who signed an application for the policy on December 30, 1932. Plaintiff, the beneficiary, was the husband of the insured, who died March 15, 1933. Defendant filed a cross-complaint seeking rescission of the contract. The action was tried by the court without a jury.

[1] The application was made part of the contract of insurance, and in that part of the application under the heading "Answers to the medical examiner," these questions were asked: "7-a Have you ever had any accident or injury or undergone any surgical operation? 7-b Have you ever been under observation or treatment in any hospital, asylum or sanitarium?" Following these questions the following appears: "If the answers to any query is 'yes' give date, detailed results and, if within five years, name and address of any physician consulted." In the space opposite question 7-a the application contains the following, and nothing else: "Yes. Appendix removed—1920—good results—no complications." In the space opposite question 7-b, the following appears: "No." It is conceded that the insured was a patient in a Salt Lake hospital for about 10 days in 1929, and that her left breast was amputated at that time. Manifestly, the answers given by the applicant, failing to disclose the amputation of the left breast, were untruthful and constituted a false representation upon a material matter. They are equivalent to a direct statement that no such operation had been performed. The false representation is sufficient to defeat recovery on the policy and call for the rescission of the contract of insurance. *Whitney v. West Coast Life Ins. Co.*, 177 Cal. 74, 169 P. 997. An insurance company which makes inquiry about prior medical treatment or surgical operations of an applicant is entitled to truthful answers

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 69 P.2d 835.

so that it may, with full information, exercise its judgment as to whether it cares to issue the policy.

[2] Plaintiff attempts to excuse the failure of the applicant to disclose the facts of the operation by the contention that the medical examiner must have discovered that the breast had been amputated. The evidence is insufficient to justify this contention. The applicant was not entirely unclothed, and that part of the applicant's body in the region of the left breast was not exposed. The medical examiner testified that he did not examine her breast; that by the rules of the company he was instructed not to examine the breasts of women, and accordingly never did so; that by applying the stethoscope to the region of her heart he did not learn that the breast had been amputated. Moreover, at the bottom of the application, and above the signature of the applicant, the following is printed: "It is mutually agreed as follows * * * that notice to or knowledge of the soliciting agent or medical examiner is not notice to or knowledge to the company, and that neither one of them is authorized to accept risks or to pass upon insurability."

[3, 4] Plaintiff asserts that the applicant was ignorant of the contents of the application when she signed it, and argues that for this reason the contract may be enforced. The policy was delivered to the beneficiary, husband of the applicant, in the presence of the applicant, and kept by him in a trunk for two or three weeks, and was thereafter placed in a safe deposit box. A person is presumed to have knowledge of the contents of an instrument executed by him or in his possession. *Wilson v. Coffey*, 92 Cal.App. 343, 268 P. 408. The rule has often been applied to insurance cases. *Ryan v. World Mutual Life Insurance Co.*, 41 Conn. 168, 19 Am.Rep. 490; *Sun Fire Office v. Wich*, 6 Colo.App. 103, 39 P. 587; *Susquehanna Mutual Fire Insurance Co. v. Swank*, 102 Pa. 17; *Quinlan v. Providence Washington Ins. Co.*, 133 N.Y. 356, 31 N.E. 31, 28 Am.St.Rep. 645; *Goldstone v. Columbia Life & Trust Co.*, 33 Cal.App. 119, 164 P. 416, 418; *Madsen v. Maryland Casualty Co.*, 168 Cal. 204, 142 P. 51. In *Goldstone v. Columbia Life & Trust Co.*, supra, it is said: "As already seen, the policy was immediately delivered to Goldstone. It was his duty to read it, and we must assume that he did so." In *Ryan v. World Mutual Life Insurance Co.*, supra, the court said: "She says that she and her husband sign-

ed the application without reading it and without its being read to them. That of itself was inexcusable negligence. The application contained her agreements and representations in an important contract. When she signed it she was bound to know what she signed. The law requires that the insured shall not only, in good faith, answer all the interrogatories correctly, but shall use reasonable diligence to see that the answers are correctly written. It is for his interest to do so, and the insurer has a right to presume that he will do it. He has it in his power to prevent this species of fraud and the insurer has not." If, as claimed, the insured was ignorant of the contents of the application at the time she signed it, she doubtless had ample opportunity to inform herself on the subject, and her neglect to do so cannot now be advanced by the plaintiff as justification for the palpable misrepresentation.

Our conclusion in the matter of the answers to question 7-a makes it unnecessary to pass upon the contentions of defendant that the applicant made other false representations in her answers to question 8.

[5] This policy contains this provision: "The Policy and the application therefor, copy of which is attached hereto, constitute the entire contract. All statements made by the Insured shall, in absence of fraud, be deemed representations and not warranties, and no statement shall avoid the Policy or be used in defense to a claim under it, unless it is contained in the written application and a copy of the application is endorsed upon or attached to this Policy when issued." Plaintiff now points out that a copy of the medical examiner's report was not attached to the policy delivered, and that there was not attached thereto a copy of several questions and answers appearing on the reverse side of one page of the application. He argues that the failure to attach these copies deprived defendant of the right to defend the action on the ground of misrepresentations. The contention is without merit. The report of the medical examiner is not a part of the application. The questions and answers on the reverse side of the application are not relied upon by defendant as grounds for rescission of the contract, and are of no consequence in this litigation. The point advanced is highly technical, and does not affect the rights of the parties. It was manifestly the intention of the parties to agree that no statement of the insured should avoid the policy unless it was con-

tained in the application and a copy of the application bearing the statement relied upon to avoid the policy delivered to the insured attached to the policy.

By the provisions of section 956a of the Code of Civil Procedure the reviewing court may in proper cases make findings contrary to those made by the trial court based on evidence adduced before the trial court. This court now finds that Catherine H. Telford underwent a surgical operation in the year 1929, and that at said time her left breast was amputated; that immediately before the issuance of the policy sued upon herein she falsely represented to the defendant that she had not undergone said operation.

The judgment is reversed, with directions to the superior court to enter judgment for defendant upon the complaint, and to grant relief to cross-complainant in accordance with the prayer of the cross-complaint.

I concur: McCOMB, Justice pro tem.

CRAIL, Presiding Justice.

I dissent. We would not be human if we could agree in all the cases which we review. I do not agree with the decision reached by the majority of the court in this case, possibly for the reason that I may have a stronger predilection than some appellate judges toward affirming the judgments of the trial court. This case largely turns upon the evidence with regard to the alleged fraud in answering the questions which were a part of the application in obtaining the insurance. In this regard we should keep in mind that this court is not a weigher of evidence, that the duty of this court upon appeal is to view the evidence in the light most favorable to the party who was successful in the trial court, and that, if there is any substantial evidence to sustain the findings, they should not be disturbed. Also, that in a case of this nature, "the court will construe the question and answer strictly as against the company, and liberally with reference to the insured." *Lyon v. United Moderns*, 148 Cal. 470, 83 P. 804, 807, 4 L.R.A. (N.S.) 247, 113 Am.St.Rep. 291, 7 Ann.Cas. 672; *Newton v. Southwestern Mut. Life Ass'n*, 116 Iowa, 311, 90 N.W. 73.

After reviewing the evidence in the light of the foregoing rules, I am not prepared to say that the evidence is such that the

trial court was bound to find that the answers to questions 7-a and 7-b constituted false representations. Far less am I prepared to say that this court on appeal should make findings to that effect. On the contrary, I believe that there is evidence from which the trial court reasonably found that the answers did not constitute false representations. Being in the minority, I shall not be contentious nor verbose in my point of view.



SCHIFFMAN v. RICHFIELD OIL CO. OF CALIFORNIA.*

Civ. 10859.

District Court of Appeal, Second District,
Division 2, California.

April 3, 1936.

Rehearing Denied April 25, 1936.

Hearing Granted by Supreme Court
June 1, 1936.

Mines and minerals 6-79(1)

Agreement by assignee of sublease to pay another percentage of proceeds from sale of certain percentage of net production of oil well to be drilled on leased property by assignee constituted personal covenant of latter, not assignment of interest in production, so that promisee could not recover value of his percentage of such oil from company subsequently acquiring title to sublease.

Appeal from Superior Court, Los Angeles County; William A. Bowen, Judge.

Action by A. F. Schiffman against the Richfield Oil Company of California. Judgment for plaintiff, and defendant appeals.

Reversed.

Gibson, Dunn & Crutcher (by H. F. Prince), of Los Angeles (Robert F. Schwarz and George W. Nilsson, both of Los Angeles, of counsel), for appellant.

Philip Grey Smith and Woodruff, Musick & Hartke, all of Los Angeles, for respondent.

McCOMB, Justice.

This is an appeal by defendant from a judgment in favor of plaintiff after a trial

*For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 64 P.2d 1081.

before the court without a jury, predicated upon plaintiff's alleged right to recover the value of a certain percentage of oil which defendant had produced from an oil well.

The conceded facts are:

September 6, 1922, Monrovia Oil Company, a trust estate, took an assignment of a sublease upon certain real property situated in the county of Los Angeles, state of California. Thereafter the trustees of Monrovia Oil Company executed a document purporting to transfer to plaintiff an undivided per cent. of the *proceeds* that should be derived or received by the Monrovia Oil Company from the sale or other disposal of 66 $\frac{2}{3}$ per cent. of the net production of a well to be drilled on the leased property. Subsequently an oil well known as Monrovia No. 1 was placed on production on the leased premises. Later through mesne conveyances defendant acquired title to the sublease of the land upon which the well was located, and produced oil from it.

Defendant relies for reversal of the judgment on this proposition:

The lessee of an oil and gas lease, by assigning a percentage of the proceeds derived from the sale or other disposal of the net production of an oil well, creates a personal covenant of the assignor to pay the designated percentage to the assignee and does not assign an interest in the production of the well.

The instruments, upon which plaintiff relies to sustain the judgment of the trial court, designated Monrovia Oil Company as first party and himself as second party, and read in part as follows:

"First party does by these presents assign and transfer to said second party an undivided ——— per cent of the *proceeds* that shall be derived and received by said party from the sale or other disposal of Sixty-six and two-thirds (66 $\frac{2}{3}$ %) Per Cent. of net production of said well,
* * *

"Whenever and as often as said first party shall receive any *proceeds* from such net production of said well, said first party shall pay to said purchaser on or before the 10th day of the month next succeeding the calendar month in which such *proceeds* shall be so received, that portion thereof to which said purchaser shall be entitled hereunder." (Italics ours.)

From a reading of the foregoing document, which is clear and unambiguous in

56 P.(2d)—19 $\frac{1}{2}$

its terms, it appears that Monrovia Oil Company agreed to pay plaintiff a certain percentage of the *proceeds* derived from the sale or other disposal of the oil taken from the well known as Monrovia No. 1. The agreement constituted a personal covenant of the Monrovia Oil Company and did not constitute an assignment of an interest in the production of the well. In the case of *In re Lathrap*, 61 F.(2d) 37, the United States Circuit Court of Appeals, Ninth Circuit, had for construction an instrument similar in wording to the one before us. Judge Sawtelle at page 39 of 61 F.(2d), said:

"We find an instrument that purports to 'sell, assign, transfer and set over' to the holder 'a royalty interest equivalent to one per cent of the gross *proceeds* received from the sale of one hundred per cent of the oil and/or gas produced and sold' from a certain well 'now being sunk.' [Italics ours.]

"Counsel for the appellants strenuously argue that these assignments in effect 'constitute a present sale to the assignee thereof of a portion of the oil and gas to be produced from the well.' But an examination of the instruments themselves discloses that they do not purport to convey any title to oil. The royalty interest is measured in terms of 'gross proceeds,' and not in terms of the commodity from which those proceeds are to be derived. Had a sale of oil been intended, it would have been a simple matter to have specified that the royalty interest conveyed was to be 'equivalent to one per cent of the oil or gas produced.' From the assignments as they now stand, it can be seen that a share in proceeds is transferred, and that there is a designation merely of the *source* from which the proceeds are to be derived. There is no attempt to transfer the corpus itself.
* * *

"These per cent. holders acquired title to the oil itself for not even a fleeting instant. They were not interested in oil; they were interested in proceeds. There are no provisions for *delivery*, but elaborate provisions for *payment*."

On the question here presented for determination *Western Oil, etc., Co. v. Venago Oil Corp.*, 218 Cal. 733, 737, 24 P.(2d) 971, 88 A.L.R. 1271, is in no way in conflict with *In re Lathrap*, supra. The instrument before our Supreme Court for construction in *Western Oil, etc., Co., v. Venago Oil Corp.*, supra, by its terms

assigned, transferred, and conveyed certain percentages of all gross oil, gas, and other hydrocarbon substances produced, saved, and sold under the terms of a certain lease. In the case of *In re Lathrap*, supra, as in the instant case, the document conveyed only an interest in the *proceeds* derived from the sale of oil.

For the foregoing reasons plaintiff's cause of action, if any, was against Monrovia Oil Company and not the defendant herein.

The judgment is reversed.

We concur: CRAIL, P. J.; WOOD, J.



13 Cal.App.2d 85

STANDAHL v. SPLIVALO et al.
Civ. 10771.

District Court of Appeal, Second District,
Division 2, California.
April 3, 1936.

Hearing Denied by Supreme Court
June 1, 1936.

States 215

Action for injuries allegedly sustained as result of collision with automobile operated by state employee in course of employment could not be maintained against the state, where no undertaking for costs and counsel fees was filed as required by statute (Pol. Code, § 667, and § 688, as amended by St. 1933, p. 2299).

Appeal from Superior Court, Los Angeles County; Isaac Pacht, Judge.

Action by Anna Standahl against Rheba C. Splivalo, the State of California, and another. From judgment dismissing the action as to the State of California, plaintiff appeals.

Affirmed.

Hansen & Sweeney, of Los Angeles, for appellant.

Joseph L. Fainer, of Los Angeles, for respondent Rheba C. Splivalo.

W. I. Gilbert, of Los Angeles, for the State.

WOOD, Justice.

Plaintiff commenced this action against the state of California and several individuals, alleging that she was injured in a collision with an automobile owned by the state of California and negligently operated by defendant Ramsey, an employee of the state, within the scope of his employment. She sought to recover damages, for the injuries sustained as the result of the collision. Defendant state of California filed a motion to dismiss the action as to the state "for the reason that the plaintiff herein has not filed an undertaking pursuant to section 688 of the Political Code."

In section 688 of the Political Code, as amended by St. 1933, p. 2299, it is provided: "Any person who has, or shall hereafter have, a claim on express contract or for negligence against the State must present the claim to the State Board of Control in accordance with the provisions of section 667 of this code. Should the claim not be allowed by the State Board of Control, the person having the claim is hereby authorized, subject to the conditions contained in this section, to bring suit against the State on such claim and to prosecute such suit to final judgment. * * * At the time of filing the complaint in any such suit, the plaintiff shall file therewith an undertaking in such sum, but not less than five hundred dollars, as a judge of the court shall fix, with two sufficient sureties, to be approved by a judge of the court, and conditioned that, in case the plaintiff fails to recover judgment, he shall pay all costs incurred by the State in such suit, including a reasonable counsel fee, to be fixed by the court." These Code provisions are plain. It was necessary for the plaintiff to file the undertaking in order to maintain the action as against the state. For failure to file the undertaking the court properly granted the motion to dismiss the action as to the state of California.

The order is affirmed.

We concur: CRAIL, P. J.; GOULD, Justice pro tem.

GIMENEZ v. RISSEN et al.

SANCHEZ v. SAME.

Civ. 9567, 9568.

District Court of Appeal, Second District,
Division 1, California.

March 20, 1936.

On motion to modify opinion.

Opinion modified.

For prior opinion, see 55 P.(2d) 292.

Peter J. Youngdahl and G. G. Glick, both
of Los Angeles, for appellants.Nourse, Betts & Jones (by Forrest A.
Betts), of Los Angeles, for respondents.

PER CURIAM.

It is ordered by the court, of its own motion, that the opinion heretofore filed in the above-entitled matters on February 27, 1936, be modified as follows:

That portion of the opinion, in the first paragraph on page 10 [296 of 55 P.(2d)] reading, "We conclude that the court below erred in taking the case from the jury and directing a verdict for defendants. For this reason the judgment herein appealed from must be reversed," is stricken; and in lieu thereof the following is ordered inserted: "we conclude that the court below erred in taking the case from the jury and directing verdicts for the minor defendant driver, Robert Rissen. For this reason the judgments herein appealed from in favor of the minor defendant, Robert Rissen, must be reversed."

That portion of the opinion appearing in the second paragraph on page 10, and reading as follows: "Though the judgments must be reversed for the foregoing reasons, we nevertheless feel impelled to consider the second proposition advanced on this appeal, in connection with which respondents urge that because section 62(b) of the California Vehicle Act (St.1929, p. 522) provides that the signer of a minor's application for an operator's license is liable for the 'negligence' of the minor, no recovery can be had against such signer for any 'willful misconduct' as distinguished from the 'negligence' of such minor in the operation of such vehicle. This we deem necessary for the guidance of the trial court upon a retrial of these cases," is stricken; and in lieu thereof the following is inserted: "We come now to a consideration of the appeal

by plaintiffs from the judgments in favor of Mrs. William R. Rissen, mother of the minor defendant, and the signer of said minor's application for an operator's license. Respondents urged that because section 62(b) of the California Vehicle Act (St.1923, p. 532, as amended by St.1929, p. 522) provides that the signer of a minor's application for an operator's license is liable for the 'negligence' of the minor, no recovery can be had against such signer for any 'willful misconduct' as distinguished from the 'negligence' of such minor in the operation of such vehicle."

The following language, appearing at the conclusion of the opinion, on page 14 [297 of 55 P.(2d)], reading as follows: "The judgments herein appealed from are reversed, and the causes remanded for new trials," is stricken, and in lieu thereof the following is inserted: "The judgments in favor of defendant Robert Rissen are reversed, and the causes remanded for new trials. The judgments in favor of defendant Mrs. William R. Rissen are affirmed."



13 Cal.App.2d 59

DREISKE v. LOS ANGELES INV. SECURITIES CORPORATION.

Civ. 5457.

District Court of Appeal, Third District,
California.

April 2, 1936.

Bonds 6-84

Where bondholder transferred title to bonds on default in interest to bondholders' committee with full discretionary power to refinance, effect a compromise, resort to litigation, or effect an adjustment, absolute title was vested in committee so that bondholder was precluded from maintaining suit to rescind purchase of bonds on ground of misrepresentation since status quo could not be restored (Civ.Code, § 1691).

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Suit by Louis F. Dreiske against the Los Angeles Investment Securities Corpora-

tion, a corporation. From judgment of dismissal, plaintiff appeals.

Affirmed.

Howard F. Shepherd and John F. Bender, both of Los Angeles, for appellant.

Flint & MacKay, Wesley L. Nutton, Jr., and Donald W. Hamblin, all of Los Angeles, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

On May 5, 1930, plaintiff became the owner of certain bonds of the Angeles Hospital Association, a corporation, having acquired them for cash from Los Angeles Investment Securities Corporation, respondent herein. During the negotiations for these bonds it was represented to the prospective purchaser that all taxes and municipal assessments had been fully paid. The hospital association paid the interest on its bonds until October 1, 1931, at which time it defaulted. Thereupon, plaintiff was requested to join with other bondholders in authorizing the trustee to proceed to foreclose the deed of trust securing the bonds. Plaintiff thereupon executed a bondholders' committee agreement and deposited his bonds with the trustee. In accordance with this agreement, the property conveyed to the trustee as security for the bonds was sold yielding an amount far less than the face value of the bonds. Some time in September, 1932, and during the investigation by the bondholders' committee and after the assignment by plaintiff of his bonds to the bondholders' committee, and after the property had been sold, he learned for the first time that when he purchased the bonds the representations then made to him that all of the taxes and municipal assessments levied against the property had been paid, was untrue, and that taxes, penalties, and assessments were at that time unpaid and delinquent. He thereupon attempted to rescind his purchase of the bonds and so notified defendant and offered to assign to defendant all interest he had under the bondholders' agreement and offered to deliver to defendant an order on the bondholders' committee to transfer and convey to defendant all interest, right, or title he had in the bonds or the trust indenture or the real property described therein, and in return demanded of defendant that he repay to him all he had paid on account of the purchase price of the bonds.

Upon the trial, based upon this notice of rescission, the court sustained an objection to the introduction of any evidence on the ground the complaint failed to state a cause of action, the plaintiff being unable to allege or prove he could restore the defendant to its status quo.

Appellant contends that his assignment to the bondholders' committee was a transfer to an agent rather than an actual sale and that it was not necessary to restore defendant to an exact status quo, but only to restore everything of value he had received from the seller under the contract. Section 1691 of the Civil Code.

An examination of the bondholders' agreement, however, discloses that the complete and absolute title to the bonds was transferred to the committee with full discretionary power to refinance, effect a compromise, resort to litigation, or by any other means to effect an adjustment. That the effect of such an agreement is to convey the absolute title is clearly determined in the case of *Bullard v. City of Cisco*, 290 U.S. 179, 54 S.Ct. 177, 78 L.Ed. 254, 93 A.L.R. 141, construing a bondholders' agreement almost identical to the one here under examination.

The trial court relied strongly upon the cases of *Kelley v. Owens*, 120 Cal. 502, 47 P. 369, 371, 52 P. 797, and *Taylor v. Hammel*, 39 Cal.App. 205, 178 P. 547, 548. In *Kelley v. Owens*, supra, plaintiff had conveyed land to Owens in exchange for stock in a manufacturing company. Kelley received the stock and caused a new certificate to be issued to himself. The stock was thereafter sold for unpaid stock assessments. False representations as to the stock were alleged and the trial court rescinded the transaction. Plaintiff did not return the stock, but delivered the certificate to the clerk of the court to be thereafter indorsed under the order of court.

Appellant attempts to distinguish this case on the ground no tender of the stock was made to defendant before the filing of the complaint. The Supreme Court commented upon this fact, and said:

"To give notice of the rescission, and restore the stock within reasonable time after discovery of the alleged fraud, was a plain duty of easy performance. There is no excuse for not doing so averred in the complaint, and no valid excuse shown by the evidence. Moreover, there was no valid offer to restore the stock after suit brought. It was not placed in a

position and condition to be taken by appellants. Placing the certificates issued to respondent in the hands of the clerk, without assignment, was of no avail. They were not assigned until immediately before the judgment, ten years after the contract, and nine years after the commencement of the action. * * * The decree does not even attempt to give appellants a money compensation for the stock, although that would have been unwarrantable, because upon rescission a party is entitled to receive back the thing which he gave, and not the mere amount of money which some one else may consider its value, unless, without the fault of the rescinding party, the thing cannot be restored."

Taylor v. Hammel, *supra*, was an action where plaintiffs had received certain washing machines in exchange for real property. Plaintiffs endeavored to rescind, and the court said:

"These articles admittedly possessed some substantial value; yet the plaintiffs made no offer to restore them until more than a year after discovery of the fraud. In fact, they could not restore the title to the 1667 washers, because they had already transferred it to defendant Hellman. Such a situation has been held a complete bar to an action for rescission. Bailey v. Fox, 78 Cal. 389, 397, 20 P. 868; Kelley v. Owens, 120 Cal. 502, 512, 47 P. 369, 52 P. 797."

Certain language is found in the foregoing case which might lend some support to the contention of appellant herein, but that language is applicable to the particular facts in the case wherein it appears that before discovery of fraud plaintiffs were induced by the defendants to transfer the washers to one Hellman who was one of the defendants and an agent of and coconspirator with other defendants. The court held that where the defrauded buyer was persuaded by fraud to part with the property he received, by the very seller who defrauded him, the seller is not entitled to set up the inability of the buyer to restore the exact status quo. No such situation exists in this case.

In the case of Herman v. Haffenegger, 54 Cal. 161, plaintiff instituted an action to rescind a contract made with defendant on the ground of fraudulent representations and to compel defendant to reconvey certain real property which plaintiff had conveyed to him. At the trial it appeared that plaintiff had sold a certain

interest in the real property received from defendant and certain shares of stock to another party. Plaintiff testified that he could have procured the return of the interest and the shares at any time, but preferred not to trouble the third parties until the offer of rescission had been accepted. The court held that inasmuch as the plaintiff did not own what he had received he could not maintain the action until he had returned or offered to return all that he has so received. A nonsuit therein granted was held to be proper.

In Bailey v. Fox, 78 Cal. 389, 20 P. 868, 871, plaintiff sought to rescind a contract for the purchase of one-third interest in a stock of hardware and agricultural implements on the ground of fraud. The Supreme Court reversed the judgment in favor of plaintiff, and said:

"The tender made was not of the goods purchased, as a great part of them had been sold. The offer was to deliver the goods on hand and pay the amount realized from the sale of those disposed of. This was not sufficient. Upon a rescission the defendant, before paying back the purchase money and delivering up the notes, was entitled to receive the identical things sold. He was not bound to take the price at which they were sold. That might, so far as we know, have been less than their value."

In support of the same general principle is the case of Stockwell v. McAlvay, 97 Cal.App. 609, 275 P. 960, and Lupton v. Domestic Utilities Mfg. Co., 173 Cal. 415, 160 P. 241.

Appellant attempts to distinguish certain of these cases, claiming that where a person desiring to rescind has voluntarily placed himself in the position where he could not restore, if in a different position than one who has been forced to do so by reason of circumstances under which he found himself, but there is nothing before us which in any manner seems to affect the uncontrolled choice of appellant between depositing and not depositing his bonds with the committee; it was purely a voluntary act upon his part.

For the foregoing reasons, we are of the opinion the judgment of dismissal on the ground that the complaint failed to constitute a cause of action was correct. The judgment is affirmed.

I concur: THOMPSON, J.

13 Cal.App.2d 109

Ex parte DAVIS.

Cr. 1487.

District Court of Appeal, Third District,
California.

April 4, 1936.

1. Criminal law ☞147

Limitation is jurisdictional in criminal cases, and crime may not be prosecuted unless indictment or information is actually filed within time prescribed by statute.

2. Habeas corpus ☞27

Limitation in criminal cases is jurisdictional, and insufficiency of information which shows on its face that cause is barred is not waived by failure to demur or move in arrest of judgment, but bar may be raised on habeas corpus.

3. Indictment and information ☞87(4)

Where limitation in criminal case is tollled by absence of accused from state, information must allege that fact to constitute cause of action (Pen.Code, § 802).

4. Habeas corpus ☞29

Conviction under information charging incest filed after limitation on offense charged had run *held* invalid and subject to attack by habeas corpus, notwithstanding failure of accused to demur or move in arrest of judgment (Pen.Code, §§ 800, 1185).

5. Indictment and information ☞176

In incest prosecution, testimony of prosecuting witness that there was no intercourse between herself and accused "later than the middle of June" *held* not in conflict with allegation of information charging offense on June 15.

6. Criminal law ☞1144(13)

In prosecution for incest where only part of testimony on behalf of prosecution was before reviewing court, such court assumed that evidence showed acts occurred at times and in manner alleged in information.

7. Habeas corpus ☞92(1)

Habeas corpus does not lie to review weight and sufficiency of evidence.

8. Indictment and information ☞161(3)

Amendment to information for incest changing dates of offenses alleged *held* not to charge new offense or amount to filing of new information, and hence conviction of accused who only informally objected to the amend-

ment was not invalid because statutory period had expired at time of amended information (Pen.Code, §§ 800, 1008, 1185).

9. Criminal law ☞159

Amendment of information in criminal case by changing alleged date of offense charged relates back to day of original filing of information and has effect of tolling running of limitations from date of filing of original information (Pen.Code, § 800).

10. Habeas corpus ☞50

Habeas corpus *held* not to lie to secure release of accused convicted on two counts charging incest notwithstanding verdict on one count was invalid, where sentences upon both counts were directed to run concurrently and accused had not served sentences imposed on count on which verdict was valid.

Proceeding by Clarence Davis for a writ of habeas corpus.

Writ denied.

A. M. Mull, Jr., of Sacramento, and Clarence Davis, for petitioner.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

This is a petition for a writ of habeas corpus. The defendant was accused in two counts of an information which was filed in Stanislaus county June 13, 1932, with different acts of incest with the same person. He was also charged with a prior conviction of another felony. The first count charged the commission of incest on August 5, 1929. The second act was alleged to have occurred September 1, 1929. The defendant pleaded not guilty to the charges of incest, but admitted the former conviction of a felony. At the trial, which occurred July 7, 1932, by leave of court the information was amended under the provisions of section 1008 of the Penal Code to allege that the first act of incest occurred June 5, 1929, and that the second offense was committed June 15, 1929. The defendant was convicted on both counts of the amended information. No demurrer to the information was filed. No motion was made in arrest of judgment as authorized by section 1185 of the Penal Code. No objection was offered to the pronouncing of judgment.

The defendant was sentenced to imprisonment in the state prison at Folsom for the term prescribed by law. The court directed that sentences on the two counts should run concurrently.

[1-4] Since the first offense was alleged to have occurred June 5, 1929, and the information was not filed until June 13, 1932, the prosecution of that crime was barred by the provisions of section 800 of the Penal Code for the reason that more than three years elapsed from the time of that first offense before the information was filed. The conviction on the first count was therefore invalid. *People v. McGee*, 1 Cal.(2d) 611, 36 P.(2d) 378. In the case last cited it was determined that the statute of limitations is jurisdictional in criminal cases and that a crime may therefore not be prosecuted unless the indictment or information is actually filed within the time prescribed by statute. A contrary rule was declared in the case of *Ex parte Blake*, 155 Cal. 586, 102 P. 269, 18 Ann.Cas. 815, but that decision must be deemed to have been overruled by the *McGee* Case. It follows that since the statute of limitations is jurisdictional, the insufficiency of the information which shows on its face that the cause is barred, will not be waived by failure to demur or move in arrest of judgment, but on the contrary the bar may be raised on habeas corpus. In harmony with the *McGee* Case, it may be said that if the statute of limitations is tolled by the absence of the defendant from the state as provided by section 802 of the Penal Code it becomes necessary to allege that fact in the information to constitute a good cause of action.

The second count of the amended information charges the defendant with the commission of incest on June 15, 1929. The information was filed June 13, 1932, which was less than three years from the time when the second offense was alleged to have been committed. It may therefore not be said the second count was barred by the statute of limitations.

[5,6] The petitioner relies on certain excerpts from the testimony of the prosecutrix wherein she says no act of sexual intercourse occurred between her and the defendant "later than the middle of June," 1929. This assertion is not in conflict with the allegations of the amended information. The support of the judgment, June 15th may be deemed to be "the middle" of the

month. Moreover, the entire evidence of this witness is not before this court. Five other witnesses were sworn and examined in behalf of the prosecution. Their evidence is not before us. We must therefore assume that the evidence abundantly shows that the acts of intercourse occurred at the very times and in the manner alleged in the amended information.

[7] Moreover, it is not the province of the writ of habeas corpus to review the weight and sufficiency of the evidence. In 13 California Jurisprudence, 218, § 4, it is said in that regard: "If the lower court had jurisdiction of the person and the subject matter, mere error in the proceedings therein may not be inquired into in proceedings on habeas corpus, for it is not the purpose of the writ to subserve the functions of an appeal, or pass upon the weight and sufficiency of the evidence introduced in the lower court, or the credibility of the witnesses who testified therein."

[8] Finally, it is asserted both counts of the amended information are barred by the statute of limitations for the reason that more than three years elapsed from the dates of the alleged offenses before the information was amended and that the changes which were made July 7, 1932, with respect to the dates of the crimes, constituted new and different offenses from those which were originally charged. It is claimed the date of the amendments fixes the time of the actual commencement of the prosecution of these cases, for the changes which were made in the information amount to the presenting of a new information for different offenses. There is no merit in this contention.

The mere changing of the alleged dates of the crimes, under the circumstances of this case, does not have the effect of charging different offenses, nor does it amount to the filing of a new information. The information was merely amended by leave of the court under the provisions of section 1008 of the Penal Code to correct defects in the alleged dates of the particular offenses charged. The rights of the defendant were not prejudiced thereby. The information was not changed in any particular except as to the alleged dates of the offenses charged. These dates were changed on the face of the original information. Both counts in the original and amended information charged the defendant with similar acts of incest upon the same indi-

vidual. The defendant was charged with successive acts of incest upon the same female. It is evident that the mere change of the alleged dates of the particular offenses relied upon would add no burden or prejudice the defendant in the presentation of whatever defense he may have had. The amendments were made in open court at the beginning of the trial. The defendant did informally object to the amendment. No ground of objections is stated. He did not suggest that the amendments would prejudice him or affect his defense. He asked for no continuance on that account. He neither demurred to the information nor moved in arrest of judgment. In the case of *People v. Lachuk*, 5 Cal.App. (2d) 729, 43 P.(2d) 579, 580, the defendant was similarly charged in four counts of an information with successive acts of incest and rape upon the same female. At the trial, by leave of court, two of these counts were amended by changing the alleged dates of the offenses exactly as was done in the present case. On appeal these amendments of the information were held to be valid, harmless, and authorized by the provisions of section 1008 of the Penal Code. The Supreme Court denied a hearing in that case. The Appellate Court said: "During the trial the court permitted the prosecution to amend the information by changing the date of one of each of the offenses of rape and incest from July 12, 1934, to June 20, 1934. No objection was made by defendant to the amendment, nor did he raise any question whatever at the trial as to its propriety; nor did he suggest surprise or request a continuance to prepare to meet the new issue as to date. The amendment was authorized by section 1008

of the Penal Code and no prejudice to defendant is made to appear as a result of such change of date. *People v. Anthony*, 20 Cal.App. 586, 129 P. 968; *People v. Marshall*, 99 Cal.App. 224, 278 P. 258."

The preceding language of the *Lachuk* Case applies to the present proceeding in every respect with the exception that this petitioner did informally object to the amendments of the information without assigning any reason therefor.

[9] The amendment of an information in a criminal case by merely changing the alleged date of the offense charged, as was done in this case, like any other amended pleading, relates back to the date of the original filing of the information, and has the effect of tolling the running of the statute of limitations from the date of the filing of the original information. *Davenport v. State*, 20 Okl.Cr. 253, 202 P. 18; *Hickey v. State*, 131 Tenn. 112, 174 S.W. 269; *Berkley v. Commonwealth*, 164 Ky. 191, 175 S.W. 364.

[10] The verdict of guilty of incest which was rendered on the second count of the information and the admission of the prior conviction of a felony was valid. The judgment which was pronounced against the defendant is not affected by the fact that the verdict on the first count was invalid for the sentences upon the two counts were directed to run concurrently. The defendant is therefore not illegally restrained of his liberty.

The writ of habeas corpus is denied.

We concur: PULLEN, P. J.; PLUMMER, J.

6 Cal.2d 10

PEOPLE v. BRITTON et al.
Cr. 3935.

Supreme Court of California.

March 31, 1936.

1. Kidnapping ☞5

Evidence, in trial for kidnapping for purpose of robbery, that one defendant not only aided and abetted or advised and encouraged codefendants before kidnapping, but actively participated with them in completing commission of such crime with criminal intent, *held* sufficient to support his conviction thereof.

2. Criminal law ☞1130(2)

Specification of error in refusing instruction need not be considered, where appellant has not printed in his brief given instructions bearing on subjects covered by refused instruction (Supreme Court Rule 8, § 3).

3. Criminal law ☞781(6)

Instruction that "confessions are to be received with great caution" *held* properly refused as exceeding statutory authorization by including written as well as oral confessions and inserting word "great" omitted from statute (Code Civ.Proc. § 2061, subd. 4).

4. Criminal law ☞781(6)

Instruction that value of confessions as evidence depends not only on whether they are deliberate and voluntary, but on every fact and circumstance surrounding party confessing at time, including all other testimony offered and introduced, *held* properly refused as purporting to direct jury's attention to course they should pursue in determining genuineness of confession.

5. Criminal law ☞1163(1)

One appealing from conviction of crime must not only specify errors complained of, but establish to reasonable certainty that result would have been substantially different had such error not been committed.

6. Criminal law ☞1173(2)

Alleged error in refusing defendant's requested instruction as to value of confessions as evidence *held* insufficient to justify reversal of conviction, in view of accomplice's testimony, corroborative testimony of other witnesses, and incriminating facts in admissions made by defendant as witness.

In Bank.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Floyd C. Britton and others were charged with an offense, Rouland W. Mikesell was convicted of robbery and kidnapping for the purpose of robbery, and he appeals.

Affirmed.

For prior opinion, see (Cal.App.) 48 P.(2d) 707.

See, also (Cal.Sup.) 52 P.(2d) 217.

Joseph L. Fainer, Gladys Towles Root, and R. E. Parsons, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

WASTE, Chief Justice.

Appellant was convicted upon three counts of an indictment charging kidnapping for the purpose of robbery and upon two counts charging robbery. In accordance with the verdicts of the jury returned on the kidnaping charges he was sentenced to life imprisonment "with possibility of parole." This cause does not, therefore, present the issue involved in the companion cases, 56 P.(2d) 493, 494, 497, this day decided. Upon his appeal to the District Court of Appeal of the Second Appellate District, Division 1, he urged, among other things, that the trial court was without jurisdiction to try him because the grand jury which returned the indictment against him "was drawn and empaneled contrary to law." Following an affirmance by the District Court of Appeal of the several judgments, appellant petitioned this court for a hearing which we granted because at the time there was pending before us the case of Fitts v. Superior Court, S.F. 15377, wherein substantially the same assaults as are here urged were directed against the same grand jury. We have since handed down our decision in the Fitts Case, *supra*, 51 P.(2d) 66, which decision fully answers appellant's contention addressed to the asserted improper empanelment of the grand jury.

Our examination of the record and authorities satisfies us as to the correctness of the following portions of the opinion prepared by Mr. Justice Houser in the Dis-

strict Court of Appeal which we hereby adopt as part of the decision of this court:

"From each of several judgments which were rendered against him pursuant to respective verdicts that were returned by a jury, as well as from an order by which his motion for a new trial was denied, defendant Mikesell has appealed to this court.

"The charges that were preferred against defendant arose from an alleged kidnaping of certain persons 'for the purpose of robbery.'

[1] "Appellant complains that the evidence was insufficient to support the several verdicts or either of the judgments. Although it is clear that defendant was not personally present when the victims of the kidnaping were first unlawfully seized by his codefendants, with an 'intent to hold or detain' such victims,—from an examination of the evidence adduced on the trial of the action this court is convinced that it was sufficient to justify the conclusion on the part of the jury that not only before such kidnaping originally occurred did the defendant aid and abet, or advise and encourage his codefendants in the nefarious enterprise, but as well that before the crime was completed defendant actively and with criminal intent participated with his codefendants in carrying the commission of the crime to its conclusion; from which it follows that in that regard the point presented by defendant is unavailing to him.

[2-6] "It is next contended that error prejudicial to the substantial rights of defendant was committed by the trial court in its refusal to grant defendant's request to give to the jury the following instruction:

"The rule of law is that confessions are to be received with great caution. They may or may not constitute evidence of a satisfactory nature; their value depends not only upon whether they are deliberate and voluntary but upon every fact and circumstance surrounding the party at the time, inclusive of all the other testimony offered and introduced upon the trial.'

"It should be noted that, in violation of section 3, of rule 8, of this court, appellant has not printed in his brief the several other instructions (if any) that were given by the court to the jury 'bearing upon the subjects covered by the refused in-

struction'; and hence that appellant is not entitled to have his specification in regard to the alleged erroneous instruction considered by this court; but notwithstanding that situation, it is clear that the proposed instruction was properly refused by the trial court. Even assuming that the opening sentence of such instruction is in harmony with the purpose of the provisions of subdivision 4, of section 2061, of the Code of Civil Procedure, and disregarding the question of the constitutionality of the statute (*People v. Jones*, 87 Cal.App. 482, 491, 262 P. 361, and authorities there cited; *Hirshfeld v. Dana*, 193 Cal. 142, 155 to page 165, 223 P. 451), it is apparent that the proposed instruction exceeds the statutory authorization in that it declares that '*confessions* (whether oral or written) are to be received with great *caution*'; whereas the language of the statute in that regard is that '*oral admissions* of a party' should be viewed 'with caution';—thus inserting the word 'oral' before the word 'admissions,' and omitting the word 'great' (as used in the proposed instruction), preceding the word 'caution.' As a matter of both fact and of law, it also may be said that defendant made neither an oral nor a written 'confession,' as such, of his guilt; but according to the evidence did make several general oral admissions, from which his guilt might have been inferred. For the distinction between a confession and an admission, see *People v. Ferdinand*, 194 Cal. 555, 568, 229 P. 341. In addition thereto, on reading the entire proposed instruction it is clear that it is objectionable in that it purports to direct the attention of the jury to the course which should be pursued by it in determining the genuineness of a 'confession.' More than that, on appeal from a judgment it is a cardinal rule that the duty devolves upon the appellant not only to specify the error of which he complains, but also to establish to a reasonable certainty that without such error having been committed, the result of the trial of the action would have been substantially different from that which was actually reached by the trial court. And in the latter connection, assuming that the trial court had given to the jury the instruction in question, and that as a consequence, in reaching its verdict, the jury had disregarded, or left out of its consideration of the evidence, the whole of the purported 'confession' of defendant, still the jury would have had a right to rely not only upon the testimony that was given by

the accomplice of defendant, with the independent corroborative testimony that was given by other witnesses with reference thereto, but also upon the many incriminative facts which appeared in the admissions made by defendant as a witness in his own behalf. To this court, from a consideration of all such evidence, it is so improbable as to be nearly inconceivable, that any verdict other than one expressing guilt of defendant would have been returned by the jury. It is therefore concluded that in no event is the alleged error available as a sufficient reason for a reversal of the judgments or the order."

The judgments and the order denying a new trial are, and each is, affirmed.

We concur: SEAWELL, J.; LANGDON, J.; CURTIS, J.; THOMPSON, J.; SHENK, J.



6 Cal.2d 8

PEOPLE v. BRITTON et al.
Cr. 3934.

Supreme Court of California.
March 31, 1936.

1. Kidnapping ¶5

Evidence, in trial for kidnapping to rob, that victims were blindfolded and bound with copper wire and one of them struck over head, *held* to show that they suffered "bodily harm," as required by statute to warrant sentence of life imprisonment without possibility of parole (Pen.Code, § 209, as amended by St.1933, p. 2617).

[Ed. Note.—For other definitions of "Bodily Harm," see Words & Phrases.]

2. Indictment and information ¶110(42)

Indictment, charging kidnapping for purpose of robbery in language of statute creating such crime, *held* sufficient to support sentence to life imprisonment without possibility of parole, though not alleging that victims suffered bodily harm (Pen.Code, § 209, as amended by St.1933, p. 2617).

CURTIS, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Floyd C. Britton and others were charged with an offense; C. R. Russell was sentenced to life imprisonment without possibility of parole on his plea of guilty of kidnapping for the purpose of robbery, and he appeals.

Affirmed.

For prior opinion, see (Cal.App) 48 P. (2d) 706.

See, also (Cal.Sup.) 56 P.(2d) 491, 494.

Frederic H. Vercoe, Public Defender, William B. Neeley, Deputy Public Defender, and Ellery E. Cuff, Deputy Public Defender, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

WASTE, Chief Justice.

Appellant and several other named persons were informed against by the grand jury of Los Angeles county in an indictment containing nine counts. The appellant entered his plea of guilty to two charges of robbery and to one charge of kidnapping for the purpose of robbery therein contained. He concedes the correctness of the judgments entered upon the robbery counts, but appeals from the judgment on the kidnapping charge in so far as it sentences him to the state prison for the term prescribed by law "without the possibility of parole."

[1] In substance, he urges that the court below was without authority to sentence him "without possibility of parole" for the asserted reason that the indictment fails to allege and the evidence fails to disclose that the victim of the kidnapping suffered "bodily harm" as required by section 209 of the Penal Code, as amended by St.1933, p. 2617, to warrant such sentence. We are satisfied that the evidence discloses that the victim suffered "bodily harm" within the meaning of section 209, as interpreted in *People v. Tanner*, 3 Cal.(2d) 279, 44 P.(2d) 324.

[2] This and three companion causes were taken over by this court after decision in the District Court of Appeal of the Second Appellate District, Division 1, in order that we might more fully consider whether the indictment, which was silent as to bodily harm having been suffered by the victim, sufficiently charged the offense

of kidnapping for purpose of robbery to support a sentence "without possibility of parole."

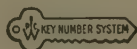
Examination of the record satisfies us that the facts of this cause are not sufficiently dissimilar from those presented in the companion case, wherein appellant was also involved, *People v. Britton & Russell* (Cal.Sup.) 56 P.(2d) 494, this day decided, to warrant any conclusion other than that announced in the cited case upon the issue having to do with the sufficiency of either the indictment or the evidence to support the judgment. Upon the authority of our decision in that case we are of the opinion that the two contentions here urged are without merit.

The judgment is affirmed.

We concur: SEAWELL, J.; LANGDON, J.; THOMPSON, J.; SHENK, J.

CURTIS, Justice (dissenting).

I dissent for the reasons set forth in dissenting opinion this day filed in 56 P. (2d) 494.



6 Cal.2d 1

PEOPLE v. BRITTON et al.
Cr. 3933.

Supreme Court of California.
March 31, 1936.

1. Kidnapping ⇐5

Evidence, in trial for kidnapping to rob, that victims were blindfolded and bound with copper wire and one of them struck over head, *held* to show that they suffered "bodily harm," as required by statute to warrant sentence to life imprisonment without possibility of parole (Pen.Code, § 209, as amended by St.1933, p. 2617).

[Ed. Note.—For other definitions of "Bodily Harm," see Words & Phrases.]

2. Indictment and Information ⇐110(42)

Indictment, charging kidnapping for purpose of robbery in language of statute creating such crime, *held* sufficient to support sentence to life imprisonment without possibility of parole, though not alleging that victims suffered bodily harm (Pen.Code, § 209, as amended by St.1933, p. 2617).

3. Kidnapping ⇐4

Indictment or information need not allege particular mode or means employed in commission of statutory offense, unless of essence thereof, but need only charge essential elements of such offense.

CURTIS, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Floyd C. Britton and C. R. Russell were sentenced to life imprisonment without possibility of parole on their pleas of guilty of kidnapping for the purpose of robbery, and they appeal.

Affirmed.

For prior opinion, see (Cal.App.) 48 P. (2d) 705.

George E. Cloud, of Los Angeles, for appellant Floyd C. Britton.

Frederic H. Vercoe, Public Defender, and Ellery E. Cuff, Deputy Public Defender, both of Los Angeles, for appellant C. R. Russell.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

WASTE, Chief Justice.

An indictment containing five counts was returned against the appellants, and others, by the grand jury of Los Angeles county. Each appellant entered a plea of guilty to one count thereof charging kidnapping for the purpose of robbery, in violation of section 209 of the Penal Code, as amended by St. 1933, p. 2617. As to the appellants, the remaining counts were ordered off calendar. Upon the charge to which each appellant entered his plea, the court below, after hearing pertinent evidence, pronounced judgment directing imprisonment in the state prison for the term prescribed by law "without possibility of parole." These appeals followed.

Section 209 of the Penal Code, as amended by St. 1933, p. 2617, under which the appellants were charged and sentenced, reads as follows: "Every person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or robbery or to exact from relatives or friends of such

person any money or valuable thing, or who aids or abets any such act, is guilty of a felony and upon conviction thereof shall suffer death or shall be punished by imprisonment in the State prison for life without possibility of parole, at the discretion of the jury trying the same, in cases in which the person or persons subjected to such kidnaping suffers or suffer bodily harm or shall be punished by imprisonment in the State prison for life with possibility of parole in cases where such person or persons do not suffer bodily harm."

[1] It is urged that the court below was without authority to include within the judgments the requirement that appellants be imprisoned "without possibility of parole." In support thereof it is contended that the victims did not suffer "bodily harm" within the meaning of the above-quoted section. The contention lacks merit. Examination of the record indicates that the victims, who were riding together in a truck, were forced to the side of the highway by appellants and a companion, where they were robbed, blindfolded, and bound with copper wire. One of the victims, for whose kidnaping appellant Britton stands convicted, was struck over the head. The victims were then taken to a garage where their truck was unloaded. Subsequently they were released with their empty truck.

In *People v. Tanner*, 3 Cal.(2d) 279, 44 P.(2d) 324, 332, we had occasion to interpret the phrase "bodily harm," appearing in the section. We there declared: "It will be noted that the statute does not use the words actual bodily harm, or great bodily harm, or bodily injury. Bodily, used singly, is defined as pertaining to the body. It is opposed to mental 'as bodily labor or pain'; physical is often synonymous with bodily, as physical discomfort, suffering. Harm is defined as 'hurt; injury; damage; (2) grief, pain, sorrow; (3) evil; wrong; wickedness.' Webster's International Dictionary (2d Ed.). Bodily harm is generally defined as 'any touching of the person of another against his will with physical force in an intentional, hostile and aggravated manner, or projecting of such force against his person.' 8 C.J. 1134; *People v. Moore*, 50 Hun, 356, 3 N.Y.S. 159; 1 Words and Phrases, First Series, p. 817; *King v. Hostetter*, 7 Canadian Criminal Law, 221. * * * To bind persons in the manner in which the Bodkins were bound is to do them bodily harm. Mrs. Bodkin, while not subjected to

the ordeal of fire, was imprisoned in a close and overheated closet, three by five feet in dimension, with two other persons for quite a period, and was finally left bound with the other members of the household. These acts unquestionably amount to bodily harm."

We are satisfied, therefore, that the treatment accorded the victims of appellants' criminal acts constituted "bodily harm" within the meaning of section 209, supra, as interpreted in the *Tanner* Case.

[2] The appellant Russell urges the further point that the court was also without authority to sentence him "without possibility of parole" because the indictment contains no allegation that in the course of the commission of the crime of kidnaping for the purpose of robbery to which he entered his plea, the victim thereof suffered "bodily harm." It is argued that the instant situation is analogous to that where, by reason of a prior conviction of a defendant, he may upon conviction of a subsequent felony be subjected to punishment greater than though he had not theretofore suffered a conviction. He directs attention to the rule that, in order for such prior conviction to result in an increased punishment as applied to a subsequent conviction, the indictment or information wherein the defendant is charged with the later offense must allege the fact of such prior conviction and that he served a term therefor, citing *People v. Dawson*, 210 Cal. 366, 292 P. 267.

It was to permit of more mature consideration of this point that we granted the hearing in this cause and its companion cases [56 P.(2d) 491, 493, 497], though the point was not urged by all appellants in the several cases.

In our opinion the asserted analogous situation is not comparable to the one here presented. The mere charging of a substantive offense only warrants the imposition of the punishment prescribed therefor. It is only when the offender has suffered a prior conviction and served a term therefor that his punishment for the later offense may be increased. In other words, a prior conviction and service of sentence thereon are indispensable to the imposition of such increased punishment for the later substantive offense. Such material facts must therefore be alleged in the indictment or information if an increased punishment is to be imposed. A mere charging of the substantive offense, without reference to

such other elements, would not support a punishment greater than that prescribed for the offense.

Such is not the situation here presented. Section 209 of the Penal Code, as amended, for the purpose of this case, defines but one criminal act or offense, viz., kidnaping for purpose of robbery, for which any one of several punishments may be imposed, depending entirely upon the circumstances surrounding its commission. A charge in the language of the statute that the accused had kidnaped his victim for the purpose of robbery in violation of the statute apprises the accused of what he will be expected to meet and of the several punishments prescribed therefor, any one of which, upon conviction, may be imposed upon him. The indictment here involved charged the offense in the language of the statute and referred thereto.

[3] It is well settled in this state that an indictment or information need not allege the particular mode or means employed in the commission of an offense, except when of the essence thereof. 14 Cal. Jur. 55, § 41, and authorities there cited. In other words, particulars as to manner, means, place, or circumstances need not in general be added to the statutory definition. *People v. Giacomella*, 71 Cal. 48, 49, 12 P. 302; *People v. Russell*, 81 Cal. 616, 617, 23 P. 418. The indictment or information need only charge the essential elements of the statutory offense. It then fairly apprises the defendant of what he is to meet at the trial.

So far as the present case is concerned, the essence of the offense denounced in section 209, as amended, as a felony is the seizing, confining, kidnaping, etc., of the victim for the purpose of robbery. If upon the trial of such offense, or upon plea of guilty, it develops that the victim suffered bodily harm, the jury or the court, as the case may be, may in its discretion fix the punishment at death or life imprisonment without possibility of parole or, should the victim not have suffered bodily harm, life imprisonment with possibility of parole is prescribed as punishment.

Though not presented in the *Tanner Case* and therefore not discussed in our opinion therein, we gave consideration to the point now being urged before affirming the judgment there imposing the death penalty, for

in that case, the first to come before us involving the amended section 209, the indictment, as here, merely charged the substantive offense in the language of the statute without any reference being made to bodily harm or the absence thereof. We there pointed out that section 209 as first added to our Penal Code in 1901 (p. 98) defined and prescribed the punishment for kidnaping for the purpose of extortion and robbery, and then declared that "the only change made by the amendments of 1933 so far as they affect the instant case [kidnaping for purpose of robbery, as here] was to increase the penalty if the person forcibly taken suffers bodily harm."

The sentences imposed upon the appellants are warranted under the indictment and evidence.

The judgments are, and each is, affirmed.

We concur: SEAWELL, J.; LANGDON, J.; THOMPSON, J.; SHENK, J.

CURTIS, Justice (dissenting).

I am unable to agree with the foregoing opinion which affirms a judgment of life imprisonment "without the possibility of parole" upon the plea of guilty by the appellants to a charge of kidnaping, where the indictment failed to charge that the person kidnaped suffered bodily harm. Section 209 of the Penal Code, as amended by St. 1933, p. 2617, fixes two punishments for the crime of kidnaping, one where bodily harm is inflicted on the victim and the other where the offense is committed without the infliction of bodily harm.

The only crime charged against appellants was that of kidnaping, and this is the only crime to which they pleaded guilty. To now inflict upon them the aggravated punishment provided for the crime of kidnaping where bodily harm is inflicted is punishing them for a crime not alleged in the indictment and one as to the nature of which they were not informed by the indictment. One of the most ancient and fundamental rules of criminal procedure is that a defendant must be informed of the precise charge against him before he can be placed on trial or punished therefor. The judgment against defendants should be modified by striking therefrom the words, "without the possibility of parole," and as thus modified, affirmed.

6 Cal.2d 7

PEOPLE v. BRITTON.

Cr. 3932.

Supreme Court of California.

March 31, 1936.

1. Kidnapping ☞5

Evidence, in trial for kidnapping to rob, that victims were blindfolded and bound with copper wire and one of them struck over head, *held* to show that they suffered "bodily harm," as required by statute to warrant sentence to life imprisonment without possibility of parole (Pen.Code, § 209, as amended by St.1933, p. 2617).

[Ed. Note.—For other definitions of "Bodily Harm," see Words & Phrases.]

2. Indictment and information ☞110(42)

Indictment, charging kidnapping for purpose of robbery in language of statute creating such offense, *held* sufficient to support sentence to life imprisonment without possibility of parole, though not alleging that victims suffered bodily harm (Pen.Code, § 209, as amended by St.1933, p. 2617).

CURTIS, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Floyd C. Britton was sentenced to the state prison for life, without possibility of parole, after pleading guilty of kidnapping for the purpose of robbery, and he appeals.

Affirmed.

For prior opinion, see (Cal.App.) 48 P. (2d) 704.

See, also (Cal.Sup.) 56 P.(2d) 491, 493, 494.

George E. Cloud, of Los Angeles, for appellant Floyd C. Britton.

Frederic H. Vercoe, Public Defender, and Ellery E. Cuff, Deputy Public Defender, both of Los Angeles, for appellant Ida Mae Alameda.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

WASTE, Chief Justice.

[1] Following his plea of guilty to a charge of kidnaping for the purpose of robbery, the appellant was sentenced to the state prison for the term prescribed by law "without the possibility of parole." Upon appeal from the judgment, he urged that the evidence did not disclose that the victim of the kidnaping had suffered "bodily harm" within the meaning of section 209 of the Penal Code, as amended by St. 1933, p. 2617, so as to warrant the imposition of sentence "without possibility of parole." In our opinion, the evidence discloses that the victim did suffer "bodily harm" within the meaning of the cited Code section, as the same was interpreted in *People v. Tanner*, 3 Cal. (2d) 279, 44 P.(2d) 324.

[2] Though the point was not raised herein, this and three companion causes were taken over by this court after decision in the District Court of Appeal of the Second Appellate District, Division 1, to permit us to determine whether an indictment drawn under said section must allege that the victim suffered bodily harm in order to support a sentence "without possibility of parole."

The circumstances surrounding the commission of the offense to which appellant entered his plea of guilty are sufficiently similar to those of the companion case, *People v. Britton & Russell* (Cal.Sup.) 56 P.(2d) 494, this day decided, to warrant an identical conclusion. Therefore, upon the authority of the cited case, we are of the opinion that the trial court did not err in sentencing appellant for the time prescribed by law "without possibility of parole."

The judgment is affirmed.

We concur: SEAWELL, J.; LANGDON, J.; THOMPSON, J.; SHENK, J.

CURTIS, Justice dissenting.

I dissent for the reasons set forth in dissenting opinion this day filed in 56 P. (2d) 494.

5 Cal.2d 749

KANE v. MENDENHALL et al.

L. A. 14589.

Supreme Court of California.

March 31, 1936.

Rehearing Denied April 30, 1936.

1. Brokers ⇐4

Principal is liable to obligee for full amount of damages suffered as result of breach of real estate broker's bond, whereas surety is liable only in penal sum of bond, but liability of both rests on acts of fraud committed by principal to damage of obligee (Gen.Laws 1931, Act 112, § 9a [repealed by St.1933, p. 540]).

2. Principal and surety ⇐145(1)

Judgment against principal is not conclusive in separate action against surety.

3. Brokers ⇐4

Act giving any person injured by real estate broker's failure to perform his duties right to commence action against broker and his sureties authorized recovery against broker and surety in single action (Gen.Laws 1931, Act 112, § 9a [repealed by St.1933, p. 540]).

4. Brokers ⇐4

In joint action against broker and his surety, recovery against surety is limited to penal sum of bond, but full damages may be recovered against broker, even though in excess of penal sum of bond (Gen.Laws 1931, Act 112, § 9a [repealed by St. 1933, p. 540]).

5. Action ⇐48(1)

Action in tort may be joined with action on contract, where both arise out of same transaction (Code Civ.Proc. § 427, subd. 8).

6. Action ⇐50(4)

Real Estate Brokers' Act authorized joinder in single action of claim against broker for full damages with claim against his surety limited by penal sum of bond, notwithstanding statutory provision that united causes of action must affect all parties (Gen.Laws 1931, Act 112, § 9a [repealed by St.1933, p. 540]; Code Civ.Proc. § 427).

7. Judgment ⇐879

Surety is liable for judgment against principal to extent of bond, and payment by surety of judgment against principal operates pro tanto as satisfaction of judgment, whether principal and surety are sued separately or in single action.

8. Action ⇐50(4)

Statutes relating to joinder apparently permit joinder of defendants, such as principal and surety, where causes of action arose out of same transaction and involve common questions, notwithstanding larger recovery is sought against principal than against surety (Code Civ.Proc. § 427, and §§ 379a, 379b, as added by St.1927, pp. 477, 478).

9. Courts ⇐121(4)

Principal and surety on real estate broker's \$2,000 bond could be sued jointly in superior court, where recovery for more than \$2,000 was sought against principal, although recovery against surety was limited to \$2,000, which is within the jurisdiction of the municipal court, since requiring separate suits would result in a multiplicity of suits (Gen.Laws 1931, Act 112, § 9a [repealed by St.1933, p. 540]; Code Civ.Proc. § 89, as added by St.1933, p. 1811; Const. art. 6, § 5, as amended in 1928).

10. Contracts ⇐94(4)

One who signs instrument without reading it, in reliance on false representations as to its contents, may avoid instrument where confidential relation exists between parties.

11. Brokers ⇐34

Relation between real estate broker and principal is fiduciary relation of agent and principal, within rule that one who signs instrument without reading it, in reliance on false representations as to its contents, may avoid instrument where confidential relation exists between parties (Civ.Code, §§ 2228, 2322).

12. Brokers ⇐4

In action against real estate broker and his surety, evidence authorized finding that broker procured plaintiff, his principal, to execute deed to broker by misrepresenting nature of instrument, as against contention that plaintiff knowingly executed deed in payment of broker's commission (Gen.Laws 1931, Act 112, § 9a [repealed by St.1933, p. 540]).

—◆—
In Bank.

Appeal from Superior Court, Los Angeles County; E. N. Rector, Judge.

Action by Betty Kane against J. J. Mendenhall and wife and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Rehearing denied; WASTE, C. J., and CONREY, J., dissent.

Willedd Andrews, of Los Angeles, for appellants Mendenhall.

Mathes & Sheppard and Robert A. Cushman, all of Los Angeles (J. Stanley Mullin, of Los Angeles, of counsel), for appellant American Surety Co.

Laurence Paul Scherb and Scherb & Spencer, all of Culver City, for respondent.

SEAWELL, Justice.

Plaintiff, Betty Kane, brought this action to procure cancellation of a deed executed by her to defendants J. J. Mendenhall and Grace Mendenhall, his wife, as grantees. In view of the fact that the property had been transferred to bona fide purchasers by the Mendenhalls, the court below awarded plaintiff damages in the sum of \$2,500 and also exemplary damages in the sum of \$2,000. The court also rendered judgment against defendant American Surety Company, surety on the real estate broker's bond of defendant J. J. Mendenhall for \$2,000.

The defendant surety company contends that, as the penal sum of the bond was \$2,000, the amount required by statute, the municipal court of Los Angeles county had jurisdiction of any suit against it, and it could not be joined in a suit in the superior court against the broker for damages exceeding \$2,000. Since 1928 the Constitution has provided that "the superior court shall have original jurisdiction in all civil cases and proceedings (except as in this article otherwise provided, and except, also cases and proceedings in which jurisdiction is or shall be given by law to municipal or to justices or other inferior courts)." Article 6, § 5. The statute fixing the jurisdiction of the municipal courts provides: "Municipal courts shall have original jurisdiction of civil cases and proceedings as follows: (a) In all cases at law in which the demand, exclusive of interest, or the value of the property in controversy, amounts to two thousand dollars or less, except cases which involve the legality of any tax, impost, assessment, toll or municipal fine." Section 89, Code Civ.Proc., added in 1933 (St.1933, p. 1811), based on section 29 of the Municipal Court Act, Deering's Gen.Laws, Act 5238, p. 2925.

[1,2] It would be unfortunate if an interpretation of our Code provisions relating to jurisdiction and to joinder required plaintiff herein to prosecute two separate actions. The liability of the principal and the liability of the surety, though differing

in amount, since the principal is liable to the plaintiff for the full amount of damages suffered, and the surety only in the penal sum of the bond, rest alike upon acts of fraud committed by the principal to the damage of plaintiff, and require the examination of questions common to both principal and surety. Actions separately tried might result in different judgments. A judgment against the principal is not conclusive in a separate action against the surety. *McPhetridge v. Smith*, 101 Cal. App. 122, 281 P. 419; *Mahana v. Alexander*, 88 Cal.App. 111, 263 P. 260; 1 *Freeman on Judgments*, p. 1002; 23 *Cal.Jur.* 1062. In *Paige v. Reinecke*, 139 Cal.App. 225, 33 P. (2d) 454, and *Yeoman v. Sherry* (Cal.App.) 52 P.(2d) 555, the appellate courts, without discussion affirmed judgments for \$2,000 against the surety and against the broker for more than \$2,000.

The appeal of defendant surety company requires consideration of two questions: (1) Whether, in the absence of any question relating to jurisdiction depending on the amount in controversy, recovery may be had in a joint action, against the principal for the full amount of damages suffered by reason of acts of the principal covered by the bond, and against the surety for the penal sum of the bond; and (2) if recovery ordinarily may be had in a single action, may the principal and surety be sued jointly in the superior court where the penal sum of the statutory bond, which represents the limit of recovery against the surety, is \$2,000.

[3] Section 9a of the Real Estate Brokers' Act (Deering's Gen.Laws, Act 112, p. 25) provided that any person who sustains an injury covered by the real estate broker's bond "shall have the right in his own name to commence such an action against said real estate broker and his sureties for the recovery of any damages sustained by the failure or omission of said real estate broker to perform his duties or obligations or any of them." (Section 9a was repealed in 1933, Stats. 1933, p. 540, the repealing act providing: "Provided, however, that this repeal shall not affect any cause of action arising under any bond given prior to the effective date of this act.") We are of the view that the above provision of section 9a authorized recovery against the principal and surety in a single action. It is suggested that the sole purpose of the provision was to make it plain that the injured person had a direct right of action on the bond, which ran to

to the state of California. We cannot accede to this proposition. In the light of the nature and purpose of the bond and the terms of the act in regard thereto in the absence of such a provision, the injured person as the real party in interest could sue thereon. 4 Cal.Jur. 363.

[4] Nor can it be said that the joint action contemplated by section 9a is solely an action *on the bond*, in which recovery against the principal, as well as against the surety, is limited to \$2,000, the penal sum of the bond. Damages suffered through the fraud of the broker may often exceed the penal sum of the statutory bond of \$2,000. A cause of action in tort against the broker to recover full damages existed independently of the provisions of the Real Estate Brokers' Act or the existence of a bond. Section 9a constitutes a recognition of this right. The section provides for recovery "of *any damages* sustained by the failure or omission of said real estate broker to perform his duties or obligations or any of them." (Italics ours.) In so far as the damages suffered exceed the penal sum of the bond, the action against the principal may be said to rest on his delictual liability rather than on a contractual liability based on the bond. As to the surety, necessarily recovery is upon his contractual liability on the bond, and is limited thereby to \$2,000, the penal sum of the bond.

[5] Decisions in other jurisdictions to the effect that the surety cannot be joined in an action against the principal based on a common-law delictual liability are found to rest upon a preservation in those jurisdictions of the common-law rule against joinder of actions in tort and contract. In this state, an action in tort may be joined with an action on contract where both arise out of the same transaction. Section 427, subd. 8, Code Civ.Proc. *Ghirardelli v. Bourland*, 32 Cal. 585, was decided under the Practice Act, which did not provide for joinder of actions in tort and contract when they arose out of the same transaction.

[6] The joinder of the surety in some jurisdictions has also been regarded as violative of the common-law rule that causes of action to be united must affect all parties to the action, which rule is embodied in this state in section 427, Code of Civil Procedure. If this provision of section 427, Code of Civil Procedure, could be construed as prohibiting joinder in a single action of a claim against the principal for full damages, with a claim against the surety limited

by the penal sum of the bond, the effect of section 9a of the Real Estate Brokers' Act is to remove such a joint action from the application of said provision. There have been instances in which by special provision a joint action against several defendants on separate causes of action has been authorized. For example, a joint action against corporate stockholders to obtain several judgments for the varying amounts of their proportionate statutory stockholders' liability was provided for. Section 322, Civ.Code.

[7] Furthermore, it seems doubtful whether in this state this requirement of section 427, Code of Civil Procedure, has ever been applied in a way to prohibit joinder of a claim for full damages against the principal with a claim against the surety limited by the penal sum of the bond. Where a plaintiff recovers judgment against a principal and surety, there is a recovery of but a single debt. The surety is liable for the judgment against the principal to the extent of the bond, and payment by the surety of the judgment against him operates pro tanto as satisfaction of the judgment against the principal, whether they are sued in a single action or separately. In this state we have upheld joint suits for personal injuries against a tortfeasor and his insurer, where, by virtue of provision in the policy of insurance or statute, the injured person had a direct right of action against the insurer and was not required first to obtain judgment against the insured. *Milliron v. Dittman*, 180 Cal. 443, 181 P. 779; *Gugliemetti v. Graham*, 50 Cal.App. 268, 195 P. 64; *Van Der Hoof v. Chambon*, 121 Cal.App. 118, 125, 8 P.(2d) 925; *Fraher v. Eisenmann*, 94 Cal.App. 48, 270 P. 704; cases decided without citing section 2777, Civ.Code. See note, 96 A.L.R. 356. Such joint suits against the tortfeasor on his delictual liability and against the insurer on his contract of insurance have not been held violative of the rule that causes of action to be united must affect all parties to the action.

The joinder in one action of a cause against the corporation for the full amount of a corporate debt and causes against several stockholders for their proportionate statutory liabilities has also been upheld. *Avery v. Chucawalla Development Co.*, 175 Cal. 644, 166 P. 1002; *Aronson & Co. v. Pearson*, 199 Cal. 286, 293, 249 P. 188, 51 A.L.R. 1380; *Kennedy v. California Sav. Bank*, 97 Cal. 93, 31 P. 846, 33 Am.St. Rep. 163; *Nelson v. Marsh*, 100 Cal.App.

578, 582, 280 P. 695; Kiefhaber Lumber Co. v. Newport Lumber Co., 15 Cal.App. 37, 113 P. 691.

[8] In addition, it has been said that the joinder of parties and joinder of causes are inextricably connected, and that the effect of the 1927 amendments to the sections relating to joinder of parties is to make important modifications in the application of the rule that causes of action to be united must affect all parties to the action. *Peters v. Bigelow*, 137 Cal.App. 135, 30 P. (2d) 450; *Colla v. Carmichael U-Drive Autos, Inc.*, 111 Cal.App.Supp. 784, 294 P. 378; 23 Cal.Law Rev. 320; 2 S.Cal.Law Rev. 315. In *Peters v. Bigelow*, supra, where the court upheld joinder under section 378, Code of Civil Procedure, as amended in 1927 (St.1927, p. 631), of plaintiffs who had separate causes of action against defendant for false imprisonment growing out of the same transaction, it was said that the effect of the amendment was to except from the requirements of section 427, Code of Civil Procedure, those cases coming within the provisions of section 378, as amended. It seems likely that sections 379a and 379b, added in 1927 (St.1927, pp. 477, 478), and relating to joinder of defendants, would have a similar effect, and permit joinder of defendants such as a principal and surety in the instant case, where the causes of action arose out of the same transaction and involved common questions.

[9] We have now to consider the additional problem presented by the fact that in the instant case recovery against the surety was limited by its bond to \$2,000, an amount within the jurisdiction of the municipal court. We are of the view that plaintiff was not required to sue the surety separately in the municipal court. We have heretofore held the claims against the broker and surety joinable. *Moore v. McSleeper*, 102 Cal. 277, 36 P. 593, supports our conclusion that the surety may be sued in the superior court. In that case judgment was entered against a sheriff in a suit growing out of an attachment. Said sheriff had previously caused an indemnity bond to be issued to himself to protect him in the performance of his duty. It was held that under section 1055, Code of Civil Procedure, judgment could be entered against the several sureties in favor of the sheriff in the superior court suit against the sheriff, although the sureties were severally liable for amounts below \$300. We also find support for our conclusion that the claim against the surety for \$2,000 may be urged in the

superior court action, in those cases which permit the assertion in the superior court of a counterclaim or cross-complaint arising out of the same transaction for an amount within the jurisdiction of the justice or municipal court. *Sullivan v. California Realty Co.*, 142 Cal. 201, 75 P. 767; *Moore v. Groftholdt*, 10 Cal.App. 714, 103 P. 149; *Kling v. Kimball Pump Co.*, 138 Cal. App. 470, 32 P.(2d) 659. It is held that, if action is first commenced in the justice court on the smaller claim, the holder of the larger claim may procure an injunction against further prosecution of the justice court action and require litigation of both claims in the superior court. *Todhunter v. Smith*, 219 Cal. 690, 28 P.(2d) 916; *Gregory v. Diggs*, 113 Cal. 196, 45 P. 261; *Coggins v. Superior Court*, 127 Cal.App. 412, 16 P.(2d) 148. In the recent case of *Brix v. People's Mut. Life Ins. Co.*, 2 Cal.(2d) 446, 41 P. (2d) 537, action was commenced in the superior court on a demand within the jurisdiction of the municipal court. Thereafter the defendant filed a cross-complaint arising out of the same transaction for cancellation, an equitable proceeding, and hence within the sole jurisdiction of the superior court at the time when the action arose. (Section 89, Code of Civil Procedure, now provides for jurisdiction to cancel contracts under certain conditions. Stats.1933, p. 1811.) We held that the superior court had jurisdiction of both claims. See, article, 24 Cal.Law Rev. 338. Thus it appears that the former constitutional provisions and the present statutory provisions conferring jurisdiction on the inferior courts of demands below certain amounts have not been interpreted as forbidding determination of said demands in the superior court where they are connected with larger claims or with a type of demand solely within the jurisdiction of the superior court.

We are of the view that such a connection exists between the demand against the broker and surety herein that the claim against the surety for \$2,000 may be tried in the superior court action. In the case of the principal and surety there is a single debt for which the principal is liable in full, the surety to the extent of his bond. Payment by the surety pro tanto satisfies the creditor's judgment against the broker. In this regard the action differs from a joint action against several stockholders of a corporation on account of their proportionate statutory liability, as to which it has been held those whose several liabilities are for amounts within the jurisdiction of the in-

ferior court cannot be joined in the superior court action against those liable for larger amounts. *Derby v. Stevens*, 64 Cal. 287, 30 P. 820; *Johnson v. Hinkel*, 29 Cal. App. 78, 154 P. 487. In the case of stockholders, each was liable for the full amount of the separate judgment against him. Payment by one stockholder did not apply upon the judgment against others.

We conclude that the broker and surety may be sued in a joint action in the superior court. A rule which would require two separate actions to examine the same facts and legal questions would result in multiplicity of suits, wasteful of the time of our already overcrowded courts.

Appellants further contend that the evidence does not support the findings in plaintiff's favor. The court found that defendant J. J. Mendenhall procured plaintiff to execute a deed on August 29, 1931, to himself and his wife by concealing from her the fact that the instrument which she signed was a deed, and by representing that it was merely a paper necessary for the completion of the escrow in an exchange transaction in which he represented plaintiff as a real estate broker. Plaintiff did not discover that the instrument was in fact a deed until about April 18, 1932.

It appears that plaintiff, who had recently lost her husband, was the owner of a duplex bungalow in Los Angeles county, subject to an encumbrance of \$3,660. She agreed to exchange her equity in this property for an unimproved lot in the city of Los Angeles owned by Mrs. E. Myers and \$1,200 in cash. By the written agreement of exchange plaintiff was to pay Mendenhall \$368 as commission, and Mrs. Myers was to pay him \$100.

The instruments required to consummate the transaction were placed in escrow with a title insurance company. The escrow instructions given by plaintiff provided for payment of \$383 to Mendenhall, which he testified represented the commission of \$368 and \$15 additional which he had advanced to plaintiff to pay her current bills. On August 29, 1931, Mendenhall executed instructions to the title company as follows: "Instead of obtaining for me from Betty M. Kane commission of \$383 you will only collect \$200 from her." On the same date Mrs. Kane executed further escrow instructions as follows:

"You will prepare a deed to be signed by Betty M. Kane to J. J. Mendenhall and Grace Mendenhall, husband and wife, as joint tenants, covering Lot 19 in Block

'K' of Tract No. 6447, Sheets 1 to 4 inclusive, as per map recorded in Book 75, Pages 80 to 83 of Maps.

"You are authorized to record this deed without collection for me as I have received full consideration on the outside of escrow.

"You will show title in the above mentioned grantees in your policy, and send the deed and policy to the grantees above at close of escrow, subject to the bonds of record."

The lot referred to in this instruction is the lot which plaintiff was to receive in the exchange from Mrs. Myers. On the same date, August 29, 1931, plaintiff signed a deed to Mendenhall. The escrow instructions and the deed were prepared and executed at the office of the title insurance company, which recorded the deed to Mendenhall and the deeds in the exchange transaction as directed by the several escrow instructions. Plaintiff contends that Mendenhall procured her to sign the escrow instructions of August 29 and the deed of that date by concealing the nature of said instruments and representing that they were merely formal instruments required to close the escrow; that said defendant, with whom she had previous dealings and in whom she reposed full confidence, told her that he would protect her interests fully, and look over all papers, and that she need not read them; and that, relying on said defendant, she did not read the instructions and deed nor discover that she had signed a deed until April 18, 1932. At that time she had received an offer to purchase the lot through another broker. Plaintiff denied that she had ever seen the lot before she entered into the exchange agreement.

[10] Where one signs an instrument without reading it in reliance on representations as to its contents in fact false, the instrument may be avoided where a confidential relation exists between the parties. *Mazuran v. Stefanich*, 95 Cal.App. 327, 331, 272 P. 772; *Gajanich v. Gregory*, 116 Cal.App. 622, 3 P.(2d) 389; 6 Cal.Jur. 84. In the absence of a confidential relation, a review of the authorities in *Mazuran v. Stefanich*, supra, indicates that there is a conflict in other jurisdictions, and that the decisions in this state are not entirely harmonious. In addition to cases cited in *Mazuran v. Stefanich*, supra, see *Freligh v. McGrew*, 95 Cal.App. 251, 272 P. 791; on effect of failure to read in general, see *Gridley v. Tilson*, 202 Cal. 748, 262 P. 322; *Simmons v. Ratterree Land Co.*, 217 Cal. 201, 17 P.(2d) 727; *Knox v. Modern Ga-*

rage, etc., Shop, 68 Cal.App. 583, 229 P. 880; Greve v. Taft Realty Co., 101 Cal. App. 343, 281 P. 641.

[11] In the instant case, the relation of principal and agent existed between plaintiff and Mendenhall. This relation is fiduciary. Section 2322 and section 2228, Civ. Code; Calmon v. Sarraile, 142 Cal. 638, 76 P. 486; Williams v. Lockwood, 175 Cal. 598, 601, 166 P. 587; Newell-Murdoch Realty Co. v. Wickham, 183 Cal. 39, 190 P. 359; 6 Cal.Jur. 74; 12 Cal.Jur. 713. In Calmon v. Sarraile, supra, the agent falsely represented to his principals that the vendor of real property required, in addition to \$10,500 in cash, the transfer of a lot owned by the principals. He procured his principals to execute a deed to him by representing that it was a deed to the vendor. By the judgment the deed was set aside.

[12] Defendant Mendenhall testified that, after execution of the exchange agreement, but before consummation of the transaction, plaintiff came to his office and said that, as she was receiving only \$1,200 in cash, she could not afford to pay him a commission in cash, and requested that he accept the lot to be transferred to her by Mrs. Myers as his commission. He finally agreed to accept the lot, as his commission provided plaintiff would loan him \$200 for 60 days. According to Mendenhall, the \$200 which he admittedly received through the escrow and which was provided for in the instructions of August 29 to the title company constituted this loan. He gave plaintiff a promissory note of \$200, which he produced upon the trial, marked "Paid" by plaintiff.

Plaintiff, on the other hand, testified that the \$200 which Mendenhall received through the escrow under the instructions of August 29 was to constitute his commission, rather than a loan to him; that she subsequently loaned him \$200, evidenced by the promissory note which defendant produced at the trial, marked "Paid," and that she loaned him a further sum of \$200, for which he gave no note and had not repaid. Defendant denied that he had received any sum from plaintiff except the \$200 paid to him through the escrow.

According to plaintiff, defendant represented to her that the lot had a value of \$2,500. Within a month after its transfer to him, he sold it for \$900, subject to bonds of \$350, which were a lien at the time of the exchange. Plaintiff did not discover that

she had been deceived into transferring the lot to the Mendenhalls until April, 1932.

Plaintiff was present with Mendenhall at the office of the title company when the deed to the Mendenhalls and the instructions which directed delivery of said deed without collection were prepared. She testified that Mendenhall, as her agent, gave the instructions from which the employees of the company prepared the instruments, and that she sat on a bench where she could not hear the instructions which Mendenhall gave. She did not read the instruments, but relied entirely on Mendenhall's promise to read all papers for her. She further testified that at various times she inquired of defendant if he had sold the lot for her, and at one time she told him that Mrs. Myers, the former owner, knew some one who would offer \$900 for it. Defendant replied, "My goodness, the \$2,500 lot? I could do better than that. You don't do anything about it at all."

Defendant Mendenhall testified that Mrs. Kane herself gave the title company officer the directions from which the deed to Mendenhall and the instructions for delivery to him were prepared, and that, if he gave the instructions, Mrs. Kane must necessarily have heard all that was said. Mendenhall's testimony was corroborated by the officer of the title company. His testimony as to plaintiff's intent to transfer the lot to him and her knowledge of the contents of the instrument she signed was corroborated by the notary who took plaintiff's acknowledgment to the deed and by certain other testimony.

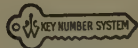
The above outline of the evidence indicates a sharp conflict. The trial court made findings in favor of plaintiff. In reaching its conclusion, the trial court was doubtless influenced by the instruction given the title company by Mendenhall on August 29, as follows: "Instead of obtaining for me from Betty M. Kane commission of \$383 you will only collect \$200 from her." This instruction would seem to describe the \$200 payment as a commission, and supports plaintiff's statement that the \$200 which Mendenhall admittedly received through the escrow was to constitute his commission. The escrow instructions nowhere refer to a transfer of the lot in lieu of a cash commission.

It is difficult in this case to discern from an inspection of the record where the truth lies. Weighing the credibility of the witnesses was the trial court's responsibility.

The witnesses were in the presence of the trial judge, and his judgment as to their credibility is final in the matter.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; SHENK, J.; THOMPSON, J.



5 Cal.2d 761

KAUFMAN v. PACIFIC INDEMNITY CO.

L. A. 15503.

Supreme Court of California.

March 31, 1936.

Rehearing Denied April 30, 1936.

1. Courts ☞121(4)

Real estate broker and surety on his bond may be jointly sued in superior court, although penal sum of bond does not exceed \$2,000, which amount is within jurisdiction of the municipal court, where larger recovery is sought against broker.

2. Appeal and error ☞907(3)

Where appeal is taken on judgment roll alone, presumption is that evidence supports special findings and verdict of jury.

3. Brokers ☞4

In action against broker and his surety, complaint based on fraud of agent of defendant real estate broker held not insufficient as failing to disclose transaction wherein agent was acting as broker or agent for broker, although transaction relied on included transfer to plaintiff of lots purportedly belonging to agent (Gen.Laws 1931, Act 112, § 2).

4. Brokers ☞4

Surety on real estate broker's bond could not be held liable for acts of broker performed subsequent to expiration of its bond.

5. Brokers ☞4

Complaint against real estate broker and surety on broker's bond for fraud in real estate transaction held demurrable for insufficiency and uncertainty in alleging damages.

6. Appeal and error ☞1170(3)

Case will not be reversed for error in overruling demurrer attacking sufficiency or certainty of allegations of damage in complaint, unless it appears that appellant was prejudiced by error (Const. art. 6, § 4½).

7. Pleading ☞428(7)

Insufficiency in allegations of damage in complaint may be cured by failure on trial to object to evidence regarding damages.

8. Appeal and error ☞917(1)

Where evidence was not before reviewing court, although complaint was insufficient and uncertain in alleging damages, presumption was that issue of damages was fully and fairly tried and that no prejudice had resulted from overruling demurrer based on insufficiency of damage allegations.

9. Appeal and error ☞928(3)

On appeal from judgment against principal for \$4,500 and against surety for \$2,000, where evidence was not before reviewing court, presumption was that court correctly instructed jury and that evidence showed at least \$2,000 damages, for which surety was liable, although \$4,500 judgment included items for which surety was not liable.

10. Costs ☞76

Where judgment which, correctly or not, does not carry costs has become final, defendant cannot be held for costs, and memorandum of costs filed against defendant will be stricken on motion or disregarded, in absence of motion.

11. Costs ☞76

Motion to strike from files, as to moving defendant, memorandum of costs filed by plaintiff held improperly denied, where judgment against moving defendant expressly provided that it should be without costs and notice of motion specifically stated that it would be based on judgment.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank M. Smith and Charles L. Bogue, Judges.

Action by Adolphine L. Kaufman against the Co-operative Realty Corporation, Limited, and others. From the judgment, defendant the Pacific Indemnity Company appeals.

Affirmed. Order denying motion to strike memorandum of costs from the file as to appellant reversed.

Rehearing denied; WASTE, C. J., and CONREY, J., dissent.

Prior opinion 47 P.2d 487.

Chas. E. R. Fulcher, of Los Angeles for appellant.

G. A. Bisbee, of Los Angeles (H. R. Spence, of Los Angeles, of counsel), for respondent.

Benjamin Elconin, of Los Angeles, *amicus curiæ*.

SEAWELL, Justice.

Plaintiff, Adolphine L. Kaufman, brought this action to recover damages for fraud practiced on her by defendant William Kelley, acting as president and agent of defendant Co-operative Realty Corporation, Limited. She also named as defendant Pacific Indemnity Company, surety on the statutory real estate broker's bond of the realty company between January 8, 1932, and December 31, 1932. The court below rendered judgment in plaintiff's favor for \$4,500 against the realty company and Kelley, and judgment against the defendant surety company for \$2,000, the penal sum of the bond, without costs. The defendant surety company has appealed from the judgment against it. The court rendered judgment in favor of defendant Walls upon the allegations of his answer that he was a mere "dummy," who at the request of Kelley received title to certain of the properties herein involved, and immediately reconveyed to Kelley, or to persons designated by him.

[1] The appeal of the surety company presents the question this day decided in *Kane v. Mendenhall* (Cal.Sup.) 56 P.(2d) 498. We there held that, in an action in the superior court against a real estate broker, the surety on his bond may be joined, although the penal sum of the bond does not exceed \$2,000, and it is not necessary to commence a separate action against the surety in the municipal court.

Appellant surety company also attacks the sufficiency of the complaint. It contends that it appears from the complaint that, in the transaction with plaintiff, defendant Kelley did not act as agent for defendant realty company, or as a real estate broker, but exchanged and sold property owned by him personally, and the bond did not cover fraud in such a transaction. Section 2 of the Real Estate Broker's Act

(Deering's Gen.Laws, Act 112, p. 25) provided at the time the transactions herein took place as follows:

"A real estate broker within the meaning of this act is a person, copartnership or corporation who, for a compensation, sells or offers for sale, buys, or offers to buy, lists, or solicits for prospective purchasers, or negotiates the purchase or sale or exchange of real estate * * * for others as a whole or partial vocation. * * *

"The provisions of this act * * * shall not apply to anyone who shall directly perform any of the acts aforesaid with reference to his own property."

[2] The appeal from the judgment herein is taken on the judgment roll alone. The case was tried by a jury. The court submitted special interrogatories to the jury in response to which it found that the acts of fraud were not committed by Kelley while acting for himself and in relation to his own property. In the absence of the evidence, it must be presumed that it supports the special findings and verdict of the jury.

[3] In support of its contention that the amended complaint fails to set forth a transaction in which defendant Kelley was acting as agent for the realty company, a real estate broker, appellant surety company relies on an agreement of exchange annexed to the complaint as an exhibit. Said agreement purports to provide for a transfer to Kelley of property owned by plaintiff in exchange for four lots in Manhattan Beach of which, the agreement recites, Kelley was the owner. Although the complaint is inartificially drawn, it is plain that plaintiff's case rests upon the premise that said agreement did not represent the true understanding, and that her execution thereof was obtained by fraud. According to the complaint, plaintiff, a widow, owned four parcels of real property. Defendant Kelley, acting as agent of the realty company, represented to her that he had a plan for disposing of her properties for \$6,500, which he could not reveal to her; that she must trust him implicitly, turn over her property and pay certain sums of money to him, and execute whatever instruments he required. Thereupon plaintiff executed the "purported agreement of exchange" of April 25, 1932, and deeds transferring her properties to Kelley. Kelley was president of the defendant realty company. Plaintiff alleges that Kelley executed to her deeds to four lots in the

city of Manhattan Beach, described as his property in the "purported agreement of exchange," and that it was understood that said lots were transferred to her as security for the promises of Kelley made in furtherance of the plan to dispose of her properties. She further alleges that said lots were encumbered and were of no value.

On the following day, she requested Kelley to return her properties to her and offered to pay him for any services rendered, but he represented that the properties were already under contract of sale. She then requested that an agreement be drawn up to set out the true understanding. Kelley replied that the first requirement of the plan was that plaintiff trust him implicitly, and thereupon he induced her to sign a "purported agreement," in form a listing agreement, authorizing Kelley to sell at \$6,500 the four Manhattan Beach lots transferred to her.

By deed dated August 6, 1932, and recorded November 30, 1932, lot 3 of the property in Los Angeles county which Kelley had induced plaintiff to transfer to him was conveyed to Lura A. Frantz, whom plaintiff alleges took without notice of her claim. On December 21, 1932, plaintiff paid \$203.50 to Kelley at his request to make payment on a deed of trust on the Manhattan Beach lots.

The above transactions all took place in 1932, while appellant was surety on the bond of defendant Co-operative Realty Company, Limited. Thereafter, in 1933, Kelley represented to plaintiff that it would be necessary for her to "repurchase" two of the four parcels theretofore transferred by her to him, "in order that they might both win out under this marvelous plan" to dispose of her properties; that "almost before plaintiff could believe it possible she would have her money back with a probable increase of tenfold more than plaintiff dared hope for." She paid \$800 in cash and transferred an equity worth \$300 in a lot in Los Angeles county to "repurchase" lot 105, in Florida, and \$800 to "repurchase" lot 1 in Los Angeles county.

At various times during 1932 and 1933 plaintiff made payments to Kelley totaling more than \$300, purportedly for services rendered by him in connection with the plan and for other items. In 1933 he also induced her to exchange stock of the par value of \$1,100 which she owned and \$300 in cash for two lots in Compton, representing that the exchange was temporary.

It is alleged that all these acts were done and representations made in pursuance of a conspiracy to defraud and cheat plaintiff of her moneys and properties, and that plaintiff relied on said representations. It is also alleged that in all these matters defendant Kelley acted and was engaged in the business of a licensed real estate broker and salesman and employee on behalf of the realty company. It cannot be held that the exchange agreement, annexed to the complaint as an exhibit, renders the above allegations as to agency a nullity and marks the transaction as the individual transaction of Kelley dealing with his own property. The complaint constitutes an attack on the agreement based on fraud of Kelley, acting on behalf of the realty company, of which he was president. Upon the complaint, plaintiff dealt with Kelley, acting as agent for the realty company, a real estate brokerage firm. The basis of her dealing was that Kelley, acting for the company, was to dispose of her property. This was a real estate brokerage transaction. The transfer by plaintiff of her property, in this analysis, was a transfer to Kelley as agent for the realty company. Plaintiff received a deed executed by Kelley conveying the four Manhattan Beach lots to her. He may have held title in his name as agent for the realty company. If he owned the lots personally, he may, nevertheless, have transferred property owned by him personally as security for his promises, made as agent of the realty company of which he was president, to dispose of plaintiff's properties under an advantageous plan which he represented he could not reveal to her. As we have heretofore said, the evidence has not been brought to this court, and it must be presumed that it supports the verdict of the jury.

[4] Appellant further contends that its demurrer to the amended complaint should have been sustained for insufficiency and uncertainty in alleging damages. In her first cause of action plaintiff set forth all transactions outlined above, and prayed for damages of \$10,261. In successive causes of action, she sought to separate the several acts of defendants and to allege separate damages therefrom. The manner in which plaintiff arrived at the figure of \$10,261 can be ascertained from a consideration of the items of damage as set forth in these successive causes of action. Appellant was surety on the broker's bond

of the realty company from January 8, 1932, to December 31, 1932. It cannot be held liable for acts of the broker subsequent to the expiration of its bond. *Palmer v. Continental Casualty Co.*, 205 Cal. 34, 269 P. 638.

[5-8] The basis of plaintiff's claim to damages is that the four parcels of property owned by her and transferred to defendant were worth \$6,500. Two of the four parcels were returned to her in 1933, upon her "repurchase." But for this return, the full value of the four parcels would represent the damage to plaintiff, and the surety would be liable for such damage to the extent of \$2,000, the penal sum of the bond, since the fraudulent transfer took place in 1932. Plaintiff alleged that the four Manhattan Beach lots which she received from Kelley were encumbered and were of no value. By virtue of the subsequent return to plaintiff in 1933 of two of the four parcels, her damages have been reduced by the value of these two parcels returned, or the value of the parcels returned less the amount which defendant Kelley charged her as a "repurchase" price—\$800 for lot 1 in Los Angeles county, and \$800 plus the value of her equity in a contract of purchase, charged for the return to her of lot 105 in Florida. In estimating her damages at \$10,261, plaintiff has charged the four parcels at their full value of \$6,500, and has added to this amount the sums paid by her in "repurchasing" the two parcels. This was improper, for the reason that two of the four parcels have been returned to her. The estimate of damages also includes those arising from the so-called exchange of her stock in 1933 for the Compton lots. This was a proper item as to Kelley and the realty company, but not as to the surety company, since it took place in 1933, after expiration of the bond. Since plaintiff's damages were reduced by virtue of the return of the two lots to her, she should have set forth the value of said lots. Without such an allegation it is impossible upon the complaint to fix any figure as the damages resulting from the acts alleged.

The demurrer should have been sustained. However, the defendants answered, the case was tried, and plaintiff's damages were fixed at \$4,500, a much lower figure than the amount of \$10,261, for which she prayed. Before a case will be reversed for error in overruling a demurrer attacking the sufficiency or certainty of allega-

tions of damage, it must appear that the appellant was prejudiced by the error. Otherwise, under section 41½, article 6, Constitution, the judgment must be affirmed. Insufficiency in the allegations of damage may be cured by failure on the trial to object to evidence regarding damages insufficiently alleged. In the instant case the evidence is not before us. In this situation it must be presumed that the issue of damages was fully and fairly tried and that no prejudice has resulted from the court's error in overruling the demurrer. *Nittler v. Continental Cas. Co.*, 94 Cal.App. 498, 271 P. 555, 272 P. 309; *Holland v. McDade*, 125 Cal. 353, 58 P. 9; *Stephenson v. Deuel*, 125 Cal. 656, 58 P. 258; *Williams v. Casebeer*, 126 Cal. 77, 84, 58 P. 380; *Rooney v. Gray Bros.*, 145 Cal. 753, 79 P. 523; *Dennis v. Crocker-Huffman, etc., Co.*, 6 Cal. App. 58, 91 P. 425. The complaint stated a cause of action for damages. The uncertainty went only to the amount thereof.

[9] No doubt the judgment of \$4,500 includes items of damage resulting from acts of Kelley in 1933, for which the surety was not liable. But the judgment against the surety is for only \$2,000 (the amount of the bond), and, in the absence of the evidence, it must be presumed that the court correctly instructed the jury, and that the evidence showed damages of at least \$2,000 on account of acts of Kelley in 1932, for which appellant surety company was liable. The judgment against the surety company must be affirmed.

[10, 11] Said surety company has also appealed from an order of the court below denying its motion to strike from the files as to it the memorandum of costs filed by plaintiff, and served on the surety. The judgment for \$2,000 against the surety expressly provided that it should be without costs, apparently in reliance on a provision of section 1032, Code of Civil Procedure (as added by St.1933, p. 1901), as follows: "Provided, that the plaintiff shall not recover costs when the judgment is one which could have been rendered by a municipal or inferior court within the same county or city and county." Under the authority of *Gould v. Moss*, 158 Cal. 548, 111 P. 925, where a judgment which does not carry costs has become final, whether correct or not, a defendant cannot be held for costs. A memorandum of costs filed against such defendant will be ordered stricken on motion, and, if no proper motion to strike is made, it must be disregard-

ed. We are of the view that the surety company's motion herein sufficiently presented as the ground for the motion the provision of the judgment providing for no costs against the surety. The notice of motion specifically stated that it would be based on the judgment.

The judgment is affirmed. The order denying the motion to strike the memorandum of costs from the file as to the appellant is reversed.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; CURTIS, J.; THOMPSON, J.



6 Cal.2d 57

MIDDLETON v. NEWPORT et al.

L. A. 14295.

Supreme Court of California.

April 1, 1936.

Rehearing Denied April 30, 1936.

1. Joint adventures ⇨5(2)

Evidence that joint adventure, formed to handle speculative realty marketing contract, under which two brokers were to contribute their sales organizations, had been terminated by abandonment by one broker who ceased to make further sales, and that his rights therein were barred by limitations and laches, where 11 years had elapsed after he had ceased to make sales before suit was brought, *held* to sustain judgment denying such broker's claim for an accounting of money received from sale of realty (Code Civ.Proc. § 318).

2. Joint adventures ⇨1

Partnership ⇨262

Partnership or joint adventure may be abandoned or dissolved by conduct inconsistent with its continuance, although liquidation is not completed or some appearances of partnership continue.

3. Limitation of actions ⇨103(1)

Where one of brokers entering joint adventure, formed to handle speculative realty marketing contract, under which each contributed his sales organization, ceased to make sales, assertion by other broker of

rights of ownership and control by carrying on sales venture himself constituted sufficient repudiation of rights of first broker to start running of statute of limitations both on first broker's personal claim or claim on any theory of trust (Code Civ.Proc. § 318).

In Bank.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by C. O. Middleton against F. P. Newport, the Security Trust & Savings Bank, and another, wherein defendant the Security Trust & Savings Bank filed a cross-complaint, and was succeeded by Frances McCourt in that capacity. Judgment for defendants, and plaintiff and the cross-complainant appeal.

Affirmed.

Anderson & Anderson, W. H. Anderson, Frank M. Gunter, Asa V. Call, H. R. Snyder and Call & Murphey, all of Los Angeles, for appellants.

Baillie, Turner & Lake, of Los Angeles, for H. F. Metcalf.

L. H. Cahill, of Los Angeles, for F. P. Newport Corporation.

Everts, Ewing, Wild & Everts, of Fresno, and McAdoo & Neblett, E. H. Mitchell, and W. C. Shelton, all of Los Angeles, for respondents.

LANGDON, Justice.

Plaintiff, Middleton, brought this action to establish an interest in certain lands and to obtain an accounting of money received by defendant Newport from the sale of other land. The controversy arose out of an original partnership or joint adventure in which the above-named parties, both real estate brokers, were engaged in 1913. The trial court gave judgment for defendants on the ground that Middleton had abandoned the project and any right to share in its profits, and also that his claims were barred by the statute of limitations (Code Civ.Proc. § 318) and by laches. The evidence as to the transactions in which the parties engaged is quite detailed, and sharply conflicting views are urged as to the legal effect thereof. Nevertheless, certain facts were satisfactorily proved, and these are sufficient to sustain the findings and judgment. A brief recital of the various transactions will make this clear.

Early in 1913 plaintiff, Middleton, and defendant Newport began negotiations to buy certain land at Long Beach Harbor, owned by Los Angeles Dock & Terminal Company, and consisting of 230 lots and 1,000 feet of harbor frontage. A contract of sale with Middleton and Newport as joint purchasers, at a price of \$225,000 payable in installments, was executed February 12, 1913. Prior thereto the parties had agreed that they would subdivide and sell the property together, each rendering services and furnishing his sales organization.

Neither party intended to put any considerable sum of money into the deal; the venture being a wholly speculative one looking toward the profits that might be made from the efforts of the parties devoted to a selling campaign. Accordingly, in order to raise money for payments under the contract, "Syndicate No. 1" was formed, consisting of Middleton, Newport, and several others. An agreement was then made whereby Middleton and Newport contracted to sell their land contract to the syndicate for \$275,000 payable in installments, and thereafter they were to proceed to subdivide and sell the property for \$400,000, as agents for the syndicate. By this contract a \$50,000 profit (less an agent's commission of \$5,000) was contemplated for Middleton and Newport, together with any amount over \$400,000 secured from sale of the lots. None of the syndicate members ever paid more than the first two payments, amounting to \$2,500 each.

It may be noted here that the joint adventure of Middleton and Newport no longer possessed any tangible assets, but had merely an agreement offering the members the possibility of profits from their efforts in making future sales of the lots. The \$2,500 payments made by Middleton and Newport were as members of the syndicate and did not constitute capital of the joint adventure. Later Middleton sold his syndicate interest to Frank Thomas.

By consent of the syndicate members, it was subsequently agreed that Middleton or Newport should receive compensation of 10 per cent. for sales made, which was later increased to 15 per cent., and still later, when Newport alone was making sales, to 25 per cent. In order to facilitate the raising of money by the syndicate, arrangements were completed under which title to 250 feet of the property was placed

in the Title Insurance & Trust Company, in trust for the syndicate holders, and, as consideration for the release of that property, the dock company (the unpaid seller) received \$12,500 on the price and a pledge of some of the certificates of interest of the syndicate members. This agreement was concluded September 3, 1913.

Despite his participation in the above modifying agreement, Middleton apparently lost interest in the project shortly after the original agreement of February, 1913. He became interested in another subdivision and removed his sales organization from the harbor property. He had various discussions with Newport in which he stated that his other ventures were requiring his full attention. There is evidence that Middleton expressed the opinion that the harbor deal was a failure and could not work out. He was asked by Newport what he proposed to do about it, and replied vaguely that he would either "come back into the picture" or "dig up some money" to carry out the agreement. But the witness Oylympius, publicity man for the project, testified that in various conversations during 1913 Middleton said that the harbor deal was a failure and that he was through with it and "wanted to get out from under." In fact, from March to August, 1913, Middleton's organization made gross sales of \$10,500, while Newport's force sold a total of \$131,250. In September, 1913, Middleton ceased his sales efforts entirely, and never resumed them. Thereafter Newport continued to carry on the entire work of sales, bookkeeping, and handling contracts, and also alone kept up the obligations, making payments on the original purchase contract, paying taxes and the cost of upkeep of the property, and eventually retiring the syndicate interests by purchasing them. He executed contracts of sale in his sole name as owner and seller.

In 1914 heavy floods ruined the market value of the harbor property. Thereafter Newport was unable to make any headway in sales, many cancellations of contracts occurred, and the venture was continuously delinquent in its obligations for some years. Middleton meanwhile was in financial difficulties with his creditors, and he practically ceased his activities as a real estate broker. In November, 1914, he made an assignment to Lasham and Hill, two of his creditors, of all money to come to him from the joint adventure up to \$8,000, the amount due them. Also in that

month he made a further assignment of his interest to Dodge and Dudley for the benefit of various creditors.

In 1915 the dock company commenced dredging work to restore the harbor, and a contract was made on December 1, 1915, under which Newport agreed to pay \$10,000 toward the cost thereof. In order to facilitate the transaction and clear the title to the property so that money might be borrowed on it, Newport assigned his interests in trust to L. V. Draper, and Middleton made a similar assignment to Draper, subject to his prior assignments to Dodge and Dudley. Dodge and Dudley likewise assigned to Draper so that Draper could borrow money for the purpose of paying the dock company. Security Trust & Savings Bank, cross-complainant herein, eventually succeeded to the rights of Dodge and Dudley.

As already stated, Newport ultimately carried out the project, paying off the obligations and carrying on sales, without any assistance from Middleton.

The fundamental situation appears quite clearly from these facts. A joint adventure was formed to handle a speculative real estate marketing contract by two persons who were to contribute only their sales organizations and efforts; and one party within a few months abandoned his efforts, and made no active claim of an interest until many years later, when changed conditions had made the venture nursed along by the remaining party a financial success. During most of 1916 and 1917 Middleton did nothing except occasionally ask Newport for a statement. Prior to a sales campaign in 1918, Newport wrote Middleton asking, in effect, for a statement of his intentions, declaring that he did not intend to carry the deal along as a partnership, with no assistance, and then divide the profits. Middleton offered nothing definite at this time, and in February, 1918, left the state for a period of three years, except for short visits, returning in 1921. In May, 1920, he wrote Newport demanding an accounting. Newport did not reply. In January, 1922, he again asked for a statement. Newport's reply was simply that he would be glad to render a statement "on what is known as the Long Beach waterfront deal." Nothing came of this. In May, 1924, this suit was filed.

[1] The trial court found that Middleton abandoned the joint adventure in Au-

gust, 1913, that his subsequent assignment to Draper conveyed nothing, since he had not rights to assign, and that the various other assignments to Draper and the transactions which followed did not constitute a revival of the joint adventure nor a new agreement between Middleton and Newport.

The court further found that Newport continuously from December, 1914, treated the property as his own and exercised complete management and control over it to the exclusion of Middleton and his successors in interest; that he treated the money derived from sales as his own; that on January 12, 1918, he repudiated in writing any alleged interest of Middleton; and that Middleton and his successors in interest had at all times from December, 1914, notice of Newport's acts and his position in this regard. The court concluded that whatever cause of action Middleton had arose in August, 1913, when the joint adventure was terminated by abandonment, and that, some eleven years having passed, the action was barred by the statute of limitations and laches.

There is, as appears above, abundant evidence to support these conclusions of the court. Plaintiff argues that there was a continual recognition of this interest by Newport, both in their correspondence and in his participation in several transactions involving the property, particularly the Draper trust. While these matters are perhaps open to different interpretations, we are satisfied that the trial court was justified in concluding that none of the negotiations had the effect of reinstating any interest Middleton formerly had as an active participant in the joint adventure.

[2, 3] It is, of course, entirely possible that an abandonment or dissolution of a partnership or joint adventure may take place by conduct inconsistent with its continuance, in spite of the fact that liquidation is not completed or that some appearances of partnership continue. See *Maryland Casualty Co. v. Little*, 102 Cal.App. 205, 282 P. 968; *Sly v. Abbott*, 89 Cal.App. 209, 264 P. 507; 47 Cor.Jur. 1110. It is further clear that, even if Middleton be considered not to have lost all interest in the assets of the adventure by abandonment, still the assertion by Newport of rights of ownership and control to the exclusion of Middleton constituted sufficient repudiation of the latter's rights to start

the running of the statute of limitations, both on his personal claim against Newport and on any theory of trust.

It follows that the judgment should be, and it is hereby, affirmed.

We concur: WASTE, C. J.; CURTIS, J.; THOMPSON, J.; SHENK, J.; SEAWELL, J.; CONREY, J.



6 Cal.2d 43

Ex parte BUSH.
Cr. 3945.

Supreme Court of California.

April 1, 1936.

Rehearing Denied April 30, 1936.

1. Automobiles ⇨74

Statute imposing license fee for transportation by motor vehicle on public highways for hire or compensation, either directly or indirectly, *held* revenue measure designed to secure fair return for use of public highways of state in transporting personal property for compensation (St.1933, p. 928).

2. Automobiles ⇨76

Statute imposing license fee for transportation on highways by motor vehicle which omitted reference to carriers found in other tax statutes *held* not limited to common carriers and private contract carriers engaged in business of transportation, notwithstanding use of word "business" in sections providing for determination of gross receipts and refunds (St.1917, p. 330, as amended; St.1927, pp. 1742, 1745, §§ 1, 7; St. 1933, pp. 928, 933, 935, §§ 1, 9, 12; St.1935, pp. 878, 1057, 1830).

3. Automobiles ⇨76

Under statute imposing license fee for transportation on highways by motor vehicle for hire or compensation either directly or indirectly, operator of bulk gasoline station using his own truck in making necessary deliveries under contract with refining company and receiving commissions on sales *held* subject to tax on gross receipts derived

from transportation operation, regardless of whether agent of refining company or independent contractor (St.1933, pp. 928, 933, 935, §§ 1, 9, 12).

4. Automobiles ⇨107(2)

Difficulty of ascertainment of part of income of bulk gasoline station operator which was directly or indirectly compensative for transportation operation within statute imposing license fee for transportation on highways by motor vehicle *held* insufficient to excuse noncompliance with statute (St.1933, p. 928).

5. Statutes ⇨121(1)

Statute entitled "An act imposing a license fee or tax for transportation of persons or property for hire or compensation upon the public streets, roads and highways in the state of California by motor vehicle," as construed to apply to persons transporting their own property, *held* not unconstitutional on ground that title was not sufficiently broad to embrace subject-matter (St. 1933, p. 928; Const. art. 4, § 24).

6. Automobiles ⇨73

Statute imposing license fee for transportation of persons or property on highways by motor vehicle for hire or compensation *held* not unconstitutional discrimination against merchant selling and delivering petroleum products (St.1933, p. 928).

7. Automobiles ⇨73

Exemption of motor vehicles operated exclusively within incorporated cities or towns or between incorporated cities or towns, where no portion of public highway outside corporate limits was traversed, *held* not to render unconstitutional statute imposing license fee for transportation on highways by motor vehicle (St.1933, p. 928).

8. Constitutional law ⇨287

Statute imposing license fee for transportation on highways by motor vehicle, based on gross receipts derived therefrom, *held* not unconstitutional as providing for deprivation of property without due process of law because of failure to specify method for determination of proportionate part of gross receipts subject to tax, where gross receipts of business were compensative for such transportation only in part, in view of provision for adjustment of tax when taxpayer was dissatisfied (St.1933, p. 933, § 9).

In Bank.

Original proceeding in the matter of the application of C. E. Bush for a writ of habeas corpus.

Writ discharged and petitioner remanded.

E. S. Williams, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John O. Palstine, Deputy Atty. Gen., for respondent.

CURTIS, Justice.

Petitioner seeks a release on habeas corpus from his detention by the constable of the seventh township, in the county of Kern, state of California. Petitioner was arrested in said county, pursuant to a warrant of arrest issued upon the filing of a complaint in the justice's court of said township. In the complaint, the petitioner was charged with a violation of the provisions of the California Motor Vehicle Transportation License Tax Act, which is hereinafter referred to as the License Tax Act of 1933 (Stats.1933, p. 928). The complaint set out in detail the manner in which petitioner operated a motortruck upon the highway of the state of California, and charged: "That while and in and for the purpose of performing the services and carrying on the business and operations aforesaid pursuant to said agreement [hereinafter discussed] said defendant on or about the 18th day of October, 1935, did drive his said truck which had been loaded with products such as aforesaid at said bulk station, and while the same was so loaded, upon the public highway in said seventh township, county of Kern, state of California, and outside of any incorporated city or town without first obtaining the license for which provision is made in the California Motor Vehicle Transportation License Tax Act, of the state of California, and without carrying or displaying upon said motor vehicle so used any number plate or emblem for which provision is made in said act, and having failed and neglected and refused to make any return or report as required under said act, and without paying and having failed and neglected and refused to pay any license tax to the state controller of California as required to be paid in said act."

The following facts appear from the allegations of the complaint: Petitioner is the owner of a certain motor vehicle, con-

sisting of a truck with a tank installed thereon suitable for and used by him in the hauling of gasoline and other refined petroleum products upon the highways of the state. Petitioner, on November 1, 1934, entered into a written agreement with the Texas Company, a corporation, engaged in the business of producing, refining, manufacturing, selling, and dealing in petroleum oil and gas and the products thereof within the state of California. By said written agreement, which is set out in full in the complaint, the petitioner agreed to become the "agent" of the Texas Company to manage a certain "bulk station" in the city of Taft, Cal., and to use his own truck in making the necessary deliveries of gasoline and other petroleum products from said bulk station to customers within a certain specified district. The customers in the territory covered by said agreement consist of automobile or gasoline service stations and business concerns which buy in large quantity gasoline and other petroleum products. Said truck belonging to petitioner is painted in the color, to wit, red, adopted and used by the Texas Company for painting various structures and equipment used in its business, and on each side of the tank on said truck was painted in letters twelve inches in height the word "Texaco," which is the trade-name of the Texas Company, and on each side of the cab of said truck was painted the legend, "C. E. Bush, Agent, The Texas Company," and on the back of said tank and on each side of the cab of said truck was painted the trade-mark of the Texas Company. Under the written agreement with the Texas Company, petitioner's chief duties consist in the selling of the company's products in a prescribed territory surrounding said bulk station and in delivering the same in his own truck when deliveries were required. For his services the company agreed to pay him certain commissions upon his sales of gasoline and petroleum products which varied both with regard to the type of product involved and according to whether or not the product was delivered by petitioner at the bulk station or delivered to the customer by the petitioner in his own truck. For example, he received 1 cent per gallon for Ethyl gasoline when the sale was made at the bulk station and two cents on such sale when the gasoline was delivered in his own truck; 1 cent per gallon for Calpet gasoline when the sale was made to the customer at the bulk station and 1½ cents per gallon when the gasoline was delivered to

the customer by truck. In like manner, a higher commission was received by him per gallon of Fire Chief gasoline and kerosene sold and delivered than for such gasoline or kerosene sold at the bulk station. Certain equipment and facilities at the bulk station consisting of two tanks of 20,000 gallon capacity each for the storage of gasoline, and similar refined products were owned by the Texas Company, including loading platform, warehouse for the storage of lubricating oils and greases, and certain office equipment, all of which were located on land leased to the Texas Company. It also appears that, in addition to soliciting sales for the company and selling and delivering the products of said oil company, the petitioner herein had certain other duties in connection with the maintenance of the bulk station in proper order and certain clerical work necessarily involved in the sale of such products and in the collection of the purchase price thereof. Title to the gasoline and petroleum products was never transferred to petitioner, and immediately upon making collections he banked all such receipts to the account of the Texas Company. In the case of any bad accounts, the only loss sustained by the petitioner was the loss of his commission on such sale, except in the case of unauthorized extension of credit, in which event the petitioner was personally liable for the entire account. Petitioner received in one lump sum compensation figured on the commission basis as set out in the agreement for all of the services furnished and duties performed by him.

Petitioner refused to comply with any of the provisions of said License Tax Act of 1933, claiming under the set of facts above outlined, that he was not an "operator" within the meaning of said act, and that said act had no application to him nor to his transportation operations. In support of his petition for the writ, petitioner advances two main arguments: (1) That the License Tax Act of 1933 applies only to transportation upon public highways engaged in as a business; that is, by common carrier and by private contract carriers as transportation agencies; and (2) that the License Tax Act of 1933, as applied to the operations of petitioner, is unconstitutional and contravenes provisions of both the State and Federal Constitutions.

The first issue before the court is therefore primarily one of statutory construction. The question thus presented is: Does

the License Tax Act of 1933 apply solely and exclusively to common carriers and private contract carriers in the business of transporting persons and property upon the public highway for hire or compensation? Petitioner argues that the act extends only to such carriers, and that, in whatever light his transportation operations are viewed, he does not come within the category of a carrier, either common or private contract carrier, and hence the act has no application to him. It is petitioner's position that a bulk station operator in delivering gasoline and petroleum products is merely an agent or employee in the business of his principal, the oil company, and that such hauling is merely delivery service incidental to that business. If, however, the bulk station operations be considered the business of the operator himself, petitioner insists it would be the business of a merchant in which the hauling would be but incidental to the whole business of merchandising.

[1, 2] An examination of the exact terminology of the act itself, including both the title of the act and the definition of "operator," therein specified as subject to taxation, clearly shows that the act is not limited to "carriers" or those who are engaged in the business of transportation of persons and property. The title to said act is as follows: "An act imposing a license fee or tax for the transportation of persons or property for hire or compensation upon the public streets, roads and highways in the State of California by motor vehicle." Section 1 of said act provides that: "The word 'operator' shall include all persons, firms, associations and corporations who operate motor vehicles upon any public highway in this State and thereby engage in the transportation of persons or property for hire or compensation, either directly or indirectly." There can be no doubt, of course, that carriers are included within such terminology. But the very phraseology employed likewise compels the conclusion that the act was not intended to be limited to such carrier service but was purposely phrased to include in addition other transportation upon the public highways for hire or compensation, directly or indirectly. Compensation for transportation service of either common or private contract carrier is direct compensation, and the very fact that the act expressly defines an operator as one who operates a motor vehicle for compensation, either directly or indirectly, supports the conclusion that the act was intended to have a wider application than to carriers alone.

It is also most significant that in the title of the act and in the section of the act defining those persons, firms, associations or corporation taxable neither the word, "carrier" nor the words "in the business of transportation" are to be found. In view of the fact that such words are to be found in a prior statute dealing with the regulation of carriers engaged in the business of transportation of persons and property for hire (Stats.1917, p. 330), and are also found in the statutes of other states, the absence of such words would indicate that such limiting words had been purposely avoided in the drafting of said act, and that, by refraining from using such limiting words, the Legislature expressed its intention of not circumscribing the scope of the act to those engaged in the business of transportation as carriers.

The fact that subsequent acts enacted in 1935 which are not tax acts but regulatory acts (Stats.1935, chaps. 223, 312, and 664, pp. 878, 1057, 1830) deal with the transportation of property for compensation or hire as a business and contain many terms employing the words "carrier" and "in the business" or "as a business" is not persuasive that the License Tax Act of 1933 was intended to deal solely with transportation operations as a business. Indeed, the very fact that such terms were deliberately used in the 1935 regulatory acts, and not used in the License Tax Act of 1933, would lead to an opposite conclusion.

It is true that the word "business" appears twice in the License Tax Act of 1933. Under the definition of "gross receipts from operation" (section 1, subd. (d), the act provides that such receipts shall include all receipts from the operation of such motor vehicle or motor vehicles beginning and ending entirely within this state and a proportion based upon the proportion of the mileage within this state to the entire mileage over which such business is done of gross receipts of such operator on all business passing through, into, or out of this state, or partly within and partly without this state. Section 9 of the act provides that: "If during any calendar year, any operator pays hereunder license taxes which together with all other taxes and licenses, State, county and municipal, upon the property of such operator used exclusively by him in his business of transporting persons or property for hire or compensation over the public highways of this State, exceed five per cent of the gross receipts from operations of such operator in this

State for such calendar year, the difference between five per cent of such gross receipts and the total amount of such taxes and licenses paid during the calendar year shall be credited on any license taxes thereafter due from such operator under this act, and the balance shall be refunded to such operator." It is to be noted that this latter reference is to be found in a section which provides for a refund to be made in the event payments by an operator of other license fees and taxes to the state, county, or municipalities upon property used exclusively in the business of transporting persons or property exceeds a certain amount, and is not found in a section which deals directly with the applicability of the act to such transportation operations. It should be noted, in this regard, that section 12, which deals with penalties to be invoked for the violation of the act, contains not a single word or term to indicate that the act is limited to transportation as a business. The reference to "business," therefore, found in section 9 and subdivision (d) of section 1, in view of the language of the other provisions of the act, is not sufficient, in our opinion, to compel a conclusion different from that at which we have already arrived; that is, that the act was not intended to be limited to carrier service, but was intended to include, in addition, other transportation upon the public highways for compensation.

Petitioner contends that the history of California legislation with reference to transportation of persons and property upon the public highways of the state for hire or compensation supports his position that said License Tax Act of 1933 was intended to apply only to carriers engaged in the business of transportation, and was never intended to apply to any operation not within such category. Such conclusion is not, we think, necessarily deducible from the history of California legislation upon this subject. The history of such legislation discloses two distinct lines of statutes. One line was enacted for the purpose of regulating the business of transportation by motor vehicles of persons or property for hire or compensation upon the public highways. Stats.1917, p. 330, and amendments; Stats. 1935, chaps. 223, 312 and 664. The following cases are pertinent to the subject of the regulation of such transportation operators; *Western Ass'n of Short Line Railroads v. R. R. Commission*, 173 Cal. 802, 162 P. 391, 1 A.L.R. 1455; *Frost v. Railroad Commission*, 197 Cal. 230, 240 P. 26;

Frost & Frost Trucking Co. v. Railroad Commission, 271 U.S. 583, 46 S.Ct. 605, 70 L.Ed. 1101, 47 A.L.R. 457; Holmes v. Railroad Commission, 197 Cal. 627, 242 P. 486; Haynes v. MacFarlane, 207 Cal. 529, 279 P. 436; Forsyth v. San Joaquin Light, etc., Corp., 208 Cal. 397, 281 P. 620; Landis v. Railroad Commission, 220 Cal. 470, 31 P.(2d) 345. The License Tax Act of 1933 was enacted as a step in the second line, that of certain acts and constitutional provisions which were primarily revenue measures, designed to secure for the state a fair return for the use of the public highways of the state in transporting persons or property for compensation. Stats.1923, p. 706; Stats.1925, p. 833; Stats.1927, p. 1708; Stats.1927, p. 1742; California Constitution, art. 13, § 15 (adopted in 1926); Pol. Code, §§ 3664aa, 3670bb, 3670cc; Stats. 1933, p. 928. These enactments have been before the courts of this state in the following cases: Bacon Service Corporation v. Huss, 199 Cal. 21, 248 P. 235; In re Schmolke, 199 Cal. 42, 248 P. 244; Los Angeles, etc., Transp. Co. v. Superior Court, 211 Cal. 411, 295 P. 837; Alward v. Johnson, 208 Cal. 359, 281 P. 389; People v. Duntley, 217 Cal. 150, 17 P.(2d) 715; People v. Lang Transportation Co., 217 Cal. 166, 17 P.(2d) 721. An analysis of the legislative history discloses the fact that all the statutes dealing with the regulation of transportation agencies refer to persons in the business of transportation of persons or property upon the public highways for hire or compensation. On the other hand, sections of the 1923 and 1925 tax acts defining those subject to taxation thereunder did not so provide. In fact, both acts specifically exempted any person "who solely transports his or its own property." In the 1927 amendment to the 1925 act, this exemption was eliminated and the words "directly or indirectly" were added to the definition of "operator." Stats.1927, p. 1742, § 1. On January 1, 1928, the constitutional provisions of article 13, § 15, and Political Code, 3664aa, 3670bb, 3670cc, went into effect and said 1927 act became ineffective. Subsequently these sections of the Constitution and Political Code were held to apply only to common carriers and not to private contract carriers or other operators. People v. Duntley, 217 Cal. 150, 17 P.(2d) 715; People v. Lang Transportation Company, 217 Cal. 166, 17 P.(2d) 721. Thereafter the License Tax Act of 1933 here involved was enacted which employed the same language with reference to the definition of an oper-

ator as that used in the 1927 act. Section 7, however, of said 1927 act (St.1927, p. 1745, § 7), which imposed penalties for the violation thereof, provided that "any person, firm, association or corporation who shall use any public highway in this state for the transportation of persons or property for hire, either as a public or a private carrier, without first obtaining the license for which provision is herein made * * * shall be guilty of a misdemeanor." Section 12 of the License Tax Act of 1933, which is the section imposing penalties, provides that "any person, firm, association or corporation who shall use any public highway in this State for the transportation of persons or property for hire or compensation without first obtaining the license for which provision is herein made * * * shall be guilty of a misdemeanor." The words "either as a public or a private carrier" used in the 1927 act, it is thus seen, were deleted from the License Tax Act of 1933. It seems reasonable to conclude that the purpose of the License Tax Act of 1933 in using the terminology of the 1927 act, from which the exemption of any person who solely transports his or its own property had been purposely eliminated from a former act, and in deleting from another section of the 1927 act any terminology which would limit the application of the act to public or private carrier, was intended to have a broader scope than the taxation only of those who were carriers or engaged in the business of transportation of persons or property upon the public highways for hire or compensation.

Petitioner has cited authorities from other jurisdictions construing statutes relating to the same subject-matter. Although some of these authorities involve bulk station operators, in view of the fact that the language of the California statute to be construed is distinctly different in phraseology and terms from the statutes of those other jurisdictions, these authorities are of little assistance and, of course, are not determinative of the meaning of the California act.

We are satisfied that the purpose of the enactment of the License Tax Act of 1933 was to secure a fair return to the state for the use of its public highways, not only from carriers, both common carriers and private contract carriers, but also from the larger class of persons who fairly answer to the description of "operator" therein defined as taxable and who receive compensa-

tion, either directly or indirectly, from the use of the public highways. Although it is true that the Legislature might legally have limited the application of such taxes to carriers, it evidently seemed more just and fair to the Legislature, as it does to us, that all those who receive compensation directly or indirectly from the use of the public highway should bear a proportionate share of the burden of its maintenance.

[3, 4] We are also satisfied that, in whatever light we view petitioner's operations, petitioner is subject to the provisions of said act, and is subject to the 3 per cent. tax therein imposed upon his gross receipts derived from his transportation operations. By reason of the fact that the Texas Oil Company retains title to the gasoline and petroleum products transported and distributed by petitioner to the customers, his contention that, if his operations be considered as his own business, he is in the business of a merchant in which delivery of the petroleum product is but incidental to the whole business of merchandising, is without merit.

The further contention of petitioner that the delivery by him of the oil company's products under his written agreement with the oil company is in fact a delivery by the oil company of its own goods to its customers for which the company receives no compensation, either directly or indirectly, and for which delivery it should pay no tax, is, we think, also untenable. While the acts of 1923 and 1925 expressly exempted those who solely transport their own property from the payment of any tax, this exemption clause was omitted from the License Tax Act of 1933, and no kindred or similar provision is to be found therein. It might be held therefore in a proper case that even a person who transports his own property is liable for the tax provided for in the License Tax Act of 1933. No such question is presented to us in the instant proceeding, and we expressly refrain from deciding such question. No attempt was made to collect said tax from the oil company. In the present action, the oil company does not own the truck in which its products are transported. On the other hand, petitioner not only owns the truck but he is paid a fixed compensation for transporting therein over the highways of the state the company's property. He therefore comes within the express provisions of the act and is liable for the payment of the tax provided therein. We think this is so whether he be held in a strictly legal sense to be the agent of the company in the transaction

of its business or as an independent contractor. In a sense, the company acts through him in the delivery of its products, and in the same sense it acts through a carrier when it employs the latter to make delivery. In both cases it is the "operator" of the truck who is using the highway for the transportation of property for hire or compensation, and who is therefore subject to the tax. As stated before, the act is strictly a revenue measure, and its purpose is to collect a reasonable remuneration from those who use the highway in certain gainful occupations.

It is therefore evident that petitioner, upon that portion of his compensation from the Texas Company which he receives for his services, which consist of the delivery of the company's products, is subject to the License Tax Act of 1933. While it may be true that the exact portion of his income which is directly or indirectly compensative for transportation operations may be somewhat difficult of ascertainment, this fact alone cannot of course furnish an excuse for noncompliance with the act.

[5] We have carefully considered the various grounds advanced by petitioner as reasons for holding the License Tax Act of 1933 unconstitutional, and are convinced that none of them is tenable. There are two answers to his first objection that, if the License Tax Act of 1933 is construed as applying to persons transporting their own property, the act would be unconstitutional under section 24 of article 4 of the Constitution in that the title of the act is not broad enough to embrace transportation upon the highways of one's own property: First, we have held that the operations of petitioner herein which are subject to taxation under the act are not a taxation of the transportation of one's own property upon the highway. Secondly, the title of the act hereinbefore quoted is sufficiently broad, in our opinion, to cover even the transportation of one's own property upon the highway if compensation is received therefor. See *Collins-Dietz-Morris Co. v. State Corporation Commission*, 154 Okl. 121, 7 P. (2d) 123, 80 A.L.R. 561.

[6] The argument that this License Tax Act of 1933 is special legislation and discriminatory as between merchants selling and delivering petroleum products and merchants selling and delivering other forms of merchandise is based upon an assumption that the state board of equalization intends to apply said act only to transporters of petroleum products. There ap-

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Supreme Court of California.

April 6, 1936.

pears to be no basis for this assumption. Doubtless the state board of equalization will faithfully perform its duty and tax all operators who fairly come within the definition of operator as defined by said act.

[7] No valid complaint can be made that the act is unconstitutional by virtue of the fact that section 14 thereof exempts from its operations motor vehicles operated exclusively within incorporated cities or towns and also motor vehicles operating between incorporated cities or towns, where no portion of the public highway outside of the corporate limits of said cities or towns is traversed in said operation. Similar provisions in the 1923 and 1925 acts were upheld in *Bacon Service Corporation v. Huss*, supra, and *In re Schmolke*, supra. The tax is placed upon those obtaining compensation for the use of the public highways. The fact that petitioner by reason of his operations upon the public highways outside the incorporated cities or towns is unable to bring himself within the exemption of said act, with the result that he is required to pay a tax based upon both his operations outside the incorporated cities and towns and also within the cities and towns, whereas those who bring themselves within the exemption are not required to pay a tax upon their city operations, is not fatal to the validity of the act. Some inequalities are bound to occur even in classifications which are manifestly fair and just.

[8] The fact that said act does not specify any method by which it may be determined what part of the gross receipts of petitioner's business and operations are from or should be allocated to the operation of transportation of property upon the public highways does not render such act unconstitutional. Petitioner argues that any assessment of a license tax upon any part of the gross receipts of petitioner's business would be wholly arbitrary and thereby deprive petitioner of his property without due process of law. There is no warrant for the assumption that an assessment will be made arbitrarily. If petitioner is dissatisfied, he may proceed under section 9 of said act to have said matter adjusted.

The writ is discharged, and the petitioner is remanded.

We concur: WASTE, C. J.; SEAWELL, J.; LANGDON, J.; CONREY, J.; SHENK, J.; THOMPSON, J.

1. Trial ⇨177

In action for fraud, trial by jury *held not* waived because defendants and plaintiff moved for instructions directing verdict where parties were not in agreement that evidence was without conflict, but each was contending that all of inferences of fact ran in his favor (Code Civ.Proc. § 631, subd. 3).

2. Trial ⇨177

Trial by jury in action for fraud *held not* waived on ground that both sides moved for directed verdict where plaintiff's requested instruction for directed verdict was not a "motion for directed verdict" (Code Civ.Proc. § 631, subd. 3).

[Ed. Note.—For other definitions of "Motion," see Words & Phrases.]

3. Trial ⇨176

Motion for directed verdict is regarded as demurrer to evidence, and hence such motion alone does not waive submission of case to jury on denial of motion (Code Civ.Proc. § 631, subd. 3).

4. Conspiracy ⇨13

In action by building and loan association's trustee in bankruptcy for conspiracy to defraud bankrupt in misrepresenting value of assets of another building and loan association which bankrupt had acquired, if proof showed conspiracy, defendant bank could not claim distinction between those acts in which it participated and those acts and representations in which bank had no part, since bank would be answerable for all of acts and statements of its coconspirators.

5. Appeal and error ⇨927(7)

On appeal from judgment for plaintiff on directed verdict, appellate court must disregard all conflicts in evidence and accept as true evidence which tends to show defendant blameless, and must draw all inferences from facts in evidence most strongly in favor of defendant.

6. Conspiracy ⇨13

Where conspiracy exists, none of conspirators are to be exonerated merely because means employed to accomplish common pur-

pose were unknown or unanticipated in beginning, or because they did not join in or know of acts of their coconspirators, or because object accomplished differs from one originally contemplated.

7. Conspiracy ☞1

* "Conspiracy" is a combination of two or more persons to accomplish by concerted action a criminal or unlawful purpose or a lawful purpose by criminal or unlawful means, essence of conspiracy being that parties should have common purpose or design.

[Ed. Note.—For other definitions of "Conspiracy," see Words & Phrases.]

8. Conspiracy ☞21

In action by building and loan association's trustee in bankruptcy against promoters of another building and loan association which had been acquired by bankrupt, and against bank, on ground of conspiracy to defraud bankrupt, if conspiracy was shown, whether acquisition of bankrupt's certificates for bonds of acquired association was within common purpose of guilty defendants was question of fact.

9. Conspiracy ☞21

In action by building and loan association's trustee in bankruptcy against promoters of another building and loan association which had been acquired by bankrupt, and against bank, whether bank conspired with codefendants to defraud bankrupt in exchanging bankrupt's certificates for bonds of acquired association held for jury.

10. Damages ☞18

Generally, wrongdoer is liable to person injured in compensatory damages for natural and direct or proximate consequences of his wrongful act or omission (Civ.Code, § 3333).

11. Negligence ☞136(25)

Where different conclusions may be drawn from evidence as to whether act is proximate cause of injury or damage, question should be left to jury (Civ.Code, § 3333).

"Proximate cause" of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause.

[Ed. Note.—For other definitions of "Proximate Cause," see Words & Phrases.]

12. Fraud ☞64(1)

In action by building and loan association's trustee in bankruptcy against promoters of building and loan association which had been acquired by bankrupt, and against bank for fraud in inducing bankrupt to exchange its certificates for bonds of acquired association, whether bank's misrepresentations that acquired association held valid permit to do business and that acquired association had in bank certain sum of money were proximate cause of bankrupt's loss because acquired bonds were worth half of their alleged value held for jury (Civ.Code, § 3333).

13. Fraud ☞30

That bank, through use of certificate of deposit, made it possible for building and loan association to sell its stock as that of an operating building and loan association did not render bank liable for distinct and independent frauds, consisting of representations in which bank did not participate, or which bank could not reasonably have anticipated would be made.

14. Fraud ☞64(1)

In action by building and loan association's trustee in bankruptcy against promoters of another building and loan association which had been acquired by bankrupt, and against bank which had certified that it had certain sum of money belonging to acquired association, for fraud in inducing bankrupt to exchange its certificates for bonds of acquired association, whether representations as to value of bonds and other assets were statements of fact or mere expressions of opinions held for jury.

15. Fraud ☞64(3)

In action by building and loan association's trustee in bankruptcy against promoters of another building and loan association which had been acquired by bankrupt, and against bank, for fraud in inducing bankrupt to exchange its certificates for bonds of acquired association, question of fraudulent nature of statements as to value of bonds held for jury.

16. Bankruptcy ☞303(2)

In action for fraud by building and loan association's trustee in bankruptcy against promoters of another building and loan association which had been acquired by bankrupt, and against bank, that one of promoters of acquired association was director of bankrupt and hence in fiduciary relation held immaterial as respects bank's liability which

depended on actual fraud or on participation with guilty knowledge in breach of duty of bankrupt's fiduciaries.

17. Pleading ⚖️248(2)

Change of theory as to basis of recovery or as to measure of damages is not change of cause of action or substitution of new and different action for original.

18. Limitation of actions ⚖️127(3)

Amended complaint *held* not to state new cause of action so as to be barred by limitation where party claiming bar of statute was made defendant by original complaint which set up same transaction and sought recovery of damages, and amended complaint was but amplification of original.

19. Bankruptcy ⚖️145(4)

Trustee in bankruptcy of building and loan association *held* entitled to maintain action for fraud in inducing bankrupt to exchange its certificates for bonds of another building and loan association which bankrupt had acquired.

20. Bankruptcy ⚖️290

Building and loan association's trustee in bankruptcy *held* not estopped from maintaining action for fraud in inducing bankrupt to exchange its certificates for bonds of another association which bankrupt had acquired on ground that bankrupt knew that it had been defrauded for two years before bringing action and that in meantime defendant acquired assets of codefendant without knowledge of bankrupt's claims against codefendant, where it was not shown that bankrupt knew of defendant's purchase of codefendant's assets and no injury to defendant was alleged or shown.

21. Bankruptcy ⚖️145(4)

As respects right of trustee in bankruptcy of building and loan association to recover damages for fraud in inducing bankrupt to exchange its certificates for bonds of another building and loan association which bankrupt had acquired, bankrupt *held* not required to recoup its loss by questioning validity of certificates transferred to innocent purchasers, since bankrupt's loss was fixed when it parted with its property, and bankrupt was not obliged to engage in litigation with certificate holders who were innocent victims of fraud.

—◆—
In Bank.

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Judge.

Action by Myron H. Wells, as trustee in bankruptcy for the estate of the Bay Cities Guaranty Building-Loan Association, bankrupt, who was substituted as plaintiff in the place and stead of the Bay Cities Guaranty Building-Loan Association, against Elwood Lloyd IV and others. From a judgment, the Bank of America and another appeal.

Reversed.

Prior opinion, 47 P.(2d) 761.

Freston & Files, of Los Angeles (Louis Ferrari, of San Francisco, and Edmund Nelson, of Los Angeles, of counsel), for appellants.

Guy Richards Crump, A. I. McCormick, and J. N. Nealon, all of Los Angeles, for respondent.

PER CURIAM.

After further consideration of this cause, we are satisfied with the disposition made by the District Court of Appeal, Second District, Division 1, and we hereby adopt as our opinion the opinion of that court by Mr. Justice Shinn, sitting pro tempore:

This is an action prosecuted by the trustee in bankruptcy of the estate of Bay Cities Guaranty Building-Loan Association, a corporation, bankrupt, to recover damages alleged to have been suffered by the bankrupt corporation by reason of alleged fraudulent acts of the defendants. The action was brought by the corporation before bankruptcy, the trustee, as such, being thereafter substituted as plaintiff. Upon the trial the action was dismissed as to all defendants except Merchants National Trust & Savings Bank of Los Angeles, herein referred to as the bank, and its successor, Bank of America.

The case was tried before a jury which, under an instruction of the court so to do, rendered a verdict in plaintiff's favor. The question of the amount of plaintiff's damage was submitted to the jury and was fixed by the verdict at the sum of \$60,000.

Appellants assign error in the giving of the first instruction, contending that no fraud was shown on the part of the bank and that in any event there were issues of fact other than the question of damages, which should have been submitted to the jury. In addition to a denial of the claims of appellants, respondent takes the position that trial of questions of fact by the jury, except as to the issue of damages, was

waived. The alleged waiver is to be found, if at all, in an agreement of the parties that there were no questions of fact to be decided and that therefore the case should be withdrawn from the jury and decided by the court upon the questions of law presented. Whether there was such an agreement must be determined from a consideration of the acts and statements of the parties at the time the evidence was closed. At that point defendant made a motion for nonsuit, specifying certain grounds therefor. This motion was denied. Defendant then moved the court that the jury be instructed to render a verdict for defendant, basing this motion upon the same grounds as the motion for nonsuit. This motion was denied. Instructions were presented to the court by each party, those of the defendant, at least, covering the entire case. The case was argued to the jury and, upon conclusion of the argument, the court instructed the jury to render a verdict in plaintiff's favor and to assess the damages according to the theory adopted by the court for the measurement thereof. The instruction for directed verdict was requested by plaintiff. Plaintiff now invokes the rule that mutual requests for an instructed verdict amount to a withdrawal of the case from the jury and a consent that the same may be decided by the court. This rule is one which has received general recognition in the greater number of state courts and in the federal courts. In numerous other jurisdictions the courts have declined to adopt it. The question has not been presented to an appellate court in California, at least no decision has been cited to us dealing with this question.

The basis of the rule relied upon by respondent; which is sometimes referred to as the New York rule, is that mutual motions for an instructed verdict amount to a waiver of trial by jury. The foundation of the waiver rests in the tacit agreement that there are no questions of fact for the jury to determine. The waiver of jury trial is held to be the necessary result of such agreement. *Beuttell v. Magone*, 157 U.S. 154, 15 S.Ct. 566, 39 L.Ed. 654; see, also, 64 Cor.Jur. 434, and notes 18 A.L.R. 1433, and 69 A.L.R. 634. The rule does not apply where either of the moving parties, after denial of the motions, requests that the case be submitted to the jury. *Empire State Cattle Co. v. Atchison, T. & S. F. R. Co.*, 210 U.S. 1, 28 S.Ct. 607, 52 L.Ed. 931, 15 Ann.Cas. 70. See note, 18 A.L.R., pages 1446 and 1449.

In the states where the rule is not followed it is held that motions by each of the parties for a directed verdict do not, of themselves, establish consent that no questions of fact are involved, and therefore do not amount to a waiver of trial by jury. In these states it is held that a case may be withdrawn from the jury, but that something more than motions of each party for a directed verdict is required to show an agreement to a trial by the court, such as an express agreement that there is no dispute as to the facts or an express waiver of jury trial in connection with motions for an instructed verdict.

[1-3] Well-reasoned opinions are to be found supporting the general rule and also in opposition thereto. The question in each case is whether the record shows a sufficient waiver of jury trial. In this state there are several methods by which a jury may be waived. The only one which might apply here is the one found in subdivision 3, § 631, Code of Civil Procedure, which provides that the waiver may be made by oral consent in open court, entered in the minutes. We are of the opinion that the proceedings had, as set forth herein, do not show a waiver. The parties were not in agreement that the evidence was without conflict. Each was contending that all of the inferences of fact ran in his favor. According to the plaintiff, fraud on the part of the bank was proven and damage as the direct result thereof. According to the defendant, no fraud was shown nor any damage resulting from the acts of the defendant bank. Where the opposing parties hold such contrary views as to what facts are proved directly, or by inference, it is difficult to understand how it can be said that the parties agree that the facts are undisputed and that questions of law only are involved. In some jurisdictions where the majority rule has been long established, motions by each party for a directed verdict are held to amount to a waiver of jury trial, even though the facts are in dispute. But we think there is no reason why the rule of implied waiver should ever be followed except where it clearly appears that the parties have agreed that the evidence upon all of the material issues is unconflicting. So much, at least, should be shown in this state, where the methods of waiver of jury trial are prescribed by statute, before it could properly be held that the parties have even substantially complied with the requirement that a jury may be waived by oral consent, expressed in open court and

entered in the minutes. We therefore conclude that the case was not withdrawn from the jury. An additional reason for so holding is the fact that the presentation of plaintiff's requested instruction for a directed verdict was not a motion for a directed verdict. In *re Easton*, 118 Cal.App. 659, 5 P. (2d) 635; *Estate of Caldwell*, 216 Cal. 694, 16 P.(2d) 139. While a party, in requesting an instruction for a directed verdict, asks that the case be taken from the jury, we can accord to such request only a limited effect. We cannot say that the party has thereby waived the right to jury trial, and to preserve his right must at some future stage withdraw his request and ask for submission to the jury. It is not an uncommon practice for each party to submit an instruction for a directed verdict in his favor. Also under our practice a motion for a directed verdict is regarded as a demurrer to the evidence (*Hunt v. United Bank & Trust Co.*, 210 Cal. 108, 291 P. 184), and it assumes no different character in a case where each party makes a motion. We hold that such motions alone do not waive submission of the case to the jury upon denial of the motions.

Lloyd Building & Loan Association was organized as a guarantee capital association, and had issued, without consideration, 1000 shares of guarantee capital stock. The issued stock was held for the benefit of the association, which had no other assets of more than nominal value and had not received a permit from the building and loan commissioner to do business. In order to obtain a permit, without which it could not lawfully engage in business, it was necessary for the Lloyd Company to have at least \$100,000 in cash capital and at least \$10,000 for organization and operating expense. Under the rules and regulations of the commissioner, a guarantee capital building and loan association, to be qualified to do business, was required to have \$100,000 paid-in capital. An applicant for a permit was required to furnish a certificate from its bank showing it to have not less than the sum of \$100,000 on deposit to its credit. Lloyd Association obtained a permit in the following manner:

Defendant Commagere, acting in concert with Lloyd Association, gave Merchants National Bank his thirty-day promissory note for \$120,000, interest on which, for said period, was guaranteed by Alvin H. Frank & Co. The bank credited the account of Commagere with the amount of

the note. Commagere purchased a cashier's check payable to himself for a like amount, and, with the cashier's check purchased, in the name of Lloyd Association, and the bank issued, its certificate of deposit for \$120,000, payable in thirty days. This certificate was indorsed and placed in an escrow with the escrow department of the bank, together with certificates for one thousand shares of the capital stock of Lloyd Association, being all of the outstanding stock. Nine hundred and ninety-five of the shares were in the name of Commagere, and one share in the name of each of five other persons. Escrow instructions were given the bank by Lloyd Association, which provided that the stock might be sold for \$120,000 within a thirty-day period; that if this money was provided from stock sales, certificates were to be issued to the purchasers, the money received therefrom was to be used to pay the Commagere note, and the certificate of deposit was to be delivered to Lloyd Association. If the full sum of \$120,000 should not be received from stock sales, such sums as had been paid in were to be returned to the persons furnishing the same, the stock was to be returned to Lloyd Association, and the certificate of deposit was to be delivered to the note department of the bank for the purpose of paying the Commagere note.

The note was given, the certificate issued, and the escrow opened on October 23, 1928, and on the same day a vice president of the bank wrote a letter to the building and loan commissioner, stating that the bank had on that day issued a certificate of deposit to Lloyd Association in the sum of \$120,000. By the use of this letter Lloyd Association procured from the building and loan commissioner, on November 9, 1928, a permit under which it became authorized to engage in the building and loan business in Los Angeles.

On October 22, 1928, defendant Commagere had arranged with a bond house, Alvin H. Frank & Co., to purchase, for cash, bonds owned by the company at their par value of \$120,000. Nothing was done toward completing this purchase, nor was anything accomplished toward selling, for cash, the stock of Lloyd Association, as was contemplated when the escrow was opened.

At about the time the permit was issued, Elwood Lloyd IV and Commagere contacted the officers of Bay Cities Building

& Loan Association, a company engaged in the building and loan business in Santa Monica. The Bay Cities company was desirous of acquiring a building and loan association doing business in Los Angeles, and entered into negotiations to acquire the Lloyd Association, under representations that the latter held a permit and had assets of the value of \$120,000.

Alvin H. Frank & Co. agreed to accept certificates of \$120,000 par value of the Bay Cities company for the bonds Commagere had agreed to buy, and Bay Cities agreed to accept the bonds and the 1000 shares of the outstanding stock of Lloyd Association in exchange for its certificates. This exchange was completed through the same escrow in the bank. Bay Cities thereupon became the owner of the bonds and stock, and Alvin H. Frank & Co. acquired the Bay Cities certificates, which it sold to its customers. The certificate of deposit was delivered to the note department of the bank, together with \$700, as interest, and the note was canceled. Defendant Commagere received some \$4,400 commission from Frank & Co. The bank received \$700 interest and the return of its certificate of deposit and \$100 as an escrow fee. The bonds which Bay Cities acquired were found by the jury to be worth only \$60,000. The difference between that amount and the face value of the Bay Cities certificates, or \$60,000, was awarded plaintiff as damages.

Plaintiff claims to have been defrauded, in that its principal object in making the deal being to acquire the Lloyd Association, so that it could engage in business in Los Angeles, it acquired only the stock of the Lloyd Association and a permit to do business procured from the building and loan commissioner, which was invalid because it had been obtained by fraud. Under the theory upon which the case was tried and submitted to the jury, plaintiff's damage must be regarded as the amount of the loss sustained in acquiring the bonds, which were actually worth \$60,000 less than they were represented to have been worth. No other damage was claimed or proven.

With reference to the claim of the bank that there was no evidence of any wrongdoing on its part, we will point out briefly sufficient reasons why we must hold otherwise. The statement in the letter of the bank to the building and loan commissioner to the effect that a certificate of deposit had been issued in favor of the Lloyd As-

sociation was false. It was a positive assertion not warranted by the information of the vice president who signed the letter. It was a suppression of material facts of which the author of the letter had knowledge. The certificate of deposit never left the custody of the bank, but was at all times held as security for the Commagere note. Mr. Brown knew, when he wrote the letter, that the bank would never part with the possession of the certificate of deposit or any money thereon until funds were provided from some other source for the payment of the Commagere note. Therefore the statement that the certificate had been issued to the Lloyd Association was true only in a limited sense and not in the sense in which the statement would be understood, and was understood, by the building and loan commissioner. The representation regarding the certificate of deposit was made by the bank with the intention that it should be sent to the commissioner. Merchant's National Bank, therefore, actively participated in the deceit practiced upon the building and loan commissioner as a result of which a permit was issued.

But this fact, alone, is not necessarily sufficient to fix responsibility on the bank for what transpired later. Bay Cities made its purchase in the belief that Lloyd Association had a valid permit to do business, and would not otherwise have purchased. Its loss, however, was sustained because of its belief that the assets of Lloyd Association were worth more than was their actual value. The liability of the defendants can arise only out of fraudulent representation as to the value of Lloyd assets. It is necessary, therefore, to inquire into those representations and the question of responsibility. The question of conspiracy is presented at the outset.

It is alleged in the amended complaint that all of the acts of the defendants, down to and including the exchange of properties, were committed under a general conspiracy and scheme of all of the defendants, except Bank of America, to cheat and defraud Bay Cities and others. It is also alleged that all of the same defendants falsely and fraudulently represented the assets of Lloyd Association to be worth \$120,000, and that Bay Cities believed and relied upon all of the said acts and statements of the defendants and so doing, and relying especially upon the false representations of the bank con-

cerning the certificate of deposit, exchanged its certificates for the stock of the Lloyd Association, thus acquiring the bonds.

Bay Cities was entitled to receive a valid permit and it received one that was invalid. It suffered detriment on this account. It sustained further damage, in the amount of \$60,000, in accepting the bonds at a valuation of \$120,000, and this was the only damage for which a recovery was had.

[4] Appellants, in denying responsibility for the acts which caused the damage, rely upon a claimed distinction between those acts in which the bank participated and those acts and representations in which the bank had no part. No such distinction may be drawn if the proof shows a conspiracy under which the bank would be answerable for all of the acts and statements of its coconspirators. Respondent claims that the evidence conclusively proves the existence of such a conspiracy.

[5] Under the rule limiting the right of the court to direct a verdict, which applies on this appeal, we must disregard all conflicts in the evidence and accept as true the evidence which tends to show the defendant blameless, and must draw all inferences from the facts in evidence most strongly in favor of the defendant. In *re Estate of Lances*, 216 Cal. 397, 14 P.(2d) 768. We must determine whether it might reasonably be held that the exchange of properties with Bay Cities was accomplished independently of the plan in which the bank joined with Commagere and Lloyd Association. We are not here permitted to consider the weight of the evidence which would support such a finding, other than to decide whether it would have sufficient substance to support a reasonable conclusion that the end accomplished was not within the scope of what the bank had a purpose to do or assisted in doing.

As we have heretofore pointed out, the original plan of the promoters, Lloyd and Commagere, was to qualify the Lloyd Association, and, thereafter, to sell 1000 shares of the stock for cash; the exchange with Bay Cities was agreed upon later. The thing which was ultimately accomplished was not shown to have been within the contemplation of the parties in the beginning.

[6] It was not shown without contradiction that Brown knew that the letter he wrote to the building and loan commissioner was to be used to obtain a permit for

the Lloyd Association or that he knew that such a letter was required before a permit would be issued, although, as we have stated, the statement was knowingly false. The bank had no part in the negotiations between Lloyd Association and Bay Cities. It did not know, until a day or two before the exchange of property was made, that Bay Cities was an intending purchaser. It acted only as escrow holder of Bay Cities certificates and the property that was exchanged therefor. It knew nothing of the representations made by Lloyd Association as to the value of the bonds, or of the investigation thereof made by Bay Cities, or the knowledge it acquired. The terms of the exchange it knew by reason of the escrow. The position of purchasers of stock, under the original plan, would have been very different from that of Bay Cities, after its purchase was concluded. While the bank may have entered into a conspiracy with Lloyd and Commagere at any time, its participation, even as escrow holder of Bay Cities certificates and the bonds, was without knowledge of the circumstances under which the exchange had been arranged. It is to be conceded, that where a conspiracy exists, none of the conspirators are to be exonerated merely because the means employed to accomplish a common purpose were unknown or unanticipated in the beginning, or because they did not join in or know of the acts of their coconspirators, or because the object accomplished differs from the one originally contemplated. But we think the present case is one in which all of these facts must be given consideration in deciding whether the bank entered into any conspiracy and if it did, whether it had a common purpose with the others in the conspiracy to perpetrate the fraud with which it was charged and for which it was held liable by the judgment.

[7-9] The conspiracy that must be shown is a combination of two or more persons to accomplish by concerted action a criminal or unlawful purpose or a lawful purpose by criminal or unlawful means. *Parkinson Co. v. Building Trades Council*, 154 Cal. 581, 98 P. 1027, 21 L.R.A.(N.S.) 550, 16 Ann. Cas. 1165.

It is of the essence of a conspiracy that the parties should have a common purpose or design. Whether the defendants conspired together for any purpose, and, if so, what that purpose was, were questions of fact. And if a conspiracy should be found

to exist between the bank and some of the other defendants, it is a question of fact whether the object accomplished, namely, the acquisition of the Bay Cities certificates for the consideration paid, was within the common purpose of the guilty defendants. When we take into consideration the extent of the bank's interest in the transactions, its limited participation in and knowledge of entire scheme of the other defendants, and of the methods employed to put them into effect, we cannot say that the evidence establishes, to the exclusion of every other reasonable conclusion, that the bank conspired to perpetrate the fraud on Bay Cities, which was ultimately accomplished. That question, we think, should have been submitted to the jury.

Assuming, therefore, that the bank is not responsible, as a matter of law, for the active representations made by the other defendants as to the value of the bonds, the next question is whether the acts in which the bank did participate were necessarily the proximate cause of the loss sustained. Under the court's instruction, this issue was tried and determined by the jury upon the theory that the damage represented by the disparity in the value of the bonds resulted proximately from the acts of the defendants in qualifying the Lloyd Association to do business, which was done for the purpose of enabling the association to sell its stock. This view of the case, we think, was erroneous.

[10] Under section 3333, Civil Code, the measure of damages for the breach of an obligation not arising from contract is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not. The Code declares the general law on the subject, stated in 17 Corpus Juris 728, as follows: "It may be stated as a broad general rule that a wrongdoer is liable to the person injured in compensatory damages for all the natural and direct or proximate consequences of his wrongful act or omission."

Proximate cause is defined in 22 Ruling Case Law 110, as follows: "The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. * * * It is the efficient cause." These definitions have oftentimes been approved by our courts.

The negotiations with the Bay Cities Association commenced shortly before November 9th. It was represented to the Bay Cities Association by the Lloyd Association that the latter held a valid permit and had assets of the value of \$120,000. The Bay Cities Association was furnished with a list of the bonds belonging to Alvin H. Frank & Co., which Commagere had agreed to buy and it was willing to take over the Lloyd Association if the bonds were worth par. Bay Cities made some inquiry as to the value of the bonds. Mr. Rishell, president of the company, and one or two others of its directors were appointed by the board to investigate the value of the bonds. Mr. Rishell inquired of Alvin H. Frank & Co., by whom he was told that the bonds were quoted at par, but that Alvin H. Frank & Co. would not guarantee to sell them at par. On November 26 he went to San Francisco where he interviewed the building and loan commissioner, confirmed the fact that Lloyd's held a permit and learned that the commissioner was not interested in the value of the bonds so long as they were a legal investment for the funds of a building and loan association. While in San Francisco, he interviewed a banker and obtained some information concerning some of the bonds. On the morning he left Los Angeles for San Francisco he delivered the Bay Cities certificates to Mr. Stintin, vice president of Bay Cities, to be placed in escrow. Stintin took the certificates to the bank where he entered into an escrow agreement to exchange them for the stock and bonds. This escrow was closed the second day following. There was testimony to the effect that this exchange was completed before Mr. Rishell intended it should be done.

It was alleged in the amended complaint that the bank, with certain of the other defendants charged, joined in making the representations as to value, but the evidence does not show that to be a fact. It was not shown that the bank had any knowledge of the value of the bonds or the value they were considered to have by the officers or directors of the Bay Cities Association or that it made any representations concerning them. It does not appear that the bank was under any duty to investigate the value of the bonds or to make inquiry as to any representations that may have been made concerning the same. The fact that the Lloyd Association was qualified as a guarantee stock building and loan association was an implied representation that, at the time it

received its license to do business, it had a paid-in capital of at least \$100,000. The representation of the bank to the building and loan commissioner was that the capital of the association in the amount of \$120,000 consisted of cash on deposit in the bank. The officers and directors of Bay Cities Association presumably knew what was required in order to qualify the Lloyd Association. They did not, however, purchase the Lloyd Association stock under the belief that the latter association possessed any cash or any capital assets other than the bonds. They, therefore, were not deceived as to what the assets were.

Several other questions of fact were presented which we think should have been submitted to the jury. These related to questions of proximate cause and reliance by Bay Cities Association upon the different representations made. It did not necessarily follow, as a natural or probable result of the fraud in procuring the permit that some one would purchase the assets of the Lloyd Association for twice their real worth. According to the complaint, Bay Cities' purchase was made in reliance upon the represented value of the assets. Plaintiff's evidence tended to show that Bay Cities relied upon express representations as to the value of the bonds themselves. If such values had not been misrepresented, or the bonds had been worth the full price paid, plaintiff would have sustained no substantial damage, for there was no representation at any time that the property purchased was worth more than the price paid. Again, it appears that Bay Cities Association made an independent investigation of the value of the bonds, and superficial as that investigation may have been, it does not appear that the purchaser did not to some extent rely thereon.

Respondent contends that these are immaterial facts; that the parties are joint tort-feasors; and that the value of the bonds is material only as affecting the question of damages. He takes the position that the bank's participation in the fraud, in obtaining the permit, directly induced Bay Cities to buy, as without a permit it would not have bought. We may concede the last statement to be correct, but we do not agree that the representation as to the value of the bonds does not go to the question of the right to recover as well as to the measure of damages. Each fact which, to a greater or less extent, induced the Bay Cities' purchase

is not necessarily the proximate cause of its damage.

[11] The question of proximate cause is one for the jury in every case where there is room for a reasonable difference of opinion.

"Thus, where the facts of the particular case are disputable, and are of such character that different minds might reasonably draw different conclusions therefrom, a question of fact is presented properly determinable by the jury. * * *. So where the rule of intervening efficient cause is relied on by the defendant, it is ordinarily a question for the jury whether there was such an intervening efficient cause as would prevent the negligent act or omission of the defendant from being the proximate cause of injury. * * *. Where it is claimed that the defendant's act was not the proximate cause of injury because the result could not reasonably have been foreseen, it is ordinarily a question for the jury whether the result should reasonably have been foreseen." 22 R.C.L. 148-150.

Where different conclusions may be drawn from the evidence as to whether the act is the proximate cause of injury or damage, the question should be left to the jury. *Mansfield v. Eagle Box & Mfg. Co.*, 136 Cal. 622, 69 P. 425; *Anderson v. Seropian*, 147 Cal. 201, 81 P. 521; *Elder v. Rose*, 63 Cal. App. 545, 219 P. 74; *Kreitzer v. Southern Pacific Co.*, 38 Cal.App. 654, 177 P. 477.

[12] We are of the opinion that it cannot be said, as a matter of law, that the loss was sustained as a natural and probable consequence of the representation joined in by the bank that Lloyd Association held a valid permit or the representation that it had in the bank \$120,000 at the time the permit was issued. There was sufficient evidence upon which the jury might have decided either that Bay Cities Association did, or that it did not, part with its property as the direct and proximate result of the representations made solely by and on behalf of the Lloyd Association. These were questions of fact which the jury should have been allowed to decide.

[13] Because the bank, through the use of the certificate of deposit, made it possible for the Lloyd Association to sell its stock as that of an operating building and loan association, it does not follow that it thereby became responsible for distinct and independent frauds, consisting of represen-

tations in which the bank did not participate, or which it could not reasonably have anticipated would be made. Whether it should have anticipated the acts of the other defendants was a question for the jury. The fact that without participation on the part of the bank the loss would not have been sustained is not sufficient to prove as a matter of law that the fraud in which the bank did join was the proximate cause of the loss.

[14] Another point, unrelated to those already discussed, is that it is open to question whether the representations as to the value of the bonds and other assets were statements of fact or mere expressions of opinions. We cannot say that the jury could not have classed them as opinions only. *Meeker v. Cross*, 59 Cal.App. 512, 211 P. 229; *Coleman v. Dawson*, 110 Cal.App. 201, 294 P. 13; *Reton v. J. D. Millar Realty Co.*, 132 Cal.App. 708, 23 P.(2d) 419. Lloyd and Commagere were not shown to have had or claimed to have any peculiar or special knowledge regarding the bonds. Bay Cities was not hindered in any way in making a full and independent investigation. No claim is made of any representation of fact in that transaction, aside from the statements as to the value of the bonds. We think the jury should have been allowed to decide whether the representations as to values were more than expressions of opinion. Upon the whole evidence we cannot say that there could not be a reasonable difference of opinion on that issue.

[15] Furthermore, the question of the fraudulent nature of the statements was in issue. There was no evidence which would compel the conclusion that the representations were made in the knowledge that they were untrue or were not warranted by the information of those by whom they were made. We cannot say that the information given Commagere by Alvin H. Frank & Co. was legally insufficient to justify a reasonable belief that the bonds were worth par. The evidence upon this issue of fraudulent intent called for its submission to the jury.

[16] Elwood Lloyd was a director of Bay Cities at the time of the transaction. Respondent argues that because of his fiduciary relationship to his company he owed it a duty which he breached by his failure to make a full and fair disclosure of all the facts which might have had an influence upon his company's decision. There can be

no doubt as to the correctness of this position. The fact of the fiduciary relationship, however, is not needed to show the culpability of Lloyd in concealing the circumstances under which the permit was issued and in failing to disclose that Lloyd Association had no assets, either in money or bonds. So far as Lloyd is concerned, his breach of duty to his company gave rise to a cause of action against him regardless of the motives that prompted his actions, but this fact does not alter the views we have expressed upon the other points decided. There was no evidence that the bank knew that Lloyd was a director of Bay Cities. The fiduciary relationship was an important fact in the proof required to show the liability of Lloyd, but the same measure of proof is not applicable to the case of the other defendants. The liability of the bank must depend upon actual fraud or upon participation with guilty knowledge in the breach of duty of the fiduciaries of Bay Cities.

[17, 18] Appellants call attention to certain particulars in which the allegations of the amended complaint differ from those of the original complaint and maintain that a new and different cause of action is stated in the amended complaint. This argument is addressed to the proposition that the action was barred by the statute of limitations before the amended complaint was filed. It is unnecessary to discuss this point with particularity. Appellant bank was made a defendant by the original complaint. Each complaint set up the same transaction and sought recovery of damages. The amended complaint was but an amplification of the original. A change of theory as to the basis of recovery or as to the measure of damages is not a change of cause of action or the substitution of a new and different action for the original. *Hutchinson v. Ainsworth*, 73 Cal. 452, 15 P. 82, 2 Am.St. Rep. 823; *Frost v. Witter*, 132 Cal. 421, 64 P. 705, 84 Am.St.Rep. 53; *Doolittle v. McConnell*, 178 Cal. 697, 174 P. 305; *Phillips v. Stark*, 186 Cal. 369, 199 P. 509; *Babcock v. Jewell*, 110 Cal.App. 323, 294 P. 30.

[19] Appellants' contention that the cause of action involved did not pass to the plaintiff, as trustee in bankruptcy of the estate of Bay Cities, is answered adversely by the decisions in the following cases: *In re Landis*, 41 F.(2d) 700 (C.C.A.); *Morris v. Standard Oil Co.*, 200 Cal. 210, 252 P. 605;

COLUMBIA CASUALTY CO. v. INDUSTRIAL ACCIDENT COMMISSION

et al.

S. F. 15335.

Supreme Court of California.

March 31, 1936.

Rehearing Denied April 30, 1936.

Wikstrom v. Yolo Fliers Club, 206 Cal. 461, 274 P. 959; Jackson v. Deauville Holding Co., 219 Cal. 498, 27 P.(2d) 643; Connolly v. National Surety Co., 35 Ohio App. 76, 171 N.E. 870; In re Gay (D.C.) 182 F. 260; In re Harper (D.C.) 175 F. 412.

[20] Appellants urge the defense of estoppel. Briefly stated, the foundation of this defense is that Bay Cities knew it had been defrauded for some two years before it brought this action; that it made no complaint in the meantime, ratified the transaction by its silence and by allowing transfers to be made of some of the certificates which it had parted with, recognized the validity of the certificates and redeemed some of them; that in the meantime Bank of America acquired the assets of Merchants National Bank in a consolidation without knowledge of the Bay Cities' claims against Merchants National. A statement of the grounds of the claimed estoppel is sufficient to disclose its entire inadequacy.

Bay Cities was under no obligation to appellants to disclose or prosecute its claim against Merchants National Bank. It was not shown to have had knowledge of the purchase of Merchants National by appellant Bank of America. No occasion called for an assertion of its claim and hence its silence was not culpable. No injury to appellant Bank of America was either alleged or shown and no action was taken by that appellant that was induced by its want of knowledge of the facts. The court correctly held the defense of estoppel to be unsustainable. 10 Cal.Jur. 654.

[21] The further argument that Bay Cities should have recouped its loss by questioning the validity of the certificates transferred by Alvin H. Frank & Co. to innocent purchasers and attempting to throw the loss upon them does not tempt us to so rule. Its loss was fixed when it parted with its property. Hines v. Brode, 168 Cal. 507, 143 P. 729. It was not obliged to engage in litigation with its certificate holders who were the innocent victims of the fraud. Knight v. Linzey, 80 Mich. 396, 45 N.W. 337, 8 L.R.A. 476.

The liability of appellants was not established by evidence of that conclusive nature necessary to warrant an instructed verdict, and appellants therefore were deprived of the right of jury trial.

The judgment is reversed.

1. Master and servant ⇐397

Under statute giving Industrial Accident Commission same jurisdiction as to awards against sureties as it had over insurance carriers, commission held to have jurisdiction to render award against surety of insurance carrier which had failed to pay claim for which insurance carrier had been found liable by commission (St.1917, p. 292; Const. art. 20, § 21).

2. Insurance ⇐679

Contract under which obligations of insurance carrier, which had been paying compensation to claimant, were assumed by another indemnity company, held not contract of reinsurance, but contract for benefit of third parties, rendering indemnity company directly liable to claimant.

3. Novation ⇐1

Contract under which obligations of insurance carrier, which had been making compensation payments to claimant, were assumed by another indemnity company, held not to constitute novation under which indemnity company would be alone liable for compensation, so as to release surety of insurance carrier.

4. Insurance ⇐21

Merger of insurance carrier with another company without knowledge of surety of insurance carrier, which had executed bond to enable insurance carrier to do insurance business in state and which subsequently executed second bond, and transfer by merged company of its assets to another indemnity company, held not to release surety from liability to claimant to whom compensation had been paid by all three companies, when indemnity company became insolvent during time that second bond was in effect (St.1917, p. 293, § 3; p. 294, § 8; Const. art. 20, § 21).

In Bank.

Proceeding under the Workmen's Compensation Act by Bertha R. Ridgway,

claimant against the International Reinsurance Corporation, wherein the State Insurance Commissioner intervened as trustee for the claimant against the Columbia Casualty Company as surety. To review an award of the Industrial Accident Commission in favor of the Insurance Commissioner as trustee, the Columbia Casualty Company seeks a writ of review.

Award affirmed.

Redman, Alexander & Bacon, and R. P. Wisecarver, all of San Francisco, for petitioner.

Everett A. Corten, of San Francisco, for respondent.

U. S. Webb, Atty. Gen., and Neil Cunningham, Deputy Atty. Gen., for E. Forrest Mitchell.

WASTE, Chief Justice.

The question to be considered in this cause, which involves a dispute between the state insurance commissioner and a surety on a bond executed to qualify an indemnity company writing workmen's compensation insurance to do business in this state, is whether or not the Industrial Accident Commission has any jurisdiction to make an award against the surety in an amount representing an unpaid compensation award previously rendered by the commission against certain workmen's compensation carriers. The insurance commissioner, joining, as trustee, with the beneficiary of the award, in turn sought an award against the Columbia Casualty Company, petitioner here, on the ground that the casualty company was surety for the Independence Indemnity Company, one of the workmen's compensation carriers. The bond in question has nothing to do with the employer or the employee in the cause, but, as stated, is one given in order to qualify the indemnity company to do business in the state of California, and is known as a "compensation bond." Briefly, the facts are:

On January 29, 1931, the original Independence Indemnity Company (hereinafter referred to as the old Independence), a Pennsylvania corporation, was engaged in the business of writing workmen's compensation insurance in the state of California, and had in force and effect a workmen's compensation policy covering the Halfhill

Packing Company. On that date, Ridgway, an employee of the packing company, was killed, and a death benefit in the sum of \$5,150 was subsequently awarded by the Industrial Accident Commission to his widow, Bertha R. Ridgway. On July 1, 1931, Columbia Casualty Company gave a compensation bond, as provided by the laws of this state (Stats. 1917, ch. 200, p. 292), on behalf of the Independence Indemnity Company, in the amount of \$106,919.66, to enable the indemnity company to write compensation insurance for the period of one year.

Thereafter, and on September 16, 1931, the Independence Company merged with the Commonwealth Casualty Company, another Pennsylvania corporation, the resultant company being and thereafter referred to as a new Independence Indemnity Company. The new company did not comply, and never has complied, with the laws of California for entry to do business in this state. On July 1, 1932, the petitioner here, Columbia Casualty Company, issued a bond on behalf of Independence Indemnity Company in the amount of \$100,000 for a period of one year. This bond was numbered with the same number as its previous bond issued on behalf of the old Independence, above referred to, and was filed with the respondent insurance commissioner. The casualty company, it claims, did not know of the existence of the new Independence, and alleges that, in executing the second bond, it intended only to retire its first bond given the year previous, and to substitute the new bond in its place and stand for the purpose of enabling the old Independence Company to do business in this state. The new Independence Company thereafter transferred all of its assets to the International Reinsurance Corporation. These two corporations, for a period, paid the amounts of weekly compensation due to Bertha R. Ridgway, and she acknowledged and gave receipts for the payments. Before June, 1933, these various companies were placed in the hands of receivers. There was no estate of the new Independence Company, its assets, as above stated, having theretofore passed to the International Reinsurance Corporation. In the meantime, the International Corporation had in force and effect a bond, as required by the statutes of 1917, *supra*, given by the Union Indemnity Company, approved by the insurance commissioner.

On Ridgway's death, his widow filed a petition with the Industrial Accident Commission, joining the International Reinsurance Corporation as defendant, and asking for an award against it. The commission made and entered a supplemental award against both the Independence Indemnity Company and the International Reinsurance Corporation, holding each liable for the full commuted value of the compensation award in the sum of \$2,257.66. The state insurance commissioner, with whom the applicant joined, then intervened as trustee for the applicant and beneficiary against the Columbia Casualty Company, as surety, praying that it be required to pay the amount of the award on the ground that the award against the Independence Indemnity Company and the International Reinsurance Corporation had become final, no application for a rehearing having been filed by the defendants. As a result of this application, an award was made in favor of the insurance commissioner, as trustee for Bertha R. Ridgway, and against the petitioner, the Columbia Casualty Company, in the sum of \$2,257.66. Petition for rehearing before the commission was denied. It is to review these proceedings that the petitioner seeks this writ of review.

[1] Preliminarily, the petitioner contends that the Industrial Accident Commission is a court of limited jurisdiction, and does not have jurisdiction over this case, which involves a claim by the insurance commissioner, as statutory trustee and obligee of a qualifying insurance carrier's bond, against the surety on that bond, the claim being disputed by the surety on the ground that there is no bond in force and effect. We are of the view that the contention cannot be sustained.

The instant proceeding is one instituted by the widow of a deceased employee, joined by the insurance commissioner as trustee, against the surety of the carrier concerning the nonpayment of compensation by the carrier, and, in lieu of payment by the carrier, for payment by its surety. We are of the opinion that the facts fall within both the language and the intent of section 21 of article 20 of the Constitution. By the terms of the section, the Legislature is "expressly vested with plenary power * * * to create and enforce a liability on the part of any or all persons to compensate any or all of their workmen for injury or disability, and

their dependents for death incurred or sustained by the said workmen in the course of their employment." By the further terms of the provision, a complete system of workmen's compensation is defined to include "full provision for adequate insurance coverage against liability to pay or furnish compensation; full provision for regulating such insurance coverage *in all its aspects*, * * * [italics added] and full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without encumbrance of any character; all of which matters are expressly declared to be the social public policy of this state, binding upon all departments of the state government." Further, the Legislature is vested with plenary powers "to provide for the settlement of *any* disputes arising under such legislation * * * by an industrial accident commission." The constitutionality of the Workmen's Compensation Act of this state (Stats.1913, p. 279) was upheld by this court in *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 151 P. 398, and in later decisions.

In order to more fully protect beneficiaries under workmen's compensation insurance policies against default or insolvency of insurance carriers, of which there were and are many, the Legislature enacted the statute of 1917 (chapter 200, p. 292), requiring insurance carriers to provide security for the payment of workmen's compensation insurance when awarded. By the terms of this act, carriers are required to file a bond with the insurance commissioner of this state, in favor of the insurance commissioner as a trustee for the beneficiaries of awards of compensation rendered by the Industrial Accident Commission, such bond to be executed by the carrier and some surety company or companies approved by the commissioner and authorized to transact the business of suretyship in this state. Such bond, by its terms, must provide that, in the event the insurance carrier fails to pay any award or awards which may be rendered against it by the Industrial Accident Commission, the surety will forthwith pay to the extent of its liability under the bond the award or awards to the insurance commissioner as

trustee for the beneficiaries. The bond must also provide that, in the event the insurance carrier shall suspend payment or become insolvent or a receiver be appointed, the surety will pay the awards without regard to any proceedings for the liquidation or reinstatement of the insurance carrier. In the event the insurance carrier shall fail to pay the award, and as a cumulative remedy only, an award may be rendered by the Industrial Accident Commission against the surety for the beneficiary of the award, without notice to the surety, for the amount of the unpaid portion of the award against the carrier. By the express terms of the act, the commission is vested with the same full power, authority, and jurisdiction as to such awards against sureties as it has over insurance carriers. The act for the protection of beneficiaries of workmen's compensation insurance policies contains further provisions for a complete scheme for the enforcement of claims for awards made against sureties. In view of the plain provisions of the statute, we find no room for an argument that the Industrial Accident Commission was without jurisdiction in the present case. We must hold that it had jurisdiction.

Relying on the fact that this court has consistently held that the Industrial Accident Commission has jurisdiction only over disputes arising between an employer and an employee concerning the payment of compensation (see *Commercial Casualty Ins. Co. v. Industrial Acc. Comm.*, 211 Cal. 210, 295 P. 11), the petitioner argues that the Legislature has gone beyond the constitutional limitation in an attempt to give the commission jurisdiction in this and similar matters. We cannot accept the proposition. The basis of this proceeding is not an alleged independent right of the beneficiary of a policy issued by the insurance carrier, but the basic liability is in fact that of the employer to the relative of the deceased employee. The Industrial Accident Commission having jurisdiction has adjudicated the question of the liability of the employer's insurance carrier and also that of its surety to pay the obligation which the carrier assumed for the employer. The procedure provided by the act for the protection of beneficiaries of workmen's compensation insurance policies against the default or insolvency of insurance carriers issuing such policies (*supra*) is simply one method of securing the payment of compensation, and

therefore within the grant of power to the legislature to enact the statute. This phase of the question was considered and, in effect, was disposed of by this court in *Hartford Acc., etc., Co. v. Industrial Acc. Comm.*, 216 Cal. 40, 13 P.(2d) 699.

The other contention of the petitioner is that there is no liability in the premises on the bonds given by it to enable the Independence Indemnity Company to qualify in order to transact business in California. In effect, it argues that the bonds given by it for that purpose covered the old Independence Indemnity Company, which ceased to exist prior to the present alleged default in payment of compensation; and the new Independence was a separate corporation not covered by the bonds. The effect of the consolidation and subsequent transactions, hereinbefore set out, was that the assets and obligations of the old Independence and the Commonwealth passed to the new Independence Indemnity Company, whereupon the old Independence ceased to do business as a corporation; yet, it is alleged, without requiring a legal entry into this state, the insurance commissioner allowed the new Independence to write compensation business in the state of California during the year beginning July 1, 1932. On that date, the petitioner, Columbia Casualty Company, issued, on behalf of Independence Indemnity Company, the required bond to enable it to do business in this state for a period of one year. Thereafter, and during the year, the Independence Indemnity Company (the new Independence) conveyed and sold all its assets to the International Reinsurance Corporation, a Delaware corporation. Petitioner, the Columbia Casualty Company, was given no notice of this merger, and did not know of it until the default in payments herein-after noted. The merger was approved by the insurance commissioner of California. From and after the acquisition of the new Independence, the International Reinsurance Corporation carried on the business of workmen's compensation insurance in the state of California under the style of Independence Underwriters of International Reinsurance Corporation. When the old Independence Company ceased to do business, the new Independence Company made the weekly payments to Bertha R. Ridgway called for by the award made to her by the Industrial Accident Commission, and continued to do so until October 21, 1932. From and after that date the International

Reinsurance Corporation, carrying on the business of workmen's compensation insurance in California, paid the weekly compensation to Mrs. Ridgway, to and including March 8, 1933, at which time the payments were discontinued and the default resulted. Shortly thereafter, the International Reinsurance Corporation, as well as its surety, the Union Indemnity Company, was placed in the hands of a receiver. There was no estate of the new Independence, its assets having all passed to the International Corporation by the merger of October 31, 1932.

It was under these circumstances that the insurance commissioner, as trustee, intervened in the proceeding before the Industrial Accident Commission in which an award has been made to Bertha R. Ridgway for the death of her husband, a large portion of which had not been paid. As a result of the intervention, an award was made in favor of the insurance commissioner, as trustee for Bertha R. Ridgway, and against the Columbia Casualty Company, the petitioner here seeking this review.

[2, 3] The foregoing facts, the Columbia Casualty Company contends, absolve it from liability in the premises. We cannot agree with the petitioner. Through the various transactions noted, the International Reinsurance Corporation assumed all the obligations of the Independence Indemnity Company, and became liable to the surviving wife of the deceased employee Ridgway when the Industrial Accident Commission made an award in her favor. The contract by which the absorption of the Independence was brought about was, in effect, not a contract of reinsurance, but a contract made for the benefit of third parties, and therefore rendered the International Reinsurance Corporation directly liable to the claimant, Mrs. Ridgway. *Whitney v. American Ins. Co.*, 6 Cal.Unrep. 220, 56 P. 50, 52; *Johannes v. Phenix Ins. Co.*, 66 Wis. 50, 27 N.W. 414, 57 Am.Rep. 249; *Bethke v. Cosmopolitan Ins. Co.*, 262 Ill.App. 586; 14 Cal.Jur. 647, 648, also 602, 603. But, contends the petitioner on this point, "the effect of the consolidation and subsequent transactions"—of and between the various indemnity companies—"was that the assets and obligations of both old constituent companies passed to the new Independence and, in turn, the assets and obligations of the new Independence were passed on to Interna-

tional Reinsurance Corporation; the ratification of these agreements by respondents [insurance commissioner and Industrial Accident Commission] constituted a completed novation of the original obligation * * * from the old Independence * * * and finally to the International Reinsurance Corporation and released the Independence." Such result was not the consequence of the various transactions. In such a case there is no novation. 8 Couch on Insurance, p. 7420. There is no showing, and apparently it was not a fact, that the respondents accepted or assented to the final situation brought about by the changes in some or any way which amounted to an agreement to accept the indemnity company, resulting at any stage in making the International alone liable in the premises. No novation resulted. In such a case there results a contract between the indemnity company and the beneficiary. See *Glen v. Hope Mutual Life Ins. Co.*, 56 N.Y. 379; *Jones v. Commonwealth Cas. Co.*, 255 Pa. 566, 100 A. 450; *County of Lyon v. First Nat. Bank*, 166 Minn. 109, 207 N.W. 138; 20 Cor.Jur. 6.

[4] The petitioner, Columbia Casualty Company, was not discharged from liability to the beneficiary by the act of its principal, the Independence Indemnity Company, in procuring by merger the International Reinsurance Corporation to assume the carrier's obligations. *Alliance Mutual Life Assur. Soc. v. Welch*, 26 Kan. 632; *State v. Wood*, 173 Minn. 406, 217 N.W. 360. Neither did the procession of changes affecting the so-called old Independence Indemnity Company discharge petitioner. The argument that such result happened seems only technical. The statute, § 8, supra, under which petitioner furnished and filed the first undertaking, fixed the liability of petitioner as answering for the payment of "awards of compensation rendered or to be rendered against said [old Independence Indemnity Company] by said industrial accident commission under the terms of the workmen's compensation insurance and safety act and acts amendatory thereof [for the period of one year], *without regard to the time when the injury upon which [the] award was based may have occurred.*" (Italics added.) The purpose of the act, to protect the beneficiaries of workmen's compensation policies against the default or insolvency of insurance carriers issuing such policies by requiring such car-

riers to provide for the payment of such compensation, allows of no other construction than that the surety is answerable to the beneficiary when default in payment of the award of compensation takes place, whether or not the injury occurred at a time when the surety was actually the surety for the carrier. The act and the undertaking, which must be renewed each year, have no direct relation to the injury suffered by the employee or to the time when he was injured. Both the act and the undertaking relate to, and the liability on the undertaking becomes available to, the beneficiary when an award has resulted and default has been made. The effect of the terms of the act clearly indicates that the liability which the Columbia Casualty Company undertook when it filed the undertaking for the old Independence Company on July 1, 1931, covered payment for the injuries occurring before that date. The undertaking filed by it one year later, as required by the act, embraced the entire liability under the first, or old, bond. The act (section 3) so provides. We are also of the view that the cases cited lend support to such construction. *Alliance Mut. Life Assur. Soc. v. Welch*, *supra*, and *County of Lyon v. First Nat. Bank*, *supra*.

Furthermore, if the transactions leading to the consolidation finally extinguished the old Independence Indemnity Company, it took place on September 16, 1931, when the first undertaking furnished by petitioner was in effect, and continued and perpetuated the obligation on the bond. The fact that Columbia Casualty Company did not know of the consolidation of the insurance carriers prior to the execution of its second, or July 1, 1932, bond does not affect the situation. Even assuming that there was any duty on the part of the insurance commissioner to notify the Columbia Casualty Company of the various changes that were taking place in the fortunes of the Independence Indemnity Company, old or new, which we cannot find and none has been shown to us, the failure of that official to notify the petitioner does not affect the rights of the beneficiary of the compensation award, who, in legal effect,

is the real party in interest, in the effort to collect the award made for her benefit. Assuming, also, for the purpose of argument only, that the insurance commissioner may have been otherwise derelict in the performance of his duties in permitting the new Independence Company to do an insurance business in California, petitioner cannot now take advantage of such dereliction as against the third party who is seeking payment of the award.

The International Reinsurance Corporation, at the time of the absorption of the new Independence, October 31, 1932, had procured, and there was in effect, a bond executed by the Union Indemnity Company, as required by the act of 1917. The International Corporation, having agreed to assume all the obligations of the new Independence Indemnity Company on default in the payment of the award, the beneficiary, Mrs. Ridgway, and the insurance commissioner, as trustee, could have proceeded against the Union Indemnity Company. At or about the time of the happening of the default, the International and the Union Indemnity Company, its insurance carrier were both placed in the hands of receivers. The default and the insolvency of the International and its insurance carrier happened during the period of the year July 1, 1932 to June 30, 1933, for which the petitioner Columbia Casualty Company executed and filed its second, or new, bond for the Independence Indemnity Company on July 1, 1932. The surety, petitioner, not being released by the fact that the International Reinsurance Corporation assumed the liabilities of the Independence Indemnity Company, and the default occurring during the period of petitioner's liability on the bond filed by it to enable the Independence Indemnity Company to carry on the business of writing compensation insurance in the state of California, petitioner must be held to the performance of the obligation it thus voluntarily assumed.

The award here attacked is affirmed.

We concur: LANGDON, J.; CURTIS, J.; THOMPSON, J.; CONREY, J.; SHENK, J.

5 Cal.2d 785

COLUMBIA CASUALTY COMPANY (a Corporation), Petitioner, v. INDUSTRIAL ACCIDENT COMMISSION, Sophronia A. Westmoreland et al., Respondents.

COLUMBIA CASUALTY COMPANY (a Corporation), Petitioner, v. INDUSTRIAL ACCIDENT COMMISSION, Mrs. Sebastiana Rubio et al., Respondents.

PACIFIC INDEMNITY COMPANY (a Corporation), Petitioner, v. INDUSTRIAL ACCIDENT COMMISSION, Sophronia A. Westmoreland et al., Respondents.*

PACIFIC INDEMNITY COMPANY (a Corporation), Petitioner, v. INDUSTRIAL ACCIDENT COMMISSION, Mrs. Sebastiana Rubio et al., Respondents.*

S. F. 15337, 15336, 15338, 15339.

Supreme Court of California.

March 31, 1936.

S. F. 15336, 15337.

Rehearing Denied April 30, 1936.

S. F. 15339.

Rehearing Granted April 30, 1936.

In Bank.

Redman, Alexander & Bacon and R. P. Wisecarver, all of San Francisco, for petitioner.

Keith & Creede, of San Francisco, for Pacific Indemnity Co.

Everett A. Corten, of San Francisco, for respondent.

U. S. Webb, Atty. Gen., and Neil Cunningham, Deputy Atty. Gen., for E. Forrest Mitchell.

PER CURIAM.

Petitions for writs of certiorari have been filed in each of the above-entitled causes. At the time the petitions were filed there was pending here a like petition for certiorari in Columbia Casualty Co. v. Industrial Accident Commission, 56 P.(2d) 527. As the five petitions offered closely related, and in large part identical questions, they were, by stipulation of the parties, consolidated for consideration and decision.

The decision in Columbia Casualty Co. v. Industrial Accident Commission, Bertha R. Ridgway et al., having been this day filed, on the authority of the decision in that cause, the awards of the Industrial Accident Commission in each of the above-entitled causes are, and each of them is, affirmed.

JACKSON v. COMMUNITY OIL CO.,
Limited, et al.
Civ. 9653.

District Court of Appeal, Second District,
Division 1, California.

April 8, 1936.

1. Bailment ⇨31(3)

Judgment for plaintiff for possession of oil drilling equipment *held* not erroneous, as against contention that defendants were not in possession of equipment and claimed no interest therein, in view of evidence to contrary.

2. Assignments ⇨137

Assignee of original owner of oil drilling equipment *held* entitled to recover amount due as rental thereon, as against contention that evidence failed to show assignment of rental claim, in view of documentary evidence of assignment and defendants' written agreement to pay rental to assignee.

3. Costs ⇨22

In action to recover possession of oil drilling equipment which court valued at \$1,500, where court entered judgment for plaintiff for possession of equipment and for \$574.50 for rental of equipment, judgment against defendants for costs was not erroneous on ground that money judgment against defendants was less than \$2,000.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Ralph Jackson against the Community Oil Company, Limited, and others. From the judgment, defendants Frank O. Creasey and Alberta Charleston appeal.

Affirmed.

Mayock & Lester, of Los Angeles, for appellants.

Sherman & Sherman, of Los Angeles, for respondent.

YORK, Justice.

Appellants rented from the Lyons Oil Company, a corporation, in April, 1932, certain oil drilling equipment, upon which was due and unpaid on March 1, 1933, rental in the sum of \$574. On or about March 15, 1933, the Lyons Oil Company assigned its rental account and conveyed title to the equipment herein involved to

*For subsequent opinion see, as to the two titles, 61 P.2d 750.

the respondent. On March 1, 1933, the defendant Community Oil Company, Limited, rented the equipment from respondent, and used the same until it was repossessed by respondent in August, 1933, at the time this action was commenced.

Respondent brought this action to recover possession of said property from the Community Oil Company, Limited, and the appellants, Creasey and Charleston, and to recover the amount of rental due therefor. Judgment was entered in favor of respondent ordering defendants to deliver possession of certain detailed equipment, or, in the alternative, the sum of \$1,500, the reasonable market value of said property. It was further ordered that respondent recover from appellants, Creasey and Charleston, the sum of \$574.50, the amount of rental unpaid and owing to respondent's assignor; also that respondent recover from defendant Community Oil Company, Limited, the sum of \$2,670, which represented the rental for the equipment from March 1 to August 25, 1933, and \$126.50 costs which were assessed against all defendants.

The court, among other things, found that plaintiff and respondent "is now and at all times subsequent to September 1, 1932, has been the owner of and prior to the commencement of this action was entitled to the possession" of the property herein involved.

Upon this appeal, it is urged that the judgment is erroneous in the following respects: (1) The judgment for possession of the property or for damages against appellants is erroneous, since they were not in possession of the property and did not claim an interest therein; (2) the judgment for \$574 for rental is erroneous, since there is no evidence to support the finding that the Lyons Oil Company assigned its claim for that amount to respondent; (3) the judgment for costs against appellants is erroneous because the money judgment against them is less than \$2,000.

[1] As to appellants' first point, the answer of Creasey admits possession of the property, and claims that it was owned by parties other than the respondent, and that he (Creasey) "informed the plaintiff that he could come and get said property at any

time." The evidence is contradictory in regard to this phase of the case, but the court found, upon sufficient evidence, that all the defendants and appellants had possession of the property and refused to deliver possession to respondent. The judgment for possession is therefore not erroneous as regards the appellants.

[2] There was sufficient documentary evidence introduced upon the trial of this action to sustain the finding that the Lyons Oil Company assigned to respondent its claim for rental in the sum of \$574; furthermore, appellants agreed to pay this sum to respondent, as evidenced by Plaintiff's Exhibit No. 1, which reads as follows:

"October 11th, 1932.

"Mr. Jackson, Long Beach, California.

"Dear Mr. Jackson: In consideration of your permitting the equipment rented under an order of April 27, 1932, from Lyons Oil Company, Ltd. which you state is your personal property, to remain on the premises of the Community Oil Company for use by it in future drilling operations, and of your assurance of this fact to the Corporation Department of the State of California, the undersigned hereby agrees that said bill for rental will be paid prior to the payment of any other indebtedness incurred by Community Oil Company or the undersigned.

"Yours very truly,

"Frank O. Creasey

"Frank O. Creasey

"Alberta Charleston

"Alberta Charleston."

There is therefore no merit in appellants' second point.

[3] As to appellants' third point that costs were improperly taxed against them, the pleadings allege the value of the property to be \$2,100, but the court found upon evidence that the property was of the value of \$1,500; this sum, in addition to the sum of \$574.50 due for rental of the property, made a total judgment in excess of the sum necessary to support the judgment for costs.

The judgment is affirmed.

We concur: HOUSER, P. J.; DORAN, J.

13 Cal.App.2d 100

GIPNER v. STATE CIVIL SERVICE COMMISSION OF CALIFORNIA et al.

Civ. 5493.

District Court of Appeal, Third District,
California.

April 4, 1936.

1. Officers 72(2)

Certiorari will lie to review order of Civil Service Commission discharging employee for cause under provisions of Civil Service Act, where written accusations wholly fail to state facts sufficient to constitute cause of action so as to confer jurisdiction upon commission to hear and determine charges (Code Civ.Proc. §§ 1068, 1074; Gen.Laws 1931, Act 1400, § 14).

2. Officers 72(2)

Where allegations of complaint in proceeding before Civil Service Commission for discharge of civil service employee are sufficient to state cause of action conferring jurisdiction on commission, although defective, erroneous rulings of commission may not be reviewed by certiorari (Code Civ.Proc. §§ 1068, 1074; Gen.Laws 1931, Act 1400, § 14).

3. Courts 159

Strict rules of pleading and procedure which are applicable to courts of record do not apply to inferior tribunals.

4. Officers 69

Charge that manager of division of state employment agencies willfully rendered incorrect statistical reports in violation of rules of such division held to state cause of action conferring jurisdiction on Civil Service Commission and precluding review by certiorari of commission's act in discharging manager (Gen.Laws 1931, Act 1400, § 14; Code Civ. Proc. §§ 1068, 1074).

5. Officers 69

Charge that manager of division of state employment agencies on numerous occasions placed political literature in waiting rooms of office of division constituted sufficient charge of improper political activity to confer jurisdiction on Civil Service Commission in removal proceeding, precluding review by certiorari of commission's action in discharging manager (Gen.Laws 1931, Act 1400, § 14; Code Civ. Proc. §§ 1068, 1074).

6. Officers 69

Charge that manager of division of state employment agencies deceived his superior

officer to procure leave to make business trip, on which he engaged in political activities, held sufficiently specific to state cause of action conferring jurisdiction on Civil Service Commission in removal proceeding, precluding review by certiorari of commission's act in discharging manager (Gen.Laws 1931, Act 1400, § 14; Code Civ.Proc. §§ 1068, 1074).

Argued before Superior Court, San Joaquin County; M. G. Woodward, Judge.

Petition for a writ of certiorari by Bailey D. Gipner against the State Civil Service Commission of the State of California and others. From an order sustaining a demurrer to the petition without leave to amend, and a judgment dismissing the petition, petitioner appeals.

Order and judgment affirmed.

Honey & Mayall and Von Detten, Henry & Goodrum, all of Stockton, for appellant

U. S. Webb, Atty. Gen. and Darwin Bryan, Deputy Atty. Gen., for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

This is an appeal from an order sustaining a demurrer to a petition for a writ of certiorari on the ground that the petition fails to state facts sufficient to constitute a cause of action.

The petition alleges that Bailey D. Gipner is a permanent civil service employee who was designated as manager of the division of state employment agencies of the department of industrial relations, under the supervision of W. A. Granfield, at the city of Stockton. November 22, 1934, written charges for his removal were preferred against him under the provisions of section 14 of the Civil Service Act of California (Stats.1913, p. 1035, and amendments thereto, 1 Deering's Gen.Laws of California of 1931, pp. 621, 630, Act 1400, § 14). The petitioner was therein charged with: (a) Insubordination; (b) willful disobedience; (c) improper political activity; (d) failure of good behavior; (e) acts incompatible with and inimical to the public service.

In support of these general charges the following particular specifications were made:

"1. That in the month of November, 1933, said respondent, while on duty as such Manager, willfully rendered incorrect statisti-

cal reports relative to the placing of applicants for work contrary to and in violation of the rules of the Division of State Employment Agencies;

"2. That while on duty as such Manager, respondent permitted the use of registration rolls of unemployed of said Division as a mailing list for political purposes contrary to and in violation of the rules of said Division;

"3. That while on duty as such Manager, respondent caused two men to be appointed from the C.W.A. and S.E.R.A. rolls, and as such Manager directed said two men so appointed to advise those applying to said Division for work or assistance concerning their future political attitude; that the aforesaid was the sole duty assigned to said two men so appointed;

"4. That while on duty as such Manager, respondent personally on numerous occasions placed political literature in the waiting rooms of the Stockton Office of said Division;

"5. That on or about September 24th, 1934, respondent, while on duty as such Manager, requested and received complainant's permission to go to Yosemite Valley in connection with certain official business of said Division; that respondent did not on said occasion go to Yosemite Valley in connection with certain official business of said Division; that respondent did not on said occasion go to Yosemite Valley as aforesaid, but did on said occasion, without the consent of complainant, absent himself from the office of said Division for the purpose of engaging in certain political activities in the City of Woodland, California, on behalf of certain candidates for public office;

"6. That while on duty as such Manager, respondent did on certain occasions deliver to certain persons in the City of Stockton, California, for political purposes, certain records and property of said Division, and did allow said persons to read and copy certain correspondence of said Division, all contrary to and in violation of the rules of said Division."

To these accusations the petitioner filed a special demurrer on the ground that they fail to state facts sufficient to constitute grounds for dismissal or to confer jurisdiction upon the Civil Service Commission to hear or determine the charges, for the reason that the several allegations are uncertain and not specific enough to enable the accused to prepare or present a defense

thereto. The demurrer was overruled, and an answer was filed denying each of the charges. The cause was duly set for hearing, at which time the petitioner appeared before the commission represented by counsel. A motion to dismiss the proceedings on the same ground assigned in the demurrer was presented and denied. The cause was heard by the commission and evidence was adduced in support of the charges. The petitioner refused to introduce evidence in his own behalf. Thereupon the commission adopted findings in support of each of the charges and filed its written decision holding the petitioner to be guilty of each of the charges and discharging him from the service.

Thereupon a petition for a writ of review was filed in the superior court of San Joaquin county, in which the preceding facts were alleged. To this petition for a writ of certiorari the commission demurred on the ground that it fails to state facts sufficient to constitute a cause of action. The demurrer was sustained and the petitioner was denied leave to amend his petition. It was sustained on the theory that the charges which were filed with the Civil Service Commission sufficiently stated a cause of action against the employee to confer jurisdiction on the commission to hear and determine the accusations; that its action did not constitute an excess of jurisdiction; and that certiorari therefore does not lie to review its proceedings. Subsequently, on motion, the petition for a writ of certiorari was dismissed. From the order sustaining the last-mentioned demurrer without leave to amend, and from the judgment dismissing the petition for a writ of certiorari, the petitioner has appealed.

The only question which is involved on this appeal is whether, as a matter of law, the accusations which were filed against the petitioner with the Civil Service Commission were sufficiently specific to confer jurisdiction upon that board to hear and determine the charges.

[1] Certiorari will lie to review an order of the Civil Service Commission discharging an employee for cause under the provisions of section 14 of the Civil Service Act of California when the written accusations wholly fail to state facts sufficient to constitute a cause of action so as to confer jurisdiction upon the board to hear and determine the charges. *Dyment v. Board of Medical Examiners*, 57 Cal.App. 260, 207 P. 409, 412; *Rapaport v. Civil Service Com-*

mission, 134 Cal.App. 319, 25 P.(2d) 265; sections 1068, 1074, Code Civ.Proc. In the Dymont Case, supra, with respect to the application of a writ of certiorari to review an order of the board of medical examiners of the state of California revoking the license of a physician for alleged unprofessional conduct, it is said: "The complaint must be sufficient in its statement of facts to show actual unprofessional conduct by the person charged, or it will not give the board power or jurisdiction to revoke his certificate, and if a revocation is ordered on such a complaint the holder thereof may maintain a proceeding in certiorari to have it annulled for the want of jurisdiction of the board to make the order."

We are of the opinion the accusations which were filed with the Civil Service Commission against the petitioner in the present case are sufficiently specific to constitute a cause of action under the provisions of section 14 of the Civil Service Act so as to confer jurisdiction upon the commission to hear and determine the charges. It is true that the law provides that the "charges must be made in writing and clearly state the specific act or acts of the employee constituting such cause."

[2] If the allegations of a complaint are sufficient to state a cause of action so as to confer jurisdiction on the commission, inartistic, uncertain, or defective as the allegations may be, erroneous rulings of the board may not be reviewed by means of certiorari, for having jurisdiction of the subject-matter and the parties, the determination of the commission is not subject to review regardless of whether it determined the matter right or wrong. *Erickson v. Municipal Court of City and County of San Francisco*, 219 Cal. 737, 29 P.(2d) 192; *Matter of Hughes*, 159 Cal. 360, 113 P. 684, 686; 4 Cal.Jur. 1036, § 14. In the *Hughes Case*, supra, it is said in that regard:

"The Supreme Court has jurisdiction in certiorari to review a judgment of the superior court only in a case where that court has exceeded its jurisdiction (Code Civ. Proc. § 1068), and in such cases only for the purpose of inquiring whether or not the judgment sought to be reviewed was in excess of jurisdiction, or, as the Code expresses it, 'the review upon this writ cannot be extended further than to determine whether the inferior tribunal, board, or officer has regularly pursued the authority

of such tribunal, board or officer.' Code Civ.Proc. § 1074. If such tribunal has regularly pursued its authority, our inquiry stops. We cannot consider or correct errors of law committed by the inferior court in the exercise of its authority on the merits of the cause it has jurisdiction to entertain and decide. No matter how erroneous that decision may be, even on the face of the record, we have no power to change, annul, or reverse it in this proceeding, if that court had jurisdiction to act in the matter before it. This has been repeatedly stated in former decisions of this court.

"'Mere irregularity intervening in the exercise of an admitted jurisdiction—mere mistakes of law committed in conducting the proceedings in an inquiry which the board had power to entertain—* * * are not to be considered here upon certiorari, otherwise that writ is to be turned into a writ of error.'"

[3] It follows from the preceding authority that if the allegations of the charges in the present case are sufficiently specific to confer jurisdiction on the commission to hear and determine them the order dismissing the petitioner should be affirmed even though the commission erred in not sustaining the demurrer to the accusations. In determining whether the written charges are sufficiently specific to constitute a cause of action, we should recall the fact that the same strict rules of pleading and procedure which are applicable to courts of record do not apply to inferior tribunals. In the case of *Anderson v. Board of Medical Examiners*, 117 Cal.App. 113, 115, 3 P.(2d) 344, 346, it is said in that regard: "It is well settled in this state that proceedings before the Board of Medical Examiners are not to be governed by the technical rules of pleading which may be invoked in criminal actions. 20 Cal.Jur. 1063; *Suckow v. Alderson*, 182 Cal. 247, 187 P. 965; *Dymont v. Board of Medical Examiners*, 57 Cal.App. 260, 207 P. 409, 411. In this regard the court in the latter case says: 'It is, of course, needless to cite authorities upon the proposition that neither as to pleadings nor as to evidence must the procedure in trials before medical boards be marked by the refinements and subtleties which are characteristic of the conduct of actions in courts of law. The cases upon this point are both uniform and numerous.'"

If the charges which were filed against the petitioner are included within the inhibi-

tions of section 14 of the Civil Service Act, and any one of the accusations is sufficiently specific in regard to circumstances and date to allow the accused to identify the transaction and understand the nature of the alleged offense to enable him to present his defense thereto, they are sufficient to confer jurisdiction on the commission, and the superior court, under such circumstances, was justified in sustaining the demurrer to the petition for a writ of certiorari which is based thereon. We think the allegations of the charges which were filed sufficiently state a cause of action which conferred jurisdiction on the commission and that the demurrer to the petition for a writ of certiorari was therefore properly sustained.

[4] The Civil Service Act authorizes the removal of an employee for "incompetency, inefficiency, insubordination, dishonesty, intemperance, immorality, profanity, discourteous treatment of the public or other employees, improper political activity, willful disobedience, * * * or for any other failure of good behavior or any other act or acts which are incompatible with or inimical to the public service." The first specification of the charge which was filed in this proceeding recites that: "In the month of November, 1933, said respondent, while on duty as such manager, *wilfully* rendered incorrect statistical reports relative to the placing of applicants for work contrary to and in violation of the rules of the Division of State Employment Agencies." This language clearly charges the petitioner, as manager of the division of state employment agencies with "wilfully rendering" to his department false reports regarding the employment or placing of applicants for work. Clearly the willful rendering of such false reports constitutes conduct which is not only dishonest and reprehensible, but also inimical to the welfare of public service.

[5] The fourth specification charges: "That while on duty as such manager, respondent personally *on numerous occasions* placed political literature in the waiting rooms of the Stockton office of said Division." Clearly this conduct constitutes "improper political activity" which is inimical to good public service. The general charge accused him of "improper political activity." This was a continuing offense. It requires no more specific recitation of dates

to inform the petitioner of the nature of this charge.

[6] In effect the fifth specification alleges that on September 24, 1934, while the petitioner was on duty as manager of the division of state employment agencies, he deceived his superior officer in that department by misrepresentations and procured leave to go to the Yosemite Valley on official business connected with the department and instead of employing his time in behalf of the state according to his representations, he failed to go to the Yosemite Valley, but on the contrary, he went to Woodland and engaged in political activities in behalf of certain candidates for political offices. This conduct constitutes insubordination, dishonesty, willful disobedience, improper political activity, and acts inimical to the public service. This accusation is sufficiently specific with relation to the time and circumstances to inform petitioner of the exact nature of the dereliction of duty with which he was charged. The statute does provide that it is only "improper" political activities which are prohibited. But certainly a civil service employee may not deceive his superior officer, fraudulently procure a leave of absence from his office on the pretense of rendering official services for his department in a specified locality, and then employ that time in political activities in another city "on behalf of certain candidates for public office," and defend such conduct on the plea that the activity in behalf of those candidates for public office was proper. We are persuaded the very nature of his conduct renders the political activity improper. It was unnecessary to specifically allege that it was improper. Moreover, at the beginning of the accusation he was charged with "*improper* political activity."

We are satisfied that the written charges which were filed with the commission against the petitioner allege facts sufficient to constitute a cause of action so as to confer jurisdiction on the Civil Service Commission, and that the superior court properly sustained the demurrer to the petition for a writ of certiorari without leave to amend the pleading. The judgment of dismissal was therefore properly rendered.

The order sustaining the demurrer and the judgment are affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

13 Cal.App.2d 207

BARROW et al. v. SIMON et al.

Civ. 10778.

District Court of Appeal, Second District,
Division 2, California.

April 10, 1936.

Hearing Denied by Supreme Court
June 8, 1936.

1. Appeal and error ⇨766

Court of Appeal would not consider propositions urged by appellant and appeal would be dismissed, where appellant failed to observe rule requiring party alleging error to print in briefs substance of pleadings in general terms (Rules of the Supreme Court and District Courts of Appeal of State of California, rule 8, § 3, p. 10).

2. Appeal and error ⇨757(2)

Court rule requiring party alleging error to print in briefs substance of pleadings in general terms is not mere technical requirement, but is prescribed to facilitate disposition of cases and to furnish court with complete and adequate information upon which to predicate judgment (Rules of the Supreme Court and District Courts of Appeal of State of California, rule 8, § 3, p. 10).

Appeal from Superior Court, Los Angeles County; Francis J. Heney, Judge.

Action by John V. Barrow and another against Rosalyn I. Simon, substituted in place and stead of M. P. Simon, deceased, and others, and Rosalyn I. Simon, executrix of the estate of M. P. Simon, deceased. Judgment for plaintiffs, and defendant Rosalyn I. Simon, executrix of the estate of M. P. Simon, deceased, appeals.

Appeal dismissed.

Black, Hammack & McWilliams, Carey McWilliams, and Alfred L. Black, Jr., all of Los Angeles, for appellant.

Chas. E. Carter, Martin M. Levering, and Henry Trowbridge, all of Los Angeles, for respondents.

Gibson, Dunn & Crutcher, of Los Angeles, for Richfield Oil Co. of California.

J. B. Quigg, in pro. per.

McCOMB, Justice pro tem.

This is an appeal from a judgment in favor of respondents after a trial before a court without a jury.

[1] The propositions urged by appellant will not be considered by us, because she has failed to observe the provisions of rule 8, section 3, of this court requiring the party alleging error to print in the briefs the substance of the pleadings in general terms. Rule 8, § 3, p. 10, Rules of the Supreme Court and District Courts of Appeal of the State of California.

[2] This rule is not a mere technical requirement, but is prescribed for the purpose of facilitating the disposition of cases upon appeal and of furnishing this court with complete and adequate information upon which to predicate its judgment.

For the foregoing reason the appeal is dismissed.

We concur: CRAIL, P. J.; WOOD, J.



13 Cal.App.2d 118

CHRISTOPHER v. CITY OF LOS
ANGELES.

Civ. 10136.

District Court of Appeal, Second District,
Division 1, California.

April 6, 1936.

Hearing Denied by Supreme Court
June 4, 1936.

1. Automobiles ⇨244(6, 26)

Evidence held to sustain judgment against employer of truck driver for death of pedestrian at safety zone when struck by automobile which was hurtled across end of safety zone when struck by truck at intersection.

2. Appeal and error ⇨1002

"Conflict" of evidence to be sufficient to make findings of trier of facts conclusive on reviewing court must be substantial and real, not mere conclusions, and must show positive, direct evidence of a fact.

[Ed. Note.—For other definitions of "Conflict," see Words & Phrases.]

3. Appeal and error ⇨1002

Where reasonable minds viewing evidence in case dispassionately may fairly entertain difference of opinion on it, conflict in evidence is substantial and verdict will not be disturbed on appeal.

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

Suit by Rosa Christopher against the city of Los Angeles. Judgment for plaintiff, and defendant appeals.

Affirmed.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and Albert E. Wheatcroft, Deputy City Atty., all of Los Angeles, for appellant.

Dailey S. Stafford, of Los Angeles, for respondent.

HAAS, Justice pro tem.

The plaintiff, a widow, brought suit for damages alleged by her to have been sustained by reason of the loss of her husband, who died following injuries received as the result of an accident which occurred while he was standing, or walking, at the south end of a pedestrian zone at the northwest corner of Twelfth street and South Broadway in Los Angeles, on the 26th day of July, 1933. No negligence is attached to the deceased. Two motor vehicles are involved in this accident; a truck belonging to the defendant city, used to pick up cans, which was traveling west on Twelfth street, driven by Christopher C. Arnelian, an employee of said city, and a certain Plymouth sedan automobile in the possession of and owned by the defendant James Ferguson that was traveling north on South Broadway.

The trial court gave judgment in the sum of \$6,500, in favor of plaintiff.

The evidence discloses that the truck, while moving westward, struck the right rear end of the Plymouth sedan going northerly, hurtling it across to the end of the safety zone, and that the Plymouth then struck the deceased, injuring him and causing his death.

The only question before us is whether the "conflict in the evidence was real and substantial and not fanciful or fictitious." See *Thoreau v. Industrial Acc. Comm.*, 120 Cal.App. 67, 73, 7 P.(2d) 767.

[1] That there was conflict the evidence fully discloses. An eyewitness, Rifenberick, testified both vehicles entered the intersection about the same time. Arnelian, the driver of the truck, testified he was just entering the intersection when he saw the Plymouth "about 50 or 60 feet away from Twelfth street * * * south of the curb line." The witness Edwards, who

was on the truck, testified: "As he [the truck driver] entered the intersection I saw the Plymouth coming about 60 or 75 feet from the intersection." The disinterested witness, Mason, testified that he was positive that at the time the truck arrived at the intersection the Plymouth was not in it. The witness Hughes, who was in the Plymouth at the time of the accident, testified that as the Plymouth entered the intersection the truck "was about 10 or 15 feet away from the curb, the line that runs across," meaning, 10 or 15 feet out of the intersection. The witness Ferguson, driver of the Plymouth, testified that as he looked to the right as he entered the intersection he saw a truck "about 100 feet down on Twelfth street and I glanced at him, thinking he was going to slow up at the corner." These conflicts must be kept in mind in considering the testimony of the witness Edwards when he related, "The driver [of the truck] applied his brakes, and shifted down, and the truck slowed down, at the time he shifted to second gear. * * * I said, 'It doesn't look like he is going to stop' and Mr. Arnelian [the truck driver] said, 'I am watching him.'" It must be borne in mind that the truck could travel some distance while this conversation was going on. The truck driver did not take the precaution ordinarily taken by a prudent person. If he had used ordinary care, having slowed down, being in second gear, and watching him as he said he did, he would, and should, have stopped his truck in time, thus avoiding the accident. The trial court found that "the driver of the truck had an equal responsibility with the driver of the sedan to avoid the accident after danger was apparent and they both failed in the performance of this duty." The truck driver admitted danger was apparent by his words, "I am watching him." We are convinced that the conflict in the evidence is not only substantial, but that the evidence preponderates quite sufficiently to sustain the judgment of the trial court. There was substantial evidence, though contradicted, that the truck driver was not in the intersection first, and even if he were, the evidence substantiates the trial court in concluding that, had he acted prudently and cautiously as the law requires, he could have avoided the accident.

[2, 3] No rule is so often repeated in the decisions of our appeal courts as the one that "reviewing courts may not invade the

field of the fact-finding body; and consequently where a conflict of evidence exists the findings of the trier of the facts are conclusive," but such conflict must be substantial and real, not mere conclusions, and must show a positive, direct evidence of a fact. *Gamberg v. Industrial Acc. Comm.*, 138 Cal.App. 424, at page 427, 32 P.(2d) 413. Reiterating the rule laid down in the case above cited is the case of *Elliott v. Market St. Ry. Co.*, 4 Cal.App.(2d) 292, 40 P.(2d) 547. We are convinced that "reasonable minds, viewing it [the evidence]" in this case "dispassionately, might fairly entertain a difference of opinion upon it," and hence the conflict was substantial. *Hughes v. Atchison, etc., Ry. Co.*, 121 Cal. App. 271, 278, 8 P.(2d) 853, 856.

The trial court was justified in finding that there was such a conflict; that it was substantial; and that the negligence of the truck driver was a proximate cause of the accident and injury.

Judgment affirmed.

We concur: HOUSER, P. J.; YORK, J.



13 Cal.App.2d 176

COYNE et al. v. MASON et al.

Civ. 10890.

District Court of Appeal, Second District,
Division 2, California.

April 9, 1936.

Rehearing Denied May 1, 1936.

1. Mortgages 4124

Where note secured by trust deed provided for payment of loan and monthly installments on life policy premium, and trust deed provided that note could be declared due and payable if premium should be defaulted, payment of premium was secured by the trust deed.

2. Mortgages 413

Mortgage moratorium law providing moratorium for obligations defaulted between May 8, 1933, and December 31, 1933, held not available to mortgagor who failed on February 1, 1933, to pay insurance premium evidenced by note which also evidenced a loan

indebtedness and was secured by trust deed (St.1933, p. 2717).

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Johanna Coyne against J. A. Mason and others, wherein the California Western States Life Insurance Company filed a cross-complaint. From an adverse judgment, plaintiff and D. Joseph Coyne, cross-defendant, appeal.

Affirmed.

D. Joseph Coyne and E. S. Williams, both of Los Angeles, for appellants.

John J. Ford, Frank M. Benedict, and Ford, Benedict & Ford, all of Los Angeles, for respondents.

CRAIL, Presiding Justice.

On the first page of her brief the plaintiff succinctly states the questions involved on this appeal as follows: "Is the Moratorium Statute of October 25, 1933 (Chapter 1057—Statutes of 1933, page 2717), valid, and was the trust deed sale held in this instance in violation of that statute?"

The plaintiff and her husband, the cross-defendant, executed to the insurance company their promissory note for the sum of \$10,000, with interest at 6 per cent. per annum, in which they agreed to pay \$110.50 per month, including principal and interest, until the said sum had been fully paid. The note contained the following further promise: "The makers hereof further agree to pay in addition to the sum of \$110.50, per month, the further sum of \$31.05, as a monthly installment covering premium on an insurance policy for the sum of \$10,000.00 issued by the holder to D. Joseph Coyne. The total monthly payments to be made shall be the sum of \$141.55, each, in advance. If any monthly installment is not paid as hereinbefore specified when due, this whole note, including both principal and interest, may, at the option of the holder, without notice to the maker, be treated as due and collectable. This note is secured by a Deed of Trust of even date herewith." They also executed a trust deed upon real property improved with a single family dwelling to secure the said note, and agreed therein that said sums should be paid monthly during the existence of the trust deed. These payments were duly made until the

one which fell due on the 1st of February, 1933, which was not paid. Plaintiff claims that in March, 1933, she was able and willing to pay, and offered to pay, the installments of \$110.50. Defendants dispute this, and claim that there is substantial evidence to sustain the implied finding of the trial court that no such offer was made. It is not necessary for us to determine this dispute, however, for the reason that in any event plaintiff did not offer to pay, and never offered to pay, and never did pay, the delinquent monthly payment on the life insurance policy, which by the terms of the note she had promised to pay on February 1, 1933. No further payments were made. On July 10, 1933, the insurance company recorded its notice, declaring the entire indebtedness to be immediately due, and also notice of its election to cause the property to be sold as provided in the trust deed, and the trustee thereunder proceeded to foreclose and sell the property. The insurance company became the purchaser. The plaintiff refused to surrender possession, but, on the contrary, commenced this action against the insurance company to quiet her title to the property. The court rendered judgment in favor of defendants, and it is from this judgment that plaintiff and cross-defendant appeal.

[1] It is the contention of plaintiff that the payments of the premiums on the life insurance policy were not secured by the deed of trust; that the deed of trust secured only the payment of the principal and interest installments amounting to \$110.50 per month; that the policy of life insurance ceased to exist by its own terms 30 days after the default of February 1, 1933, and therefore no further premiums became due or payable thereunder; that thereafter the plaintiff had a right to pay and offer to pay the installments of \$110.50 per month, which installments only, she contends, were secured by the deed of trust, and thus, by keeping those installments paid, to prevent any foreclosure, and that the insurance company had no right to attach as a condition of the payment of those installments the payment for insurance.

Plaintiff did agree and promise in the note to pay the sum of \$31.05 monthly for insurance. Furthermore, the note was secured by the deed of trust, and the deed provided that, if the plaintiffs failed to make payments on the insurance as they

fell due, then the insurance company might at its option and without notice declare all debts and moneys thereby secured to be immediately due and payable and might proceed to foreclose under the deed of trust. It also contained the stipulation that upon default in the payment of any monthly installment of the life insurance policy the insurance company was authorized to accelerate the maturity and to have the property sold as provided in the deed of trust. There is no merit in plaintiff's contention.

[2] Plaintiff further contends that the deed of trust comes squarely within the provisions of the moratorium statute above referred to and that the trustee's sale on November 10, 1933, was in violation of that statute. The part of the statute upon which plaintiff relies, reads as follows: "Section 1. No sale shall be made under any power of sale contained in any mortgage or deed of trust executed before May 8, 1933, upon real property improved with a single family dwelling, nor shall any sale be made under any final decree of foreclosure rendered in any action to foreclose a mortgage executed before May 8, 1933, upon real property improved with a single family dwelling, in any case in which the only default in the performance of the obligation for which said mortgage or deed of trust was given as security consists solely of the failure to pay when due installments of the principal sum of such obligation which became due according to the terms of the obligation between May 8, 1933, and December 31, 1933, inclusive, until at least six months after the due date of the last installment of the principal sum of such obligation. Nothing contained in this act shall prevent the acceleration, by reason of the nonpayment of taxes, interest or insurance, of the entire obligation secured by any such mortgage or deed of trust, nor prevent the sale thereunder by reason of such default."

It is apparent from the recital of facts which we have heretofore made that this was not a "case in which the only default in the performance of the obligation for which said * * * deed of trust was given as security consists solely of the failure to pay when due installments of the principal sum of such obligation which became due according to the terms of the obligation between May 8, 1933, and December 31, 1933." The sums concerning which defaults were made became due prior to and not during the period of time

specified in said act. The statute has no application to the facts in this case, and, as it has no application to the facts, it becomes unnecessary for us to comment upon the plaintiff's further contention that said statute is constitutional.

Judgment affirmed.

We concur: WOOD, J.; GOULD, Justice pro tem.



**CROATIAN-SLAVONIAN BENEVOLENT
SOC., LODGE NO. 177 OF CROATIAN
FRATERNAL UNION OF AMERICA, v.
MIOCH.***

Civ. 10358.

District Court of Appeal, Second District,
Division 1, California.

April 13, 1936.

Rehearing Denied April 28, 1936.

Hearing Granted by Supreme Court
June 11, 1936.

1. Beneficial associations Ⓒ20(6)

Allegation that fraternal union was a nonprofit fraternal benevolent society organized under laws of Pennsylvania, and that plaintiff benevolent society was branch of parent organization and had complied with laws of California governing fraternal benefit societies, held insufficient to show capacity to sue.

2. Pleading Ⓒ56

When right to sue constitutes an integral part of plaintiff's cause of action, facts showing authority to sue must clearly appear.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by the Croatian-Slavonian Benevolent Society, Lodge No. 177 of the Croatian Fraternal Union of America, against Stephen A. Mioch, sometimes known as S. A. Mioch. From an adverse judgment, defendant appeals.

Judgment reversed, with directions.

Haas, Johnston, Maurseth & Kerrin, of Los Angeles, for appellant.

V. P. Lucas, of Los Angeles, for respondent.

ROTH, Justice pro tem.

To plaintiff's complaint in this action a general and special demurrer was interposed by defendant. One of the grounds of the special demurrer was that it appeared upon the face of such complaint that plaintiff had not the legal capacity to sue. The demurrer, both general and special, was overruled; defendant failed to answer, and in default thereof, judgment was entered in favor of plaintiff. The appeal is from such judgment.

[1, 2] The allegations with reference to plaintiff's capacity are contained in paragraph 1 of the complaint, and are as follows: "That Croatian Fraternal Union of America is a nonprofit fraternal benevolent society organized and existing under and by virtue of the laws of the State of Pennsylvania, and that plaintiff herein, Croatian-Slavonian Benevolent Society, Lodge No. 177 of Croatia Fraternal Union of America, is a branch of said parent organization and has complied with the laws of the State of California governing fraternal benefit societies."

A mere reading of this allegation makes it apparent that the special demurrer should have been sustained. It does not appear from said allegation whether the parent organization, or the branch thereof, was in existence at the time the obligation sued on was incurred. It does not appear whether the parent organization, or the branch, is a corporation or an unincorporated association. Under the laws of this state, it could be either. 19 Cal.Jur. 463. If the parent organization is a corporation, it does not appear that it is qualified to operate in this state. If the branch organization, the plaintiff herein, is a corporation, there is no allegation to that effect. If it is not, it appears affirmatively that it has no capacity to sue. It does not appear from said allegation with what laws of the state of California the actual plaintiff has complied. Grand Grove, etc., v. Garibaldi Grove, 130 Cal. 116, 62 P. 486, 80 Am.St.Rep. 80; Agricultural Extension Club, etc., v. Hirsch & Son, 39 Cal. App. 433, 435, 179 P. 430; Judah v. Fredericks, 57 Cal. 389; Collins v. O'Laverty, 136 Cal. 31, 68 P. 327; Swamp & Overflowed Land District No. 110 v. Feck, 60 Cal. 403; Pleaters & Stitchers Ass'n v. Davis, 140 Cal.App. 403, 35 P.(2d) 401; Herald v. Glendale Lodge No. 1289, 46 Cal.App. 325, 189 P. 329. It is established

that when the right to sue constitutes an integral part of plaintiff's cause of action, the facts showing the authority to sue must clearly appear. *Louisville & N. R. Co. v. Brantley's Adm'r*, 96 Ky. 297, 28 S.W. 477, 49 Am.St.Rep. 291; *Wilson v. Shrader*, 73 W.Va. 105, 79 S.E. 1083, Ann.Cas. 1916D, 886.

The judgment is reversed, with directions to the trial court to sustain the demurrer and permit plaintiff reasonable time within which to amend its complaint.

We concur: HOUSER, P. J.; DO-RAN, J.



13 Cal.App.2d 227

ALLEN v. BLAIR et al.

Civ. 1912.

District Court of Appeal, Fourth District,
California.

April 13, 1936.

1. Trusts ⇨191(1)

Provision of express trust directing trustee in case of trustor's default to sell trust property and to use proceeds in discharge of trustor's obligations *held* mandatory and to impose upon trustee duty to sell trust estate when necessary to make good trustor's default and discretionary only as to selection of property to be sold (Code Civ.Proc. § 1060).

2. Trial ⇨400(1)

In action to determine whether provision of trust authorizing trustee to sell trust property was mandatory, court *held* without authority to make amended finding that trustee should be ordered to sell property apart from any provision of trust, or to order such sale by trustee, since beyond issues made by pleadings (Code Civ.Proc. §§ 662, 1060).

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by R. E. Allen, trustee, against John H. Blair and others. From an adverse judgment, named defendant appeals.

Judgment modified and, as so modified, affirmed.

Porter & Sutton, of Los Angeles, for appellant.

Arnold Praeger and Laurence Berger, both of Los Angeles, for respondents.

MARKS, Justice.

This is an action brought under the provisions of section 1060 of the Code of Civil Procedure by the trustee of an express trust against the trustor and the beneficiaries for the purpose of determining and declaring the meaning and effect of a provision in paragraph XIII of the declaration of trust, which is as follows: "Should the Trustor default in the performance of any of his obligations hereunder or in the payment of any sum which may be payable by him under the terms of this Declaration of Trust, the Trustee may, and it is hereby specifically authorized and directed to, sell any part or all of the property constituting the principal or corpus of the trust estate which in its discretion may be deemed advisable, and use the proceeds therefrom, or any part thereof, and/or any cash which may be in its hands and subject to this trust, to pay any and all sums in respect to the payment of which the Trustor is in default under the terms thereof. * * *

[1] The trial court found this provision mandatory, and entered judgment accordingly. We have concluded that the quoted language supports this conclusion. It seems to us clear that upon the default on the part of trustor to perform the obligations imposed upon him by the declaration of trust it became the duty of the trustee to sell any portion of the trust estate necessary to make good the default of the trustor, and that the only discretion given the trustee was in the selection of the property to be sold. A study of that portion of the declaration of trust brought before us forces the conclusion that it was the clearly expressed intention of John H. Blair, the trustor, to provide a trust fund of \$300,000, having a net income of not less than \$1,500 per month, for the support of Velma Blair, his wife, and Marian Blair, his daughter, during the life of Mrs. Blair, with provisions for the support of the daughter thereafter. The obligation was placed upon Blair to keep the value of the corpus of the trust estate up to \$300,000 and supply any deficit in its net income should such income be less than \$1,500 per month. It is admitted that the value of the trust estate had been reduced below \$300,000 and the net in-

come below \$1,500 per month, and that Blair had not made good these deficiencies. It then became the plain duty of the trustee to sell such property belonging to the trust estate which he might select to supply the deficiencies.

[2] Findings of fact and judgment were signed and filed on June 26, 1933. On August 22, 1933, amended findings of fact and an amended judgment were signed and filed. A reading of these documents disclose that Blair had moved for a new trial, and that on the hearing of that motion the trial court amended the findings of fact and judgment and denied the motion. The power to do this is clearly given by section 662 of the Code of Civil Procedure.

In amending the findings of fact, the trial court added finding No. 5, which is as follows: "The court further finds from the evidence that even if the provisions of article XIII of said declaration of trust were not mandatory, as found by the court, that from all of the facts in the case as disclosed by the evidence, the said trustee should be ordered to sell said property forthwith in the manner provided by law."

In amending the judgment, the court added the following: "It is further ordered, adjudged and decreed that said R. E. Allen, trustee of said trust, be and he is hereby directed to sell the property constituting the corpus of the trust estate forthwith in the manner provided by law." It should be observed that this amounts to a peremptory order of the trial court requiring the trustee to immediately sell the property constituting the corpus of the trust. No discretion is given him in the choice of the property to be sold.

A somewhat similar situation was before the Supreme Court in the case of *City of San Diego v. Cuyamaca Water Co.*, 209 Cal. 105, at page 150, 287 P. 475, 495, where the court said: "The only remaining question for our determination upon these appeals relates to that portion of the judgment of the trial court wherein it purported to enjoin the defendants and interveners from the doing of certain constructive work in connection with their conservation and diversion of the waters of the San Diego River except in subordination to the prior and paramount rights of the plaintiff therein, and also purporting to restrain the defendants and interveners from the assertion of any claims of right or title in or to the waters of the San Diego river except in subordination to the paramount rights of

the plaintiff therein, and save and except in the amounts and to the extent in said judgment specified. In respect to the aforesaid portions of the judgment it is clear that the trial court has gone beyond the scope and issues of the instant action. This, as we have seen and as this court has already decided upon the former proceeding, is an action purely declaratory in character and is one wherein the plaintiff has neither pleaded nor attempted to prove any facts which would entitle it to any other or affirmative relief beyond that of having its prior and paramount right to the use of the waters of the San Diego river established. This being so, the trial court was in error in attempting to give to its determination of this matter any other or further effect than that of a declaratory judgment." The judgment was amended on appeal by striking out those portions enjoining defendants and interveners from constructing works in connection with the conservation and diversion of the waters of the San Diego river, and from asserting any right to the waters of that river, except in subordination to the paramount rights of the plaintiff. As modified the judgment was affirmed.

In the instant case, the complaint sought nothing more than declaratory relief and a declaration by the trial court of the true meaning of certain provisions of the declaration of trust. The answer of Mrs. Blair and her daughter merely joined with the trustee in the allegations and prayer of the complaint. The answer of Blair admitted the material allegations of the complaint and alleged that the paragraph from the declaration of trust which we have quoted was directory and not mandatory in effect. He also alleged that the value of the property composing the corpus of the trust had greatly depreciated, "and that it would be an abuse of discretion for plaintiff to sell any of said properties at this time." In the prayer to his answer, Blair united "with plaintiff in asking for the relief sought by plaintiff in this action."

From what we have said it seems evident that the conclusion reached by the Supreme Court in *City of San Diego v. Cuyamaca Water Co.*, supra, is controlling here, and that what was there said is applicable here. It follows that the quoted portions of the amended findings of fact and amended judgment go beyond the issues made by the pleadings in ordering the immediate sale of "the property constituting the corpus of the trust estate."

It is ordered: That finding No. 5 be stricken from the amended findings of fact and conclusions of law, and that the amended judgment be modified by striking therefrom the following: "It is further ordered, adjudged and decreed that said R. E. Allen, trustee of said trust, be and he is hereby directed to sell the property constituting the corpus of the trust estate forthwith in the manner provided by law"; and, as so modified, the judgment is affirmed. Each party will pay his own costs of appeal.

We concur: BARNARD, P. J.; JENNINGS, J.



13 Cal.App.2d 198

MICHEL v. WILLIAMS et al.

Civ. 10219.

District Court of Appeal, Second District,
Division 2, California.
April 10, 1938.

1. Judgment $\hookrightarrow$ 346, 381

Court has power to vacate order void upon its face at any time upon court's own motion or upon motion of a party.

2. Judgment $\hookrightarrow$ 386(3)

Judgment awarding costs against party defaulting in quiet title action held void, and hence could be vacated more than six months after entry of order (Code Civ.Proc. § 739).

3. Judgment $\hookrightarrow$ 395

Where, in quiet title action against individuals and corporation, costs were awarded against corporation which had defaulted, subsequent order vacating award of costs should have been made applicable only to corporation and not to individuals who did not default (Code Civ.Proc. § 739).

Appeal from Superior Court, Ventura County; Edward Henderson, Judge.

Action by Clarence E. Michel against W. C. Williams and his wife, and another, wherein named defendant and his wife

filed a cross-complaint. From an order, plaintiff appeals.

Affirmed in part, and reversed in part.

Mark H. Edwards, of Santa Paula, for appellant.

Wayne L. Clark, of Ventura, for respondent.

WOOD, Justice.

Plaintiff commenced this action to quiet title against defendant Peoples Lumber Company, a corporation, and certain individual defendants. The corporation failed to answer, and its default was entered February 14, 1933. The individual defendants filed an answer and cross-complaint, and upon the trial plaintiff recovered judgment. The court, apparently through inadvertence, rendered judgment against all the defendants for costs in the sum of \$189.05. These matters appear in the judgment roll. More than six months after entering of the judgment the defendant corporation filed a motion to be relieved from the purported judgment for costs. This motion was granted on October 17, 1934, and plaintiff appeals from this order.

It is provided in section 739 of the Code of Civil Procedure: "If the defendant in such action [quiet title] disclaim in his answer any interest or estate in the property, or suffer judgment to be taken against him without answer, the plaintiff cannot recover costs." It is conceded that the court should not have rendered judgment for costs against the defendant corporation, but plaintiff contends that after the expiration of six months from the time of entering the judgment the court was without jurisdiction to modify the judgment by relieving the corporation from the payment of costs. It is claimed that the judgment was erroneous, but not void.

[1] The position of plaintiff is not an enviable one. The order relieving defendant corporation from the effects of an unfair and illegal judgment should be sustained unless its reversal is made mandatory by clear provisions of the law. "A judgment which is void upon its face, and which requires only an inspection of the judgment roll to demonstrate its want of vitality, is a dead limb upon the judicial tree, which should be lopped off if the power so to do exists." *People v. Greene*, 74 Cal. 400, 16 P. 197, 199, 5 Am.St.Rep. 448. The court has power to vacate an order

void upon its face at any time upon its own motion or upon motion of a party. *People v. Davis*, 143 Cal. 673, 77 P. 651. "If a court grants relief, which under no circumstances it has any authority to grant, its judgment is to that extent void." 1 Freeman on Judgments, §120-c.

In *Grannis v. Superior Court*, 146 Cal. 245, 79 P. 891, 892, 106 Am.St.Rep. 23, the lower court had entered a final decree of divorce in disregard of the statutory requirement that only an interlocutory decree should be entered. After the judgment became final, a motion was made to vacate "so much of said decree as awards to the said plaintiff an absolute decree." The Supreme Court denied a petition for a writ of prohibition by which it was sought to prevent the superior court from granting the motion. The court said: "But where the question upon which the jurisdiction depends is one of law purely, the jurisdiction over the subject-matter is always open to collateral inquiry. * * * The judgment in question being wholly void as a final judgment granting an immediate divorce, it was within the power of the superior court, at any time, on motion of either party, or of its own motion, to declare it null, in so far as it purported to be of such effect." In *Tonningsen v. Odd Fellows' Cemetery Ass'n*, 60 Cal.App. 568, 213 P. 710, 712, the trial court had improperly entered a judgment of foreclosure without giving the right of redemption. The reviewing court said: "We conclude that the judgment in the foreclosure proceeding, in so far as it barred the right of redemption, was void and subject to collateral attack." In *Sache v. Wallace*, 101 Minn. 169, 112 N.W. 386, 387, 11 L.R.A. (N.S.) 803, 118 Am.St.Rep. 612, 11 Ann. Cas. 348, the court said: "Proceedings outside the authority of the court, or in violation or contravention of statutory prohibitions, are, whether the court have jurisdiction of the parties and subject-matter of the action or proceedings, or not, utterly void. *Ex parte Simmons*, 62 Ala. [416] 417; *Ex parte Gibson*, 31 Cal. 619, 91 Am.Dec. 546; *Barton v. Saunders*, 16 Or. 51, 16 P. 921, 8 Am.St.Rep. 261. The mere fact that the court has jurisdiction of the subject-matter of an action before it does not justify an exercise of a power not authorized by law, or a grant of relief to one of the parties the law declares shall not be granted. * * * Although every

exercise of power not possessed by a court will not necessarily render its action nullity, it is clear that every final act, in the form of a judgment or decree, granting relief the law declares shall not be granted, is void, even when collaterally called in question. * * * The case of *Ritchie v. Sayers (C.C.)* 100 F. 520, involved a collateral attack on a judgment, and the court after referring to the rule as generally stated in the books, namely, that the judgment of a court having jurisdiction of the parties and the subject-matter of the action is conclusive and cannot be collaterally called into question, said: "That may be conceded, but the question is, did it have jurisdiction to enter the particular decree and judgment that it did enter? As we have before seen, we reach the conclusion that the particular judgment could not be entered; and it is a well-settled principle that, although a court may have jurisdiction of a case, yet, if it appears from the record that it did not have jurisdiction to enter the particular decree and judgment, it may be collaterally attacked."

[2,3] In a proceeding in which the court is permitted to render judgment for costs, an award of an excessive amount doubtless would be erroneous and not void, and therefore could not be modified after the expiration of the six months' period. An award of costs against a party defaulting in a quiet title action is a "grant of relief to one of the parties which the law declares shall not be granted," and is therefore void. The court was without authority to enter a judgment for costs against the defendant corporation, and the order relieving the corporation from this part of the judgment was proper. The plaintiff points out that in the order of October 17, 1934, the court vacated as against all defendants the part of the judgment providing for costs. The order should have been made applicable to the defendant corporation only.

It is ordered that the order of the superior court entered on October 17, 1934, be affirmed in so far as it relieves the defendant Peoples Lumber Company from the payment of costs. The said order is reversed in so far as it relieves other defendants from the payment of costs.

We concur: CRAIL, P. J.; McCOMB, Justice pro tem.

13 Cal.App.2d 193

SANFORD v. WILCOX.

Civ. 10026.

District Court of Appeal, First District,
Division 2, California.

April 10, 1936.

Hearing Denied by Supreme Court

June 8, 1936.

1. Appeal and error ⇨867(2)

On appeal from order granting new trial on issue of damages alone, Appellate Court was not concerned only with question of whether trial court abused its discretion in determining that award was inadequate (Code Civ.Proc. § 657).

2. New trial ⇨75(4)

Action of trial court in granting plaintiff, proving \$1,283.81 special damages and establishing injuries including fractures of fibula and tibia and concussion from blow on head causing headaches and dizziness, with some complications remaining 14 months after accident, new trial on ground that \$3,000 damages was inadequate, *held* not abuse of discretion.

3. Appeal and error ⇨867(2)

Where record contains substantial evidence to support implied finding that injuries were proximately caused by negligence of defendant without fault on part of plaintiff, question of preponderance of evidence on such issues *held* not before Appellate Court on appeal from order granting new trial on issue of damages alone.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Nina B. Sanford against Bertram Wilcox. From an order granting a new trial on the issue of damages alone, defendant appeals.

Affirmed.

Barry J. Colding, Theodore Hale, and Carroll B. Crawford, all of San Francisco, for appellant.

Geo. K. Ford and Faulkner, Doyle & Sanford, all of San Francisco, for respondent.

SPENCE, Justice.

In this action to recover damages for personal injuries, plaintiff was awarded a verdict in the sum of \$3,000. Plaintiff was dissatisfied with the amount awarded,

and moved for a new trial because of the alleged inadequacy of the damages. The trial court made its order granting a new trial on the issue of damages alone. Defendant appeals from said order.

[1] Appellant does not question the power of a trial court to grant a new trial limiting the issue to that of damages alone. *Tumelty v. Peerless Stages*, 96 Cal.App. 530, 274 P. 430; section 657, Code Civ. Proc. Appellant contends, however, that the order granting the motion in the present case was "an abuse of judicial discretion" because "the verdict is not so grossly inadequate as to indicate that it is the result of passion or prejudice or inadequate at all." We believe, however, that on this appeal from an order granting a new trial, we are not concerned with the question of whether the verdict was so grossly inadequate as to indicate that it was the result of passion or prejudice, but rather with the question of whether the trial court abused its discretion in determining that the award was inadequate. This was clearly stated in the recent decision in *Hoffman v. Lane* (Cal.App.) 54 P.(2d) 477, 478, where the court reviewed the decision in *Peri v. Culley*, 119 Cal.App. 117, 6 P.(2d) 86, and said: "It was there decided that a trial judge may grant a new trial if he is satisfied from the evidence that the award is not legally adequate or commensurate with the injuries, and he is not limited in the exercise of such power to awards so grossly inadequate as to raise an inference of passion or prejudice."

[2] In appellant's statement of the questions involved in this appeal, he states the facts as follows: "Plaintiff, a pedestrian, was struck by defendant's automobile while crossing a street; she proved special damages amounting to \$1,283.81. Her major injuries were fractures of fibula and tibia and concussion from blow on head, causing headaches and dizziness. Some complications remained 14 months after accident." The record discloses evidence from which it might have been found that respondent's special damage was greater than the amount above stated, and further discloses evidence from which it might have been found that respondent's injuries were more serious and more lasting than the above summary would indicate. But even accepting appellant's brief summary as a basis for this discussion,

there was only approximately \$1,700 awarded as general damages, and we cannot say that the trial court abused its discretion in determining that the award was inadequate.

[3] Appellant further sets forth certain evidence relating to the issues of negligence and contributory negligence, and argues that in view of this evidence, the award was more favorable to respondent than she had a right to expect. If the evidence of appellant's negligence was insufficient as a matter of law or if the uncontradicted evidence showed that respondent was guilty of contributory negligence as a matter of law, then appellant's discussion of these issues might be pertinent to the question involved on this appeal. But appellant's argument merely relates to the claimed "preponderance of the evidence" on these issues. Suffice it to state that the record contains substantial evidence to support the implied finding that injuries were proximately caused by the negligence of appellant without fault on the part of respondent. The question of the preponderance of the evidence on these issues is therefore not before us on this appeal.

The order is affirmed.

We concur: NOURSE, P. J.;
STURTEVANT, J.



13 Cal.App.2d 202

THATCH v. LIVINGSTON et al.

Civ. 10132.

District Court of Appeal, Second District,
Division 2, California.

April 10, 1936.

Quieting title ☞44(3)

Evidence that defendants by misrepresentations induced plaintiff to accept as security for loan a note and trust deed, naming plaintiff and one of defendants as payees of note and beneficiaries under trust deed, held sufficient to justify judgment for plaintiff quieting title to note and deed.

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Action by Mary L. Thatch against Ruth Livingston and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

R. D. Wickham, of Alhambra, for appellants.

Sloan Pitzer, of Alhambra, for respondent.

McCOMB, Justice pro tem.

This is an appeal by defendants from a judgment in favor of plaintiff after a trial before the court without a jury.

The conceded facts are:

July 29, 1931, plaintiff, the grandmother of defendant Ruth Livingston, loaned to defendants the sum of \$2,400 secured by a note and trust deed executed by defendants and naming plaintiff and defendant Ruth Livingston as the payees of the note and beneficiaries under the trust deed. Plaintiff filed this action to quiet title to the promissory note and trust deed, alleging that defendants misrepresented certain facts at the time of the execution of the note.

This is the sole question presented for our determination: Was there substantial evidence to sustain the trial court's findings that defendants by misrepresentation induced plaintiff to accept as security for a loan a note and trust deed, naming plaintiff and defendant Ruth Livingston as the payees of the note and beneficiaries under the trust deed?

We have examined the record and are of the opinion there was substantial evidence considered in connection with such inferences as the trial court may have reasonably drawn therefrom to sustain each and every material finding of fact upon which the judgment in favor of plaintiff was necessarily predicated. We therefore refrain from further discussion of the evidence. *Leavens v. Pinkham & McKeivitt*, 164 Cal. 242, 245, 128 P. 399; *Koeberle v. Hotchkiss* (Cal.App.) 48 P.(2d) 104.

In thus disposing of this case we are heartily in accord with a recent expression of Mr. Justice McReynolds. He says: "In my view, multiplied judicial utterances have become a menace to orderly administration of the law. Much would be gained if three-fourths (maybe nine-tenths) of

those published in the last twenty years were utterly destroyed. Thousands of barren dissertations have brought confusion, and often contempt. * * * Hurried opinions and long dictated ones, when not laboriously revised, generally have no proper place except in the waste basket."

The judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.



13 Cal.App.2d 93

WHITE v. FINANCIAL GUARANTEE CORPORATION, Limited, et al.

Civ. No. 9976.

District Court of Appeal, Second District,
Division 1, California.

April 4, 1936.

Hearing Denied by Supreme Court
June 1, 1936.

1. Fraud ☞11(1)

To avoid an action for deceit or fraud, expression of opinion should be honestly entertained, and whether representations are of fact or matters of opinion depends largely on the circumstances.

2. Fraud ☞11(1)

Expression of opinion may amount to fraud where accompanied by active misrepresentations or concealment, or where it relates to subject of which parties have no knowledge or means of ascertaining the truth.

3. Fraud ☞23

One has right to rely on statements of material facts essentially connected with substance of transaction, where one of parties is ignorant or inexperienced in regard to matters concerning which material representations are made, and such ignorance is known to the other party, who is aware that reliance is being placed on his representations, and that facts are not within first party's knowledge.

4. Fraud ☞58(1)

Evidence held to support judgment for investor for fraudulent representations of brokerage company that it had inside information as to condition of investment markets which would enable it to prevent loss to investor, whereby investor was induced to ad-

vance money for purchase of securities to investor's loss.

5. Fraud ☞41

Complaint which alleged that brokerage company falsely represented that it had inside information as to condition of investment markets which would enable it to prevent loss to investor, whereby investor was induced to advance money for purchase of securities, to investor's loss, held to state actionable fraud.

6. Licenses ☞26

Brokerage company dealing in securities issued by others held "broker" within Corporate Securities Act, and hence brokerage company's surety was liable to investor for loss resulting from company's fraudulent representations relating to brokerage transaction (St.1917, p. 673, as amended).

[Ed. Note.—For other definitions of "Broker," see Words & Phrases.]

7. Appeal and error ☞110

Orders denying motions for new trial are not appealable.

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Action by Lulu C. White against the Financial Guarantee Corporation, Limited, Fred Rogers, the Coast Surety Corporation, and others. From a judgment for plaintiff, named defendants appeal.

Affirmed.

Leslie S. Bowden, of Los Angeles, for appellants.

Ben C. Cohen and Irving Cohen, both of Los Angeles, for respondent.

WHITE, Justice pro tem.

This action was commenced against the defendants Financial Guarantee Corporation, Limited, a corporation; Fred Rogers, and others who do not appear herein as appellants, to recover certain moneys alleged to have been obtained by said defendants from plaintiff through fraudulent misrepresentations in connection with certain brokerage transactions had with the aforesaid defendants. Joined also as a party defendant was the appellant Coast Surety Corporation, as surety for defendant Financial Guarantee Corporation, Limited, under and by virtue of a bond executed by said surety company pursuant to the provisions of section 6 (formerly section 5) of the Corpo-

rate Securities Act (St.1917, p. 673, and amendments thereto).

The cause was tried before a jury, which returned a verdict against the defendants in the sum of \$2,446.52, and assessed exemplary damages against the defendants in the sum of \$1,000. A motion for a new trial was interposed and denied, but the judgment against defendant Coast Surety Corporation was reduced by the trial court in the sum of \$1,000. Judgment was entered accordingly, from which this appeal is prosecuted. Appellants urge a reversal of the judgment on the grounds that the trial court erred in overruling defendants' demurrers to the second amended complaint and in refusing to exclude all evidence upon the trial of the cause, as well as in denying defendants' motion for a nonsuit. As further grounds for reversal of the judgment, appellants assert that the evidence is insufficient to support the judgment; that the court erred in denying defendants' motion for a new trial and in holding the defendant Coast Surety Company liable under its bond.

We have examined the evidence, and it is apparent therefrom, we think, that a fraud was practiced on respondent; and, although the testimony is conflicting on several points, we believe that as a whole it is legally sufficient to support the verdict arrived at by the jury, that the fraud was actionable, and entitled respondent to the relief granted her.

The second amended complaint alleged, and there was sufficient evidence to sustain plaintiff's contentions, that appellant Financial Guarantee Corporation, Limited, and its officers and agents were engaged in the brokerage business, handling corporate securities, and counseling and advising investors; that plaintiff was an elderly woman with a limited experience in dealing with stocks and securities; that defendants represented to plaintiff that they would make safe investments in securities listed on the New York stock exchanges, which would return an income without any speculation or danger of loss of the investment; that defendants further represented to plaintiff that they would not purchase stocks on behalf of the plaintiff on marginal transactions, or on partial cash payments, but would purchase stocks for and on behalf of the plaintiff by making full cash payment for said purchases; that further representations were made by defendants to plaintiff that Financial Guarantee Corporation, Limited, had been and was in a good position to have in-

side information as to the condition of the investment markets in New York City, and the political, industrial, and credit situation in Washington, D. C., which would have a direct bearing upon the market situation in New York. The second amended complaint further averred, and there was evidence to the effect, that the defendants further represented to plaintiff that the defendant corporation had direct telegraph wires to the said investment markets and exchanges; that said defendant corporation had advance information and advance notices as to the future transactions and movements of the exchanges and investment markets in New York City; that by reason of said advance information defendant corporation knew when to sell securities at the right time, and thereby make profits for its clients; that the defendant corporation knew in advance what the investment markets and exchanges in New York City would do with reference to the rise and fall in prices of securities listed thereon, and that it knew the credit situation in Washington, D. C., in advance, so that defendants could tell how the markets in New York City would react; that by reason of such facilities and advance information defendant Financial Guarantee Corporation, Limited, and its agents could prevent any loss to plaintiff in her investments through such corporation. Plaintiff established the falsity of the representations by which defendants claimed to have inside information as to the condition of the investment markets in New York City and the political, industrial, and credit situation in Washington, D. C.; and also disproved the truth of the representations that defendant corporation was receiving advance information as to movements in the investment markets and exchanges of New York City, and that it knew in advance what the investment markets and exchanges in New York City would do with reference to the rise and fall in prices of securities; and also disproved defendants' claim of direct telegraphic facilities to eastern investment markets and exchanges.

[1-3] Possibly, as appellants contend, some of the misrepresentations related more or less to matters of opinion, but expression of opinion, to avoid an action for deceit or fraud, should be honestly entertained by the person making the same (Macdonald v. De Fremery, 168 Cal. 189, 142 P. 73; Phelps v. Grady, 168 Cal. 73, 141 P. 926; Barron Estate Co. v. Woodruff Co., 163 Cal. 561, 126 P. 351, 42 L.R.A.(N.S.) 125); and

whether or not representations are of fact or matters of opinion depends largely on the circumstances (*Hall v. Mitchell*, 59 Cal.App. 743, 211 P. 853; *Hodgkins v. Dunham*, 10 Cal.App. 690, 103 P. 351). As was said in *Zwart v. Landfield*, 93 Cal.App. 328, 333, 269 P. 740, 742: "Moreover, the expression of opinion may amount to fraud where it is accompanied by active misrepresentations or concealment, or where it relates to a subject as to which the parties have no knowledge or means of ascertaining the truth. * * * The general rule is that one has a right to rely on statements of material facts essentially connected with the substance of the transaction where one of the parties is ignorant or inexperienced in regard to matters concerning which material representations are made, and such ignorance is known to the other party, who is also aware that reliance is being placed on his representations, and that the facts are not, and cannot be expected to be, within the first party's knowledge (12 Cal.Jur. 754, and cases cited); and, if one material statement be false, it is sufficient ground for rescission (*Beeman v. Richardson*, 185 Cal. 280, 196 P. 774)."

[4, 5] Under the foregoing rules, which we feel are particularly applicable to the facts of the present case, we are of the opinion that the evidence is sufficient to sustain the verdict and judgment entered thereon. And, the facts hereinbefore noted having been averred in the second amended complaint, we are of the opinion that the trial court was correct in overruling defendants' demurrers and refusing to exclude all evidence upon the trial of the case.

Appellants earnestly urge, as a further ground for reversal, that the trial court fell into error in holding the defendant Coast Surety Corporation liable under its bond. The bond here in question was executed in accordance with the provisions of the Corporate Securities Act, *supra*. Appellants contend that the bond provided for by the statute was never intended to cover the type of transaction involved in the case at bar, for the reason that an examination of the act discloses that its primary purpose is to vest in a corporation commissioner certain powers to regulate the sale of a certain class of securities; that section 3 of the act (St.1917, p. 675, § 3) provides, in effect, that no company shall sell, or take any subscriptions for, any securities of its own issue, until it shall have first applied for and se-

cured from the corporation commissioner a permit authorizing the same. Appellants argue that it was undoubtedly the intention of the Legislature, in providing for the certificate of a broker and a bond, to vest in the corporation commissioner power to regulate the sale of companies' securities through brokers; that is, securities which were subject to the control of the corporation commissioner. They challenge the claim that the Legislature intended that the corporation commissioner should control brokers who, like the defendants in the instant case, were selling securities of their clients listed on the New York and other stock exchanges. They assert that section 6 of the act was never intended to inure to the benefit of investors who were selling their own securities through a broker, unless they were selling original issues of stock or other securities; that the position of the defendant brokerage company herein was that of simply executing sales and purchases for its customers, and not actually selling its customers anything.

The contention of appellant Coast Surety Corporation, that under the terms of the Corporate Securities Act it is not liable to respondent in this case under its bond, in our judgment, is not tenable. The act in question, although adopted in 1917 (St.1917, p. 677, § 5), was amended in 1923 (St.1923, p. 90), and again in 1925 (St.1925, p. 967) and in 1931 (St.1931, p. 943 [section 6]), so as to enlarge the surety's liability on the bond.

Paragraph 3 of section 5 of the Corporate Securities Act (St.1923, p. 90) provided, before its amendment in 1925, that, "said bonds shall be conditioned upon the faithful compliance with the provisions of law by said applicant and by all agents representing the said applicant." This language was construed in *Blumenthal v. Larson*, 79 Cal. App. 726, 251 P. 241, and *Mitchell v. Smith*, 204 Cal. 197, 267 P. 540, to limit the liability on the bond to cases where the broker was guilty of fraud in the sale of securities as defined by section 14 of the act.

In 1925 the section was amended (St. 1925, p. 967) to read in part as follows: "Said bond shall be conditioned upon the strict compliance with the provisions of this act, and the honest and faithful application of all funds received, and the faithful and honest performance of all obligations and undertakings in the purchase or sale of securities, by said broker, his agents and employees. Said bond shall be further condi-

tioned upon the payment of all damages suffered by any person damaged or defrauded by reason of the violation of any of the provisions of this act, or by reason of any fraud connected with or growing out of any transaction contemplated by the provisions of this act."

In 1931 the Legislature re-enacted and amended the foregoing section, as section 6 (St.1931, p. 943), so as to enlarge the liability of the surety to include any installment purchase contracts involving the sale of a security, but the 1931 amendment has no application to the facts in the instant case.

As was said in *Bridges v. Price*, 95 Cal. App. 394, 398, 273 P. 72, 74, the purpose and effect of the 1925 amendment was obviously to extend the liability upon such bonds beyond that which was imposed by the statute before the amendment. Commenting thereon, the court said: "Whatever may be meant by the word 'honest,' the 'faithful performance of all obligations and undertakings' means no more than performance of those obligations and undertakings according to their terms. Bonds conditioned for the 'faithful performance' of a contract have always been construed as being breached by any failure of performance in the principal contract. *Garrett v. Dodson* (Tex. Civ.App.) 199 S.W. 675, 682; *General Bonding & Casualty Ins. Co. v. Hill* (Tex. Civ.App.) 195 S.W. 873; *Lamson v. Maryland Casualty Co.*, 196 Iowa, 1185, 194 N.W. 70; *Trinity Parish v. Aetna Indemnity Co.*, 37 Wash. 515, 79 P. 1097; *Long v. American Surety Co.*, 23 N.D. 492, 137 N.W. 41; *Hensley v. School District*, 97 Kan. 56, 154 P. 253. In fact, such bonds are frequently referred to as 'faithful performance bonds.'"

[6] The appellant Financial Guarantee Corporation, Limited, having failed in the faithful performance of its obligation in the sale and purchase of securities for respondent herein, and the jury by its verdict having found defendant Financial Guarantee Corporation, Limited, guilty of fraud in connection with its transactions with plaintiff, we are of the opinion that said surety company became liable to respondent upon its bond. In our opinion, appellant Financial Guarantee Corporation, Limited, comes within the definition of a broker as defined by the Corporate Securities Act, and its relation to respondent herein was that of a broker as contemplated by the Corporate

Securities Act, because undoubtedly, from the evidence in this case, it was dealing in securities issued by others, and was offering the same for sale and negotiating for the purchase thereof. We think the trial court was justified in denying the motion for nonsuit as to all appellants herein, and was correct in holding that appellant Coast Surety Corporation was liable to respondent herein under the bond in question.

[7] The attempted appeal from the denial of the motions for new trial is dismissed, for the reason that no appeal lies from such orders. The judgment appealed from is affirmed.

We concur: HOUSER, P. J.; YORK, J.



13 Cal.App.2d 46
STEWART v. LIDO CAFE et al.
Civ. 1394.

District Court of Appeal, Fourth District,
California.
April 1, 1936.

Rehearing Denied April 29, 1936.
Hearing Denied by Supreme Court
May 28, 1936.

1. Negligence ⇨32(1)

Proprietor of public place of business is bound to keep business portion of premises and passageways in safe condition and to use ordinary care to avoid accidents or injury to persons properly entering upon premises on business, but rule does not apply to parts of building used for owner's private purposes unless person injured was induced to enter such part by owner's invitation, express or implied.

2. Negligence ⇨37

Invitation of proprietor of public place of business extends to portions where invitee would naturally be likely to go under conditions of invitation, and such implied invitation may be manifested by arrangement of premises or conduct of proprietor.

3. Negligence ⇨136(9)

In actions for injuries incurred in public place of business, question of negligence of injured person is involved, and, where circumstances are such that reasonable minds might differ as to whether person was negli-

gent, person is not as a matter of law a mere licensee.

4. Negligence ☞136(15)

Whether decedent, who fell down stairway in public restaurant and bar after employee had expressly but ambiguously directed decedent to toilet, was an invitee up to moment of injury held for jury.

5. Negligence ☞136(27)

Contributory negligence of decedent, who fell down stairway in public restaurant and bar after employee had expressly but ambiguously directed him to toilet, held for jury.

6. Master and servant ☞332(4)

Negligence ☞138(3)

Evidence supported instruction that employee of public restaurant and bar was required to use ordinary care in directing deceased guest to lavatory, and that failure to exercise such care would constitute negligence which could be attributed to proprietors.

Appeal from Superior Court, Kern County; Allan B. Campbell, Judge.

Action by Virginia May Stewart, as administratrix of the estate of Harvey J. Stewart, deceased, against the Lido Café, a copartnership composed of Joe Cinelli and others. From a judgment for plaintiff, defendants appeal.

Affirmed.

Hugh B. Rotchford, of Los Angeles (Donald E. Ruppe, of Los Angeles, of counsel), for appellants.

Borton & Petrini, of Bakersfield, and Athearn, Chandler & Farmer, of San Francisco, for respondent.

BARNARD, Presiding Justice.

This is an action for damages for the death of Harvey J. Stewart. A motion for a nonsuit having been denied, the defendants rested without introducing evidence and moved for a directed verdict, which motion was denied, as was also a motion for judgment notwithstanding the verdict. From a judgment in favor of the plaintiff, the defendants have appealed.

The appellants were operating a restaurant and bar in Bakersfield known as Lido Café, and the injuries which resulted in the death of Stewart were caused by his falling down a stair on those premises

on October 19, 1933. The Lido Café faces south and is divided by a partition running north and south. The western portion is occupied by the restaurant from which swinging doors give access to the bar, which occupies the front end of the eastern portion.

An understanding of the points raised requires a description of this eastern portion. This portion has a front of 19 feet and a depth of about 80 feet and is divided into what may be called three rooms. The front room, used as a bar, is approximately 19 feet by 22½ feet. Its north wall goes to the ceiling and entrance to the middle room is by a door at the west end of this wall and to the left as one faces the rear of the building. The middle room is approximately 19 feet by 44 feet in size. To the rear of this is what may be called another room, although the partition between the two is only 6½ feet high while the ceiling is 17 feet high. Entrance to this third room is by a door at the west end of this partition, near the left wall of the room as you face the rear. This third room is 19 feet wide and about 11 feet in depth. In the northwest corner of this room is an offset 3½x4 feet in size, the walls of which go to the ceiling, and in which there is a toilet the door to which is in the east wall of the offset. As one enters this third room through the door referred to, he faces the south wall of this offset, and sees ahead of him a sink along the lower part of the wall, and above that, beginning about 7 feet from the floor, a grillwork with wire in front of it which is similar in construction to an air conveyor. Along the east wall of the portion of the building we are describing is another offset which is partly in the middle room and partly in the third room. The walls of this offset are 12 feet high and the top is covered. This offset is about 12 feet long and 4½ feet wide. It incloses a stairway to the basement. The entrance to this stairway is by a door in the north end of this offset, near the northeast corner of the third room. On the occasion in question there was no light in this toilet and no light in this third room, although this room received some light over the partition from a light near the center of the middle room. The first person to enter this room after the deceased was injured testified: "You could see to get around but it was rather faint."

On the evening in question the deceased dined with a party of friends in this restaurant. About 8 o'clock he went through the door into the barroom, where two of his friends were standing at the bar. He asked the bartender, who was an employee of the appellants, the way to the lavatory and received the reply: "Down the end of the hall to the left." He then told his friends he would see them in a minute and started to the rear of the premises through the door in the northwest corner of the barroom. Shortly thereafter the bartender heard a noise and said to Mr. Jones, a friend of the deceased: "I think your friend fell back there." Jones went back and found the deceased injured at the foot of the stairway leading to the basement. Jones testified that when he went back there was no light in the third room or the toilet; that after he entered through the door he proceeded to about the center of the room and at that point looked back over his shoulder and "I could see by the faint glow the bowl of the lavatory"; that he then had his back to the offset which contained the toilet; that he then proceeded to the other or east side of the room where he found the door to the stairway open; that he could see the opening, but could see nothing beyond the opening itself; and that he found Stewart at the bottom of this stairway. It is conceded that the door to the basement was not locked and that there were no signs either of direction or warning in either of these rooms. One of the appellants, when asked if this lavatory was maintained for the use of patrons, replied: "Not necessarily for patrons, it was more for employees than patrons." She then testified that nevertheless it was used by patrons quite often and that her employees often directed patrons back there, and that there was another toilet off of the dining room.

[1] The appellants contend that the deceased, in entering this stairway, was a mere licensee and not an invitee. The jury has impliedly found that he was an invitee, and the essential question is whether there is any evidence to support such a finding. In *Corbett v. Spanos*, 37 Cal.App. 200, 173 P. 769, 770, the court said: "The law of California as to the duties owing by a proprietor of a store to his customers and to the public is settled by the cases of *Schmidt v. Bauer*, 80 Cal. 565, 22 P. 256, 5 L.R.A. 580; *Means v. Southern Cal-*

ifornia Ry. Co., 144 Cal. 473, 77 P. 1001, 1 Ann.Cas. 206; *Herzog v. Hemphill*, 7 Cal. App. 116, 93 P. 899. It is well expressed in the following quotation from *Schmidt v. Bauer*, supra: 'The keeper of a public place of business is bound to keep his premises and the passageways to and from it in safe condition, and use ordinary care to avoid accidents or injury to those properly entering upon his premises on business. * * *. But this rule only applies to such parts of the building as are a part of or used to gain access to, or constitute a passageway to and from the business portion of the building, and not to such parts of the building as are used for the private purposes of the owner, unless the party injured has been induced by the invitation or allurements of the owner, express or implied, to enter therein.'"

[2] The invitation of a proprietor extends not only to all parts of the premises which the patron is expressly invited to use but also to such parts as he is impliedly invited to enter. *Schmidt v. Bauer*, 80 Cal. 565, 22 P. 256, 5 L.R.A. 580. The invitation also extends to those portions of the premises where the invitee under the circumstances and conditions of his invitation would naturally be likely to go. *Bush v. Weed Lumber Co.*, 63 Cal.App. 426, 218 P. 618. Such an invitation may be manifested by the arrangement of the premises as well as the conduct of the proprietor. *Herzog v. Hemphill*, 7 Cal.App. 116, 93 P. 899.

The appellants argue that the rules laid down in *Herzog v. Hemphill*, supra; *Corbett v. Spanos*, supra; *Schmidt v. Bauer*, supra; and *Medcraft v. Merchants' Exchange*, 211 Cal. 404, 295 P. 822, are conclusive here, and that it must be held, as a matter of law, that the deceased was not an invitee but was merely a licensee at the time of entering this stairway. The facts in the instant case, however, are somewhat different from those in the cases cited.

In the *Herzog Case* there was no express invitation on the part of the defendant or his employees, and there was no allegation that the portion of the premises in question was designed or maintained for the use of patrons or used as a part of the business. While the court says that the mere permission or habit of an owner of allowing people to enter and use a certain portion of his premises is indicative of a license merely and not of an invitation, it does not follow that such a general habit

of permitting it to be used by customers, coupled with a direct invitation by sending a customer there, is not sufficient to constitute the customer an invitee rather than a licensee. In the case before us, there is evidence that this toilet was often used by patrons, that employees often directed customers there, that this fact was well known to the employer and that one of the employees expressly directed the deceased to the same.

In the Schmidt Case the defendant pointed the way which was plainly marked, but the customer, disregarding the signs, went out into a back yard and in returning by a different route went aside and entered a private part of a house in the rear of the business premises. In the Corbett Case, while it was alleged that the dressing room was placed at the disposal of customers and maintained as an inducement to have them patronize the business, the court pointed out that there was no evidence that it had ever been so used except on this one occasion, that it was not shown that the employee who had directed the lady there was authorized to do so, and that in the absence of such a showing no inference could be drawn of an invitation on the part of the owner.

While the Medcraft Case is a little closer, it there appears that the plaintiff was an invitee in the anteroom merely by reason of an implied invitation, that another lighted room in front of him from which a light appeared over and under an intervening swinging door constituted a further implied invitation, and that the plaintiff deliberately turned aside from this implied invitation and opened another door through which he advanced into darkness. In effect, it was held that the lighted room clearly presented the only invitation that could be implied under the existing circumstances.

[3] We think these cases are not controlling here. Whether or not there is an invitation, and the extent of the invitation, must depend upon the circumstances of each case, and under some circumstances these are close questions. The question of negligence on the part of the injured party is involved, and where the circumstances are such that reasonable minds might differ as to whether or not he was negligent in going where he did it cannot be said, as a matter of law, that he was merely a licensee.

[4] The evidence here justifies the inference that the toilet in the rear room was used for the purposes of the business, and an employee of the appellants expressly directed the deceased to it. When he arrived in the third room there was no other lighted room or anything else to give him a further implied invitation to go one way rather than another. The directions given him were ambiguous and it was impossible for him to follow them literally. He was told to go "down the end of the hall to the left." Following this direction would take him to the door in the low partition between the second and third rooms, which door was at the left end of that partition. The appellants argue that this direction meant that after he entered the third room he was then to go to the left to the toilet in the northwest corner of that room, but he could not go to his left as he entered the room, for he was then next to the west wall of the building. He could not go straight ahead, as there was the sink and the wall resembling an air shaft. In order to reach the toilet it would have been necessary for him, after entering this room, to go to his right for a few feet, to then turn to his left and go a few feet, and then again turn to his left and go straight ahead. He was not given these complete directions and, as he entered the third room, he would naturally see straight ahead of him a very small setoff with a grillwork in the wall facing him which looked similar to an air shute. The light in this room was dim and he would see along the opposite or east wall a much larger setoff which would appear much more like such a wash room as was to be expected in an establishment of that size. It appears that Mr. Jones did not see the toilet until he was in the middle of this third room and then only because he stopped and looked back over his shoulder. The deceased may not have stopped in that position and very naturally may have failed to look back over his shoulder. When he entered the third room he had to turn to his right and then the larger setoff would be straight ahead of him, although he would still have to go to his left to enter the same. He could well have understood the direction given him as meaning that he should go through the door at his left after he had gone through the longer hall. He entered the rear room which was not properly lighted and not properly signed, after having been given poor and inade-

quate directions. In attempting to follow these directions he could well have been confused and the mistake he made appears to have been a natural one. It cannot be said, as a matter of law, that the only reasonable course open to him would have led him to the toilet. Under such circumstances the question presented is one of fact and not of law, and the evidence is sufficient to support the implied finding of the jury that the deceased was an invitee up to the moment he was injured.

cluding the detailed map of the premises in question, furnishes support for the giving of this instruction.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.



13 Cal.App.2d 54

PEOPLE v. WOOLSEY.

Cr. 2841.

District Court of Appeal, Second District,
Division 2, California.

April 2, 1936.

Hearing Denied by Supreme Court
April 30, 1936.

1. Licenses ⇨7(1)

Corporate Securities Act requiring person or company dealing in certain securities to obtain broker's license *held* not unconstitutional as regulation of purchase and sale by an individual of his own property (Gen. Laws Supp.1933, Act 3814).

2. Licenses ⇨18½

Person engaged in buying and selling building and loan certificates *held* "broker" within act regulating sale of certain securities and requiring broker to obtain license (Gen.Laws Supp.1933, Act 3814, § 2 (a), par. 10).

[Ed. Note.—For other definitions of "Broker," see Words & Phrases.]

3. Licenses ⇨18½

Business of purchasing securities for purpose of resale is proper matter for legislative regulation (Gen.Laws Supp.1933, Act 3814).

4. Licenses ⇨18½

Defendant engaged in buying and selling building and loan certificates as a business *held* within Corporate Securities Act, and subject to prosecution for engaging in such business without broker's license, notwithstanding defendant owned certificates for brief interval they were in his possession (Gen.Laws Supp.1933, Act 3814, § 2 (b), pars. 6, 10).

5. Indictment and Information ⇨110(30)

Indictment in language of act charging broker with buying and selling building and

[5] The second point raised is that the deceased was guilty of contributory negligence as a matter of law. This is based upon the contention that he had departed from the directions given him and was merely a licensee in entering the stairway. This contention has been sufficiently disposed of in what has already been said.

[6] The only other point raised is that the court erred in giving an instruction to the effect that if the jury found that the providing of a lavatory was part of the service furnished by the Lido Café in return for the patronage of its paying guests, that Stewart was a paying guest, and that the employee in question, in the course and within the scope of his employment, directed Stewart to the lavatory in the room which contained the door to the basement, that this employee was required to use ordinary care and prudence under the circumstances in giving such directions, and that a failure to exercise such care and prudence in this respect would constitute negligence which could be attributed to the defendants. It is argued that this instruction contains a correct statement of the law but that there was no evidence to support it. This argument is based upon the contention that the instruction given to Stewart by this employee was unambiguous, complete, and not lacking in any respect. The back room with its poor visibility, absence of direction or warning signs, and with an unlocked door which opened immediately upon a stairway to the basement, presented a dangerous situation. The employee in question could have directed Stewart to the toilet on the restaurant side of the café, which was plainly marked, or he could have given him adequate directions for reaching the one to which he sent him. As we have pointed out, the directions given were incomplete and ambiguous and could not be literally followed. The evidence in the record, in-

loan certificates in violation of Corporate Securities Act *held* sufficient (Gen.Laws Supp. 1933, Act 3814).

6. Larceny $\hookrightarrow$ 14(1)

To sustain conviction for larceny by trick and device, owner of property must have intended to part with possession only and not to pass title as well.

7. Larceny $\hookrightarrow$ 14(1)

Where owner intends to pass both possession and title of property, transaction, though it may amount to crime of obtaining property by false pretenses, is not "larceny."

[Ed. Note.—For other definitions of "Larceny," see Words & Phrases.]

8. Criminal law $\hookrightarrow$ 1172(6)

In prosecution for grand theft of building and loan certificates from owners who intended to part with possession and title, erroneous instruction on larceny by trick and device *held* not prejudicial, where evidence supported conviction on charge of obtaining property by false pretenses (Const. art. 6, § 4½).

9. Criminal law $\hookrightarrow$ 808½

In prosecution for violation of Corporate Securities Act, instructions defining "broker" in language of act *held* proper (Gen. Laws Supp.1933, Act 3814, § 2 (a), par. 10).

10. Licenses $\hookrightarrow$ 42(4)

Evidence *held* sufficient to support conviction of broker for buying and selling building and loan certificates in violation of Corporate Securities Act (Gen.Laws Supp. 1933, Act 3814).

11. Criminal law $\hookrightarrow$ 234

Departure of complaining witness from preliminary hearing without submitting to cross-examination *held* not to require defendant's discharge at trial in superior court, especially in absence of showing that defendant was not legally bound over by the committing magistrate.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

George V. Woolsey was convicted of grand theft and of violation of the Corporate Securities Act, and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

GOULD, Justice pro tem.

Defendant, according to the testimony adduced in this case, owned and controlled two corporations, each admittedly an alter ego of defendant, by means of which he engaged in the business of purchasing building and loan certificates from the general public, commonly contacting the public through newspaper advertisements. For these certificates he paid 10 per cent. of their face value in cash and executed a promissory note for the balance, payable in 18 months, with interest at the rate of 7 per cent. per annum. Evidence disclosed that, as soon as the certificates were acquired, defendant sold them at prices far below their face value, and that he used the money so realized to keep up interest payments on his notes for a time. It was also brought out by the evidence that in connection with the purchase of these certificates defendant made representations that he was engaged in the business of settling life estates, from which he derived sufficient income to meet the notes and other obligations. The testimony as a whole clearly established that he had no such business, that his companies made no profits, and that the representations so made were false and untrue. It is admitted that he held no broker's license from the commissioner of corporations.

For transactions involving the purchase of two certificates for \$1,000 and \$1,573, respectively, defendant was charged upon four counts, two for grand theft and two for violation of the Corporate Securities Act (St.1917, p. 673, as amended). A jury found him guilty on all four counts, the court denied his motion for new trial, and he appeals from the judgment and order.

[1-3] Appellant contends that the Corporate Securities Act is unconstitutional in so far as it purports to regulate the purchase and sale by an individual of his own property. In this he relies chiefly upon the cases of *People v. Pace*, 73 Cal.App. 548, 238 P. 1089, and *People v. Lesser*, 123 Cal.App. 489, 11 P.(2d) 668. The Corporate Securities Act as it now stands and as amended since the decision in *People v. Pace*, supra, to eliminate the uncertainties discussed therein, defines a broker as one who "shall, in this State, engage wholly or in part in the business of selling, offering

for sale, negotiating for the sale of, or otherwise dealing in any security issued by others * * * or of purchasing such securities with the purpose of reselling them, or of offering them for sale to the public." Deering's 1933 Supp., Act 3814, § 2 (a), par. 10, p. 1766. Manifestly the course of conduct on the part of appellant as disclosed by the evidence herein brings him within the class described in the phrase "or of purchasing such securities with the purpose of reselling them, or of offering them for sale to the public." That the business of purchasing securities with the purpose of reselling them is a proper matter for legislative regulation is squarely held in *State v. Swenson*, 172 Minn. 277, 215 N.W. 177, 179, 54 A.L.R. 490, wherein the Minnesota Supreme Court uses this language: "While it is recognized everywhere that the owner has the right to sell or dispose of his property when and to whom he pleases, it is also recognized everywhere that the manner of exercising that right may be regulated by law, and that he may be restrained from making such use or disposition of his property as will be injurious to the community, and may be required to comply with reasonable regulations deemed necessary for the prevention of frauds or the protection of the general public. The power to regulate is undoubted, and is vested in the Legislature. The Legislature may exercise this power in such manner and to such extent as it deems necessary in order to cure or lessen recognized evils so long as it keeps within the bounds of legitimate regulation."

[4] We see no reason to exempt one such as appellant, engaged in the buying and selling of securities as a "business," from the necessity of securing a broker's license and submitting to the reasonable regulations of the act. The public welfare is directly involved, the provision complained of is not discriminatory or unreasonable, and the fact that appellant is the owner of the securities bought and sold for the brief interval that they are in his possession presents no cogent reason why the act is inapplicable in his case. To hold otherwise would be to defeat the enforcement of the act and to prevent the safeguarding of the public designed by this legislation. It is also to be noted that in neither the *Pace* nor the *Lesser Cases*, relied upon by appellant, was the court called upon to consider whether one engaged in

the "business" of purchasing and reselling securities was subject to the provisions of the act or whether such "business" was a valid subject of regulation.

Appellant's point that the Corporate Securities Act was not intended to apply to building and loan certificates is answered by the provisions of the act itself, section 2 (b), pars. 6 and 11, which specifically declare brokers subject to the provisions of the act with respect to all transactions involving building and loan securities.

[5] It is contended that the two counts charging appellant with violation of the Corporate Securities Act fail to apprise him of the nature of the accusation. The charge is in the language of the statute, and similar charging language has been approved as sufficient in *People v. Ratliff*, 131 Cal.App. 763, 22 P.(2d) 245.

[6-8] Appellant complains that the court erroneously instructed the jury upon the subject of larceny by trick and device, which is one of the crimes included within the offense of grand theft. *People v. White*, 124 Cal.App. 548, 553, 12 P.(2d) 1078. It is the essence of larceny by trick and device that the owner of the property shall intend to part with possession only and not to pass title as well. *People v. Edwards*, 72 Cal.App. 102, 236 P. 944. If the owner intends to pass both possession and title, the transaction, though it may amount to the crime of obtaining property by false pretenses, will not constitute larceny. In the case before us the testimony was undisputed that the owners of the property intended to part with both possession and title, and therefore, the essential elements of larceny being lacking, it was error for the court to instruct upon the subject of larceny by trick and device. However, the instructions were not prejudicial to appellant, because the evidence overwhelmingly demonstrated his guilt and was ample to support his conviction upon the charge of obtaining property by false pretenses, a crime included within that of grand theft. For an error not affecting the substantial rights of appellant, the judgment of the trial court may not be disturbed, and, unless the error complained of has resulted in a miscarriage of justice, the judgment will not be set aside. Const. art. 6, § 4½.

[9] The court's instructions as to what constituted a "broker" within the meaning

of the Corporate Securities Act followed the statutory language, and in our opinion were not objectionable.

[10, 11] Objections as to the insufficiency of the evidence do not appear to have merit. Ample evidence was brought before the jury to justify its verdict. There is no force in appellant's objection to the reception of evidence upon two of the counts upon which he was held to answer for trial, although the complaining witness at the preliminary examination had left the witness stand and walked from the courtroom without submitting to cross-examination. Such conduct at the preliminary hearing had nothing to do with the trial in the superior court before a jury, and we perceive no force in appellant's claim that, because he was deprived of the right to cross-examine the complaining witness at the preliminary hearing, he should have been discharged at the trial in the upper court. There was no showing that appellant was not legally bound over by the committing magistrate.

Numerous objections to testimony pointed out by appellant have been examined in detail, but we find no error in the admission or rejection of evidence sufficient to warrant interference with the judgment.

Judgment and order affirmed.

We concur: CRAIN, P. J.; WOOD, J.



12 Cal.App.2d 525

PEOPLE v. NOVO.

Cr. 1484.

District Court of Appeal, Third District,
California.

April 2, 1936.

Hearing Denied by Supreme Court
April 16, 1936.

1. Criminal law §878(4)

Verdict finding defendant guilty of burglary for entering building with intent to commit rape, and that defendant had not committed assault held not rendered void by verdict on subsequent count finding that de-

fendant had committed assault, since crime of burglary is complete without assault.

2. Criminal law §878(4)

Verdict finding defendant guilty of burglary and that he did not commit assault held in effect acquittal of charge of assault so as to nullify verdict on subsequent count finding defendant guilty of simple assault.

Appeal from Superior Court, Sonoma County; Donald Geary, Judge.

On petition for rehearing.

Rehearing denied.

Prior opinion 55 P.(2d) 915.

J. Harold McAlpine, of Santa Rosa, Albert E. Sheets, of Sacramento, and Alfred J. Hennessy, Virgil Garibaldi, and Carlton D. Dethlefsen, all of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for the People.

PER CURIAM.

[1, 2] On petition for rehearing we are satisfied the opinion which was filed correctly states the law. Paradoxical as it may seem, the fact that the verdict in the first count is inconsistent with that which was rendered on the second count on the mere element of an alleged assault which was involved in both counts does not render the verdict on the first count void for the reason that the crime of burglary with which the appellant was charged in the first count is complete, regardless of whether or not he committed an assault. The only inconsistent feature of the verdicts which were rendered is that the jury first found that he did not commit an assault, and in the second count they found that he did commit a simple assault. The first verdict nullifies the second one, for, in effect, it is an acquittal of the charge of assault. The fact that the second verdict is void conflicts in no way with the validity of the first verdict for it may stand regardless of whether an assault was or was not committed. By the first verdict the jury merely found that the defendant entered the building with intent to commit rape. We are therefore of the opinion the verdict on the first count should stand.

The petition for a rehearing is denied.

WILSON v. ZORB.*

Civ. 9950.

District Court of Appeal, Second District,
Division 1, California.

April 6, 1936.

Rehearing Granted May 6, 1936.

1. Release ☞19

"Confidential relation," invalidating release of claim for damages from negligence, is not a "friendship," but presupposes substitution of one person's will for another's, as where latter reposes confidence in former, who exercises dominion, superiority, and influence; being relation in which dominion may be exercised by one person over another and influence has been acquired and abused or confidence reposed and betrayed.

[Ed. Note.—For other definitions of "Confidential Relation," see Words & Phrases.]

2. Release ☞57(2)

Evidence, in action for damages from negligent shooting of plaintiff by defendant, that they had been intimate friends for many years, associated in practice of medicine and surgery, and exchanged business confidences, and that plaintiff and his wife lived at defendant's home during plaintiff's convalescence, without charge, *held* to justify verdict for plaintiff as against defenses that his claim was barred by covenant not to sue and release; jury being warranted in concluding that plaintiff fell under defendant's dominance as result of confidential relation.

3. Trial ☞199

Court may not leave law question to jury by instructions in civil case.

4. Trial ☞186

Court may not comment on evidence in civil case tried by jury.

5. Trial ☞139(1)

Trial court should not take fact question from jury, unless evidence leaves no issue to be determined.

6. Trial ☞194(11)

Instruction, in action for damages from negligent shooting of plaintiff by defendant, who set up covenant not to sue and release as defenses, that relations between parties were not confidential and imposed no duty on defendant to disclose facts and circumstances of transaction involved, *held* errone-

ous as taking from jury fact issue, raised by evidence, as to existence of confidential relationship.

7. Appeal and error ☞1068(1)

Instruction, taking from jury fact question, raised by evidence, as to existence of confidential relationship invalidating plaintiff's covenant not to sue and release of claim for damages, *held* not error sufficient to warrant reversal of judgment on verdict for plaintiff, where jury disregarded instruction and found that plaintiff was fraudulently induced to sign covenant and release.

8. Release ☞57(2)

Evidence, in action for damages from negligent shooting of plaintiff by defendant, who set up defenses of covenant not to sue and release of plaintiff's claim, *held* to justify jury's finding that plaintiff was fraudulently induced to sign such instruments by defendant's false representations as to his financial status and unkept promises to pay plaintiff's bills and indebtedness while in no condition to investigate for himself.

9. Damages ☞228

Trial court may remit part of damages found by jury, if so excessive under all evidence as to shock court's sense of justice and raise presumption that award was based on prejudice or passion.

10. Damages ☞130(1)

Jury's award of \$20,500 damages to physician, reduced to state of invalidism for about five months by gunshot wound, *held* not excessive.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Clair Wilson against George Anthony Zorb. Judgment for plaintiff, and defendant appeals.

Affirmed.

Joseph Scott and Theodore C. Heyl, both of Los Angeles, for appellant.

Henry G. Bodkin and Leonard Husar, both of Los Angeles, for respondent.

HAAS, Justice pro tem.

This is an action for damages resulting from the negligent shooting of plaintiff by the defendant in the home of plaintiff. The jury in the superior court gave plain-

tiff judgment for \$20,500, together with his costs and disbursements.

The answer admits that defendant's negligence caused plaintiff's injuries, but pleads as affirmative defenses: First, that plaintiff was guilty of contributory negligence (this defense was withdrawn during the trial); second, that plaintiff's claim for damages was barred by a covenant not to sue, alleged to have been executed by plaintiff for a valuable consideration, on or about July 5, 1933; third, that plaintiff's claim for damages was also barred by a release alleged to have been executed by plaintiff for a valuable consideration, on or about May 17, 1933.

The questions presented to the jury, and for our consideration, are: The amount of damages suffered by plaintiff; whether the covenant not to sue barred plaintiff's action; and whether the release barred plaintiff's action.

In order to present all of the points bearing on these issues, appellant presents for consideration the following: "1. Whether a confidential relationship existed between plaintiff and defendant. 2. Whether defendant committed any act of fraud which constitutes ground for setting aside the release and covenant not to sue, and in this connection, (a) Whether statements of defendant as to his wealth constituted fraud; (b) Whether the financial position of plaintiff and any evidence in regard thereto, was admissible in an action of this nature and was properly admitted by the trial court herein. 3. Whether promises made by defendant at the time of the execution of the release and covenant not to sue, if any promises were made, constitute fraud. 4. Whether the verdict of the jury for \$20,500 was excessive and unconscionable, contrary to law and unsupported by the evidence. 5. Whether, if the verdict and judgment thereon is contrary to law and unsupported by the evidence, this court should reverse the judgment and remand the case with instructions to the trial court to enter judgment for the defendant."

The question arises: Were their relations merely friendly or intimate, or may they be classed as confidential in the legal sense of the term?

[1,2] The evidence in regard to the relationship of the parties is quite extensive. It is to the effect that it extended over a period of twenty years; that they, with

their wives, attended parties together; visited each other's homes regularly, at times sleeping at the home of one or the other; belonged to the same bridge club, meeting once a week; attended hunting and fishing trips together; visited Caliente in company; worked together in a common profession, medicine and surgery; and prescribed for each other's patients. The evidence further reveals that plaintiff lived at defendant's home on April 8, 1933, and for some time thereafter, until the "first part of September."

"A 'confidential relation' is not a 'friendship,' as we may love one in whom we have no confidence in a business way." 2 Words and Phrases, Third Series, p. 315, quoting from *In re Brand*, 185 App.Div. 134, 173 N.Y.S. 169. It presupposes a substitution of the will of one for the other (*Derdyn v. Low*, 94 Okl. 41, 220 P. 945), as where one reposes confidence in the other and the other exercises dominion, superiority, and influence (*Hitchcock v. Tackett*, 208 Ky. 803, 272 S.W. 52); it is that relation where "dominion may be exercised by one person over another" (*Harraway v. Harraway*, 136 Ala. 499, 34 So. 836, 837); "in which influence has been acquired and abused,—in which confidence has been reposed and betrayed." (*Thomas v. Whitney*, 186 Ill. 225, 57 N.E. 808, 810). In *Re Estate of Cover*, 188 Cal. 133, at page 143, 204 P. 583, 588, the court supported the findings of the trial court of undue influence "upon the theory that the agreement in question was procured from the wife as the result of constructive fraud, having its origin in the confidential and fiduciary relation of husband and wife. * * * Confidential and fiduciary relations are, in law, synonymous, and may be said to exist whenever trust and confidence is reposed by one person in the integrity and fidelity of another. The very existence of such a relation precludes the party in whom the trust and confidence is reposed from participating in profit or advantage resulting from the dealings of the parties to the relation"—Citing cases. It will be noted that in the above case the relationship was that of husband and wife. In the instant case, the relationship was that of an intimate friendship between two parties. In the case of *Jackson v. Gorham*, 98 Cal.App. 112, at page 116, 276 P. 391, 393, the court states: "There must be something further than mere confidence in another's honesty and integrity to sustain the

presumption of constructive fraud." In the case last above cited the Harrises were advanced in years, they were not mentally incompetent; the plaintiffs were their tenants "for about two years; * * * that during said time the plaintiffs had been very kind and attentive to the Harrises; had looked after their personal wants; but there is no testimony in the record that the plaintiffs in this action had anything to do with the business affairs of the Harrises or ever transacted any business for them whatsoever, or gave any advice in relation thereto. It follows as a necessary conclusion that there is nothing upon which to base constructive fraud, by reason of the relationship in this case."

It is apparent that in the case before us the relationship went much further. Besides being the ordinary garden variety of friends, visiting at each other's home, playing bridge, and staying overnight now and then, the plaintiff and defendant were upon occasion associated together in the practice of medicine and surgery; a profession, it must be conceded, demanding the highest degree of confidence. They exchanged confidences as to business transactions, and during his convalescence plaintiff and his wife lived at defendant's home without any charge to him. It no doubt, appeared to the jury from the evidence that plaintiff, being reduced to a state of invalidism (by reason of the gunshot wound), by necessity fell under the dominance of the defendant, to whom he was beholden for the livelihood of himself and wife, and that he followed defendant's direction in order to attain a recovery, physically and financially. We are of the conclusion that the court was justified in overruling the motion for a new trial

[3-8] Before proceeding further, it may be well to determine here the effect of an instruction admittedly given by the court to the jury at defendant's request, which the jury apparently entirely disregarded. The instruction reads in part as follows: "You are instructed that the relations existing between the plaintiff and the defendant were not confidential and did not impose any duty upon the defendant to disclose any of the facts and circumstances of the transaction involved in this action." Was this such a question as was proper for the court only to decide? Disregarding the instruction, was the jury justified in finding that fraud existed sufficient to nullify the contract?

It is a well-settled rule of law that the court in its instructions to the jury in a civil case may not leave a question of law to the jury (*Tompkins v. Montgomery*, 123 Cal. 219, 55 P. 997), and may not comment upon the evidence. The trial court is not justified in taking from the jury a question of fact, unless the evidence is such that there is no issue to be determined. There was here an issue to be determined, namely, the issue of whether a confidential relationship existed. See *Missouri, K. & T. Ry. Co. of Texas v. Williams* (Tex. Civ. App.) 117 S.W. 1043. The instruction was erroneous. It is apparent, however, that in the case before us the jury entirely disregarded the instruction of the court, or, after considering all of the instruction of the court, they found fraud to exist nevertheless. We cannot hold as error sufficient to reverse the judgment the giving of an erroneous instruction, that, being disregarded by the jury, had no bearing upon its verdict, for the very fact that they found for the plaintiff presages that they found fraud to exist and that fraud was the controlling factor inducing plaintiff to sign the covenant and waiver in question; although contradicted by the statements of the defendant, there is evidence to the effect that defendant stated his "finances were in terrible shape, had been in terrible shape," and made various promises, among them being "that he would pay up all bills and indebtedness," which representations as to defendant's financial status were not true, and which promises were not kept. These representations and promises plaintiff had fully relied upon, and thereby was induced to sign the release of May 17, 1933, and the covenant not to sue of July 5, 1933. We are convinced the jury acted within its province in finding here the elements of fraud. Had appellant held himself at arm's length and thereby cast the burden upon respondent to investigate for himself, respondent would have had no one but himself to blame if he fell into a trap, but, where appellant had treated respondent with such great kindness that it dimmed respondent's vision and quieted all inquiry, there cannot be said to have been a meeting of the minds, an open covenant openly arrived at.

But, disregarding this, for it opens up the question of confidence, where essential facts, not in the possession of plaintiff to enable him to covenant, were withheld by defendant, the jury had a right so to con-

clude fraud, as it did, from the evidence. The evidence reveals that the plaintiff was not in condition to investigate for himself. True, he consulted a "friend," who afterwards turned out to have been an attorney, before signing the instruments. The evidence does not show, however, that this shook his confidence in his former friend, the appellant, nor that he learned anything from his attorney friend, or from any one else, of the financial status of defendant that would put him on his guard as to the ability and intentions of appellant.

With the contradictions in the evidence we have here no concern. We must assume that the jury believed the plaintiff and not the defendant. The jury found defendant did not in good faith make a full disclosure of all the facts, namely, as to his financial status, but that he led plaintiff to believe that because of his financial status he (the defendant) could not carry out his promises and plaintiff could not expect him to carry them out; and that therefore defendant misled plaintiff to accept a settlement to his injury.

It must follow that the \$1,500 which plaintiff received was not in full settlement of plaintiff's claim against defendant.

No question arises on appeal in reference to the notice of rescission of the release of May 17, 1933, and the covenant not to sue of July 5, 1933.

[9, 10] The jury was instructed to find: First, whether plaintiff's recovery was barred by the release and the covenant not to sue, and, if they found it was not so barred, to then find the amount of damages suffered. They found damages in the sum of \$20,500. Were these damages excessive? Had the trial court, after hearing all the evidence, considered such damages excessive, it was within his province to remit part of the damages, where such an award shocks the court's sense of justice (*Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 116 P. 513), and where a presumption is raised that it is based on prejudice or passion. The trial court remitted no part of the award. While \$20,500 is a goodly sum, we find nothing in the evidence nor in the proceedings to justify an assumption that the jury acted out of prejudice or passion shocking the court's sense of justice. *Hart v. Farris*, 218 Cal. 69, 21 P.(2d) 432. Considering the extent of the injury, suffering, physi-

cal detriment, and loss of business to plaintiff, as demonstrated by the evidence, this court cannot hold that the award is in no just relation, legally, to injuries sustained by the plaintiff, and therefore that it is in law excessive.

The judgment is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.



13 Cal.App.2d 196
MONTGOMERY v. BULLOCK et al.
Civ. 10213.

District Court of Appeal, Second District,
Division 2, California.
April 10, 1936.

Homestead § 197

Quiet title action by purchaser at sheriff's sale pursuant to execution to satisfy purchaser's judgment held to lie to determine portion of land described in declaration of homestead which was needed for convenient use of claimant and excess portion thereof; it not being necessary to follow statutory procedure on execution against homestead (Civ.Code, §§ 1237-1269).

Appeal from Superior Court, Los Angeles County; Francis J. Heney, Judge.

Action by Ida M. Montgomery against William E. Bullock and others. From a judgment of nonsuit, plaintiff appeals.

Reversed.

G. M. Grant, of Los Angeles, and B. F. Tyler, of San Diego, for appellant.

W. K. Dial, of Los Angeles, for respondents.

WOOD, Justice.

Plaintiff filed this action to quiet title to a parcel of real estate. She appeals from a judgment of nonsuit. In a former action plaintiff obtained judgment against defendant William E. Bullock, April 26, 1932, and purchased the realty in dispute at sheriff's sale held pursuant to a writ of execution issued in that action. Before the judgment

of April 26, 1932, defendant William E. Bullock deeded the property to his wife, defendant Orpah Bullock, who filed a declaration of homestead thereon and conveyed it to defendant Grace A. James. Plaintiff alleges that these transactions were fraudulent.

The property in litigation consists of a city lot 147 feet by 61 feet upon which have been erected the dwelling house, including a built-in garage, in which the defendants Bullock resided up to the time of trial, and three separate dwelling houses and two double garages, all of which were rented to tenants by the Bullocks. Plaintiff contends that the three rented houses and two double garages, together with the land on which they are located, were not property included in the declaration of homestead. The complaint contains no allegation as to the value of the property.

Although the bill of exceptions is incomplete, it is sufficiently comprehensive to enable us to pass upon the issue involved. When the plaintiff presented her evidence and rested, counsel for defendants made a motion for a nonsuit as follows: "I make a motion for nonsuit on the grounds that the complaint failed to state the cause of action in the fact that it failed to allege that the property was worth more than \$5000.00 the allegation being that it is business property, and the further grounds that the sale made by the sheriff is void because the plaintiff did not comply with 1245 of the Civil Code." The court granted the motion. The bill of exceptions settled by the trial judge contains this statement: "Plaintiff took the position that the house designated as 1772 Cotner Avenue, and in which William E. Bullock and Orpah Bullock lived when the declaration of homestead was filed, and the land on which this house was situated, was impressed with a homestead. That all of the other buildings and the land on which they were situated was not impressed with a homestead though included in the declaration of homestead, on the ground that they were rented to and used by tenants and not used as a home by the Bullocks when the declaration of homestead was recorded, and therefore subject to execution and sale in an action other than is prescribed by sections 1237 to 1261 of the Civil Code. The court decided that upon the aforesaid facts it was necessary for the plaintiff to comply with the provisions of section 1245 of the Civil Code, and in view of the fact that plaintiff had not com-

plied with the provisions of said section, a nonsuit was granted."

The court erred in granting the motion for nonsuit. The precise question involved has been determined adversely to the contention of defendants in the case of *Wagner v. Ulrich*, 204 Cal. 452, 268 P. 629, wherein the court, having before it a case with facts very similar to those of the case before us, held that plaintiff may in a quiet title action ask the court to determine what portion of the land described in a declaration of homestead is needed for the convenient use of the claimant and what portion thereof is excess land. It was not necessary for plaintiff to follow the proceedings set forth in sections 1245 to 1269 of the Civil Code.

The judgment is reversed.

We concur: CRAIL, P. J.; GOULD, Justice pro tem.



13 Cal.App.2d 171
BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. SAGE.
Civ. 9525.

District Court of Appeal, Second District,
Division 1, California.

April 9, 1936.

Guaranty ◀40

Guaranty contract requesting bank to permit designated firm to become indebted to it in amount not exceeding total of \$75,000 and guaranteeing full amount of debt not exceeding sum of \$75,000 held to provide for guaranty of any sum not exceeding \$75,000 and to limit liability of guarantor to that amount, but not to provide that guaranty should be void when debt exceeded \$75,000.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by the Bank of America National Trust & Savings Association against W. H. Sage. Judgment for defendant, and plaintiff appeals.

Reversed, with directions.

Freston & Files, Edmund Nelson, and Howard Waterman, all of Los Angeles (Ralph E. Lewis, of Los Angeles, of counsel), for appellant.

O'Melveny, Tuller & Myers and Homer I. Mitchell, all of Los Angeles, for respondent.

YORK, Justice.

This is an action brought by the plaintiff as successor in interest of the Bank of America of California; it having been stipulated in this action that the Bank of America of California was merged with and became consolidated with several banks under the name of Bank of America National Trust & Savings Association, which action is on a guaranty signed by defendant in words and figures following, to wit:

"Continuing Guarantee.

"Bank of America of California, Los Angeles, California.

"You will please give credit to Beverly Bond and Mortgage Company, Inc. and permit them to become indebted to you on endorsements, overdrafts, acceptances or other liabilities in a sum in United States gold coin not exceeding the total amount of Seventy-five Thousand and No/100 Dollars (\$75,000.00#) and as said Beverly Bond and Mortgage Company, Inc. contemplates a course of future dealings with you, you will please continue said credit, or if it should be reduced or satisfied by payments, renew the same from time to time for said amount, or any less sum, or otherwise keep said credit permanently up to the limit aforesaid, or any less sum.

"And these presents shall be deemed to be, and shall constitute to you a continuing guaranty in reference to, and embrace the original credit hereby authorized and all future liabilities of said Beverly Bond and Mortgage Company, Inc. to you under such original credit and under any renewal or renewals thereof, and under any note, endorsement, acceptance, over-draft, and/or other liability and under such successive transactions with you as shall either continue said liabilities, or from time to time renew them, and this guaranty shall remain and be operative until all present or future credit and credits given by you as aforesaid and all liabilities incurred as aforesaid, not exceeding said limited amount, shall be fully paid, and this guaranty shall remain in full force and effect until written notice of revocation shall have been actually received by you from the undersigned, which notice of rev-

ocation shall apply only to any transactions occurring after the receipt of notice of such revocation.

"And in consideration of the compliance by you to the above requests, the undersigned hereby promises and agrees to pay you at any time upon demand, in United States gold coin, the full amount of principal and interest due you from said Beverly Bond and Mortgage Company, Inc. as aforesaid, not exceeding the said sum of Seventy Five Thousand Dollars (\$75,000).

"The undersigned further agrees that your right to demand, and the obligation of the undersigned to pay the above indebtedness and liabilities shall not be effected by the holding by you of any collateral or security to secure the same, and you need not give, and the undersigned expressly waives notice of acceptance of this guaranty, notice of any advance, credit or forbearance extended hereunder or of any action taken upon or affecting any obligation or instrument hereby guaranteed, or any security for any such obligation or instrument, and likewise waives diligence in the collection of any obligation or instrument hereby guaranteed or of any security for the same, together with demand, presentment for payment, notice of non-payment, protest and notice of protest. It is further agreed that the undersigned will pay any reasonable attorney's fees properly incurred by you in any proceeding to enforce this guaranty, either by action at law or otherwise.

"Dated Beverly Hills, California May 16th, 1929

"[Signed] E. F. Consigny

"[Signed] W. H. Sage"

On February 13, 1931, plaintiff loaned the sum of \$131,750 to the Beverly Bond & Mortgage Company, Inc., which company thereupon executed and delivered its promissory note to plaintiff in words and figures following, to wit:

"Beverly Bond & Mtge. Co. 77968
\$131,750.00 Los Angeles, California
February 13th, 1931.

"On May 14th, 1931, for value received, —, a corporation, promises to pay the Bank of America National Trust & Savings Association, successor to Bank of America of California, successor to Merchants National Trust and Savings Bank of Los Angeles or order at its office in this City, the sum of One Hundred thirty one thousand seven hundred fifty and no/100 Dollars, with interest thereon from date hereof until paid, at the rate of seven per cent per annum, pay-

able monthly, and in case suit be brought hereon or an attorney be employed or expenses incurred to compel the payment hereof, a reasonable sum in addition as attorney's fees. Principal and interest payable only in gold coin of the United States of present standard. The makers and endorsers of this note hereby waive diligence, demand, presentment for payment, notice of nonpayment, protest and notice of protest.

"And the said corporation hereby pledges to and deposits with Merchants National Trust and Savings Bank of Los Angeles, as collateral security for the payment of this note, or any other liability or liabilities of the said corporation to Merchants National Trust and Savings Bank of Los Angeles, when due or to become due or which may hereafter be contracted, the following property, viz:

"As per General Pledge Agreement — the market value of which is now \$ —, with this condition, viz:

"That Merchants National Trust and Savings Bank of Los Angeles has the right to call at any time for such additional security as it may deem proper, and on failure to respond forthwith to such call, this obligation shall become immediately due and payable at the option of the holder hereof, and on the non-performance of this promise, or on the non-payment of any liability or liabilities above mentioned, the said Merchants National Trust and Savings Bank of Los Angeles, its agents, successors or assigns, is given full power and authority to collect or sell, assign and deliver the whole or any part of the above named securities, or any substitute therefor, or any addition thereto, at public or private sale, at any time or times hereafter, without demand, advertisement or notice—such demand, advertisement and notice being hereby expressly waived; and upon such sale the said Merchants National Trust and Savings Bank of Los Angeles, or the holder of this note, may become the purchaser of the whole or any part of such property, discharged from any right of redemption, and after deducting all legal or other costs and expenses for collection, sale and delivery, may apply the residue of the proceeds of such collection, sale or sales, to pay any, either or all of said liabilities as said Merchants National Trust and Savings Bank of Los Angeles, its successors or assigns, shall deem proper, returning the overplus to the undersigned. And the undersigned agrees to pay the holder of this note any deficiency upon demand.

"In Witness Whereof, the President and Secretary of said Corporation, under authority of a resolution passed by its Board of Directors, at a meeting thereof duly held on the — day of — 192—, which resolution is still in full force and effect, have hereunto signed the name of the corporation and affixed its corporate seal.

"[Seal] Beverly Bond and Mortgage Co., Inc.,

"By (Signed) E. F. Consigny,
"President.

"By (Signed) Wm. Gibson,
"Secretary.

"P. O. Box 2A, Beverly Hills,
"X LC 90 das."

There was paid on account of principal and interest of said note the sum of \$114,550.97, and it is not disputed that the Beverly Bond & Mortgage Company, Inc., was indebted to plaintiff at the time of the filing of the complaint in the sum of \$17,199.03, with interest thereon at the rate of 7 per cent. per annum from December 30, 1932, on account of such unpaid balance of principal and interest, as evidenced by said note.

The trial court found that, by reason of the phraseology of the guaranty, hereinbefore set forth, the defendant was guaranteeing the indebtedness of Beverly Bond & Mortgage Company, Inc., only in the event the said plaintiff restricted and limited its loans to said Beverly Bond & Mortgage Company, Inc., to a sum not to exceed at any one time the sum of \$75,000, and that said guaranty was void when more than \$75,000 was loaned to said Bond & Mortgage Company.

The guaranty set forth herein is in a very unusual form, and we have not been cited to any case in which a similar contract of guaranty has been in controversy. We construe said guaranty to mean only that the defendant guaranteed any sum not exceeding the sum of \$75,000, loaned by plaintiff to the Beverly Bond & Mortgage Company, Inc., and that the wording used in said guaranty merely *limits* the liability of the defendant to the sum of \$75,000 under any circumstance.

If it had been intended by defendant that at no time should the bank allow any credit to the Beverly Bond & Mortgage Company, Inc., in a sum in excess of \$75,000, and that in such case there should be no liability for any past or future indebtedness, it must be assumed that the parties would have expressly so stated in their contract, and there-in would have provided that in case of any

such indebtedness of said Beverly Bond & Mortgage Company, Inc., to the bank, then the guaranty would be of no force or effect and should be immediately cancelled. There is nothing in this contract to show that such was the intention of the parties; all of the limiting clauses of the guaranty being merely a restriction of the total liability of the defendant at any time to a sum not to exceed \$75,000.

The judgment is reversed, and it is ordered that the trial court enter judgment in favor of the plaintiff and against the defendant for the sum of \$17,199.03, together with interest thereon at 7 per cent. per annum from December 30, 1932, and that the court fix and determine such additional sum as attorney's fees as the court may adjudge reasonable, not exceeding the sum of \$520, as prayed for in the complaint.

I concur: DORAN, J.

I concur in the judgment: HOUSER, P. J.



13 Cal.App.2d 146

**NEAHR v. INDUSTRIAL ACCIDENT
COMMISSION et al.**

Civ. 10667.

District Court of Appeal, Second District,
Division 1, California.

April 8, 1936.

1. Master and servant ☞417(7)

Industrial Accident Commission's conclusion supported by evidence, on reasonable basis, as to injured employee's average weekly earnings, will be sustained by court (Gen. Laws Supp.1933, Act 4749, § 12, subd. 1).

2. Master and servant ☞417(5)

Industrial Accident Commission's order or rule cannot be invalidated by court because of commission's admission of evidence not admissible under common-law or statutory rules and use thereof as proof of disputed fact.

3. Master and servant ☞417(7)

Reviewing court cannot disturb Industrial Accident Commission's award for insufficiency of evidence, where there was sub-

stantial evidence to support commission's findings.

4. Master and servant ☞405(6)

Evidence held sufficient to support Industrial Accident Commission's finding, basing rate of pay of compensation claimant, employed as riveter when injured, on both circumstances affecting his earning ability and work as riveter and other work by him for periods of employment within year before date of injury (Gen.Laws Supp.1933, Act 4749, § 12, subd. 1).

Owner and operator of plant at which employee was injured while cutting rivets made affidavit that such work was for 40 hours per week or more, and that he contemplated using claimant as riveter at least 5 days a week and 8 hours a day for more than 10 days after date of injury, while claimant testified that he knew job was going to last at least 3 weeks, that his employment called for 30 hours a week or more and that his name was always on employer's pay roll, but that he did not work the year round.

5. Master and servant ☞417(7)

Court cannot disturb Industrial Accident Commission's award, based on finding supported by evidence as to injured employee's average weekly earnings, calculated by either of two statutory methods provided for in cases of claimants employed for 30 hours a week or more (Gen.Laws Supp. 1933, Act 4749, § 12, subds. 1, 4).

6. Master and servant ☞417(7)

Industrial Accident Commission's conclusion as to injured employee's average weekly earnings is conclusive, in absence of abuse of discretion, as when there is no evidence supporting commission's findings, but, if there is any evidence supporting them, though slight and affording ground for wide difference of opinion, court cannot set aside commission's award (Gen.Laws Supp. 1933, Act 4749, § 12, subds. 1, 4).

7. Master and servant ☞385(1)

Industrial Accident Commission may disregard statutory method of computing injured employee's average weekly earnings, where employment was for 30 hours a week or more, if such method cannot be reasonably and fairly applied, regardless of whether word "employment" means "contract of employment" or "days of labor" (Gen.Laws Supp.1933, Act 4749, § 12, subds. 1, 4).

Proceeding for compensation under the Workmen's Compensation Act by Walter William Neahr, employee, opposed by the Wilmington Welding & Boiler Works, employer. Compensation was awarded in an unsatisfactory amount by the Industrial Accident Commission, and the employee brings certiorari to set aside the Commission's findings and award and award compensation in a larger amount.

Award affirmed.

Hiram T. Kellogg, of Los Angeles, for petitioner.

Everett A. Corten and Emmet J. Seawell, both of San Francisco, for respondent commission.

HAAS, Justice pro tem.

In this matter it appears that in the course of, and arising out of, his employment by the Wilmington Welding & Boiler Works, Walter William Neahr, the petitioner herein, on December 9, 1934, while cutting rivets, sustained an injury to his left eye, in that a piece of steel entered the eyeball, necessitating enucleation of the left eye.

The percentage of disability for petitioner was fixed by the commission at 29 per cent., entitling him to compensation for 116 weeks, beginning December 17, 1934, fixing his compensation remuneration, for compensation purposes, at \$10.81 per week, based upon an average weekly earning capacity of \$17.50. Of this amount \$367.33 is to be deducted as paid, \$32.77 is to be allowed a lien claimant, and \$50 for attorney's fees. The award orders the employer relieved of liability and to be dismissed therefrom.

Petitioner prays that the findings and award of the commission "be vacated and set aside" and that petitioner be awarded compensation upon the basis of his earnings at the time of his injury, pursuant to the provisions of subdivision 1 of section 12 of Act 4749 of the General Laws Supplement 1933, of the state of California, namely, at the rate of \$1.10 per hour for 8 hours' work per day or more, alleging that he worked more than 30 hours per week, and that the work contemplated employment for more than 30 hours per week for a period of more than 10 days.

[1] As amended, subdivision 1 of section 12 of Act 4749 reads as follows: "(1) Average Weekly Earnings. Where the employment is for thirty hours a week or

more, the average weekly earnings shall consist of ninety-five per cent of five times the daily earnings at the time of such injury, where the employment is for five working days a week. Where the employment is for five and one-half, six, six and one-half or seven working days a week, the average weekly earnings shall be ninety-five per cent of five and one-half, six, six and one-half or seven times the daily earnings at the time of the injury, as the case may be." Where there is evidence to support the conclusion of the commission on a reasonable basis, such conclusion will be sustained. 27 Cal.Jur. § 219, and cases there cited.

The affidavit of Harry Wallace, owner and operator of the Wilmington Welding & Boiler Works, relates: "That said work was for a period of forty hours per week or more, and that he contemplated using Mr. Neahr as a riveter at least five days a week and at least eight hours a day for a period of more than ten days next ensuing the 8th day of December, 1934." The petitioner testified before the commission that he knew the job was going to last "at least three weeks," and that he was receiving "\$1.10" per hour, and that his employment called for "thirty hours a week or more." In answer to whether he had been on the pay roll for as long as a year, he stated: "Oh, yes, they always had my name on the payroll but I didn't work the year round." He was a riveter by trade, as the evidence shows, a fact to be considered.

It is apparent that the commission, in fixing his rate of pay, based it both upon surrounding circumstances affecting his earning ability and his work as a riveter, and his work other than as a riveter, for periods of time employed within the year preceding the date of the injury, and not upon the rate of pay fixed for the type of employment (namely, as a riveter) that he was engaged in at the time of the accident.

Was the evidence sufficiently substantial to support the findings of the commission?

[2] As is stated in the case of *Western P. & S. Co. v. Industrial Acc. Comm.*, 194 Cal. 379, at page 381, 228 P. 859: "Other and better evidence might possibly have been produced tending to shed light upon the question * * * but no order or rule of the Industrial Accident Commission may be invalidated because of the admission into the record, and use as proof

of any fact in dispute before it, of any evidence not admissible under the common-law or statutory rules of evidence. * * * At the conclusion of the hearing before the commission the petitioner requested a continuance to enable it to take the deposition of the parents of the decedent who were in Italy. The request was denied, and petitioner now argues strenuously that this action amounted in effect to a denial of a hearing before the commission, and renders its award void as in excess of jurisdiction and as depriving petitioner of its property without due process. * * * The action now complained of in this case, at the very most that can be charged against it, was nothing more than an error in the proceedings of the commission which did not go to its jurisdiction to make the award. Consequently, it does not constitute a ground of review in this court."

[3] "The reviewing court has no authority to disturb an award for insufficiency of the evidence when there is substantial evidence to support the findings." 27 Cal.Jur. § 219.

[4] It must be held the evidence was substantially sufficient.

There is no showing of a lack of jurisdiction or of acts in excess of jurisdiction.

The award is affirmed.

YORK, Acting Presiding Justice, and DORAN, Justice.

We concur.

[5] Petitioner earnestly contends that his average weekly earnings should be based upon the rate of pay at which he was working at the time of his injury, for, although he was injured on the second day of his employment, such employment was for 30 hours a week or more, and that he was therefore subject to the provisions of subdivision 1 of section 12 of the Workmen's Compensation, Insurance and Safety Act of 1917, as amended (St.1933, p. 1343).

It is urged, in support of the claim above outlined, that in the face of the evidence the commission abused its discretion by basing the award on another and differ-

ent classification, and that such action by the board was unsupported by the evidence and clearly arbitrary.

In directing the method to be employed by the commission in fixing awards, paragraph 1 establishes the rule that, where the employment is for 30 hours a week or more, the average weekly earnings shall consist of 95 per cent. of five times the daily earnings at the time of such injury.

Subdivision 4 of said section 12 of the act provides that, where the employment is for less than 30 hours per week, or where for any reason the foregoing methods of arriving at the average weekly earnings of the injured employee cannot reasonably and fairly be applied, such average weekly earnings shall be taken at 95 per cent. of such sum as shall reasonably represent the average weekly earning capacity of the injured employee at the time of his injury; due consideration being given to his actual earnings from all sources and employments.

Thus it will be seen that the commission is vested with authority to disregard paragraph 1 if, in its judgment, the method provided for in such paragraph cannot reasonably and fairly be applied. If there is evidence to support a finding based on a calculation under either of the methods provided for, the court is without power to disturb the award based thereon.

[6] The law clearly contemplates that the judgment of the commission shall prevail and shall be conclusive unless there is an abuse of discretion. Such an abuse of discretion is held to occur when there is a total absence of evidence to support the findings. On the other hand, if there is any evidence, even though it may be slight and afford a ground for a wide difference of opinion, the court is without authority in the premises to set the award aside.

[7] It is also urged by petitioner that the word "employment" in paragraph 1 means "contract of employment" and not "days of labor." This question is immaterial, for it is quite evident that, if the commission has authority to disregard the provisions of paragraph 1, it has that power regardless of the meaning of the word "employment."

13 Cal.App.2d 134

**THOMPSON v. BOARD OF SUP'RS OF
FRESNO COUNTY et al.**

Civ. 1732.

District Court of Appeal, Fourth District,
California.

April 7, 1936.

1. Statutes ☞245

Although tax statutes are to be strictly construed in favor of individual, language thereof must not be given an unnatural construction to defeat tax or legislative intent.

2. Taxation ☞90

Although partnership property technically belongs to partnership rather than individuals composing partnership, such property is owned by partners, and may be so considered for purpose of taxation (Pol.Code, §§ 3717, 3821).

3. Taxation ☞507

If a person is owner, within statute, of personalty to permit assessment to be made to him and to become liable for payment thereof, such person is owner within statute to make tax a lien on his realty (Pol.Code, §§ 3717, 3821).

4. Taxation ☞507

Surviving partner *held* "owner" of half interest in partnership personalty within statute authorizing assessment of personalty tax to owner, and hence assessment of such personalty to surviving partner became lien on surviving partner's realty, and wife of deceased partner acquired title thereto subject to such lien (Pol.Code, §§ 3717, 3821).

[Ed. Note.—For other definitions of "Owner," see Words & Phrases.]

5. Frauds, statute of ☞17

Surviving partner's agreement to pay assessment of partnership personalty tax *held* not invalid as undertaking to answer for debt of another within statute of frauds so as to invalidate assessment thereof against surviving partner's undivided interest in realty, since surviving partner was liable for all of partnership's debts (Pol. Code, §§ 3629, 3717, 3821).

6. Taxation ☞500

Statement signed by manager of partnership authorizing placing of assessment of partnership personalty tax against surviving partner's undivided interest in realty *held* sufficient to show that surviving part-

ner authorized such assessment so as to render assessment valid (Pol.Code, §§ 3629, 3717, 3821).

7. Taxation ☞500

In determining whether surviving partner authorized statement directing placing of tax on partnership personalty against his half interest in realty, court assumed that partner made statement in compliance with statutory requirement and that assessor performed his duty in making assessment (Pol. Code, §§ 3629, 3717, 3821).

8. Taxation ☞500

Deceased partner's wife who brought action to cancel tax on partnership personalty assessed against surviving partner's realty, which partner conveyed to such wife, had burden to prove illegality of such assessment (Pol.Code, §§ 3629, 3717, 3821).

9. Taxation ☞463

Surviving partner and wife of deceased partner *held* estopped by lapse of several years from attacking authorized assessment of personalty tax of partnership against surviving owner's half interest in realty (Pol. Code, §§ 3629, 3717, 3821).

Appeal from Superior Court, Fresno County; H. S. Schaffer, Judge.

Proceeding by Helen P. Thompson against the Board of Supervisors of Fresno County and others. From an unsatisfactory judgment, petitioner appeals.

Affirmed.

Everts, Ewing, Wild & Everts, A. W. Carlson, C. L. Clark, and Richard H. Reeve, all of Fresno, for appellant.

Arthur C. Shepard, of Fresno, for respondents.

BARNARD, Presiding Justice.

In this proceeding petitioner sought to cancel certain taxes and to remove the lien thereof from certain real property in Fresno county.

The petitioner is the widow of Claude M. Thompson, who died in April, 1930. Prior thereto he had been a partner in a business conducted under the name of Thompson Bros., and in another business conducted under the name of Fresno Builders' Supply Company. Thereafter his brother E. O. Thompson continued the business of these two partnerships as sur-

viving partner. The petitioner acquired the interest of her husband in these two partnerships, but the same was not distributed to her until some time after July 25, 1931. On the first Monday in March, 1931, the real property on which the business of these two partnerships was conducted stood of record in the name of the petitioner and of E. O. Thompson; each of them owning an undivided one-half interest. On July 25, 1931, E. O. Thompson conveyed his half interest in this real property to the petitioner. On the first Monday in March, 1931, the assessor of Fresno county assessed certain personal property belonging to these two partnerships with the real property above referred to, and thereby charged this real property with the payment of the tax on this personal property.

The petitioner brought this proceeding seeking a writ of mandate to compel the respondents to cancel an assessment of this personal property thus levied. In her petition she alleged that on the first Monday in March, 1931, she and E. O. Thompson each owned an undivided one-half interest in this real property; that thereafter E. O. Thompson conveyed to her his one-half interest therein, and that she is now the sole owner thereof; that on or about the first Monday in March, 1931, the county assessor assessed a tax upon this personal property; that on that date neither the petitioner nor E. O. Thompson owned the personal property so assessed, nor was it on said date, or at any time since, the property of the said E. O. Thompson or of the petitioner; that on October 13, 1934, the petitioner made a written demand upon the respondent board of supervisors for a cancellation of said tax upon said personal property upon the ground that said assessment was illegally made, in that the personal property had been assessed to the petitioner as the owner thereof, whereas the petitioner was not the owner thereof at the date of the assessment; and that the respondent board had refused to cancel the assessment.

After a trial the court entered a judgment directing the issue of the writ as prayed for as to the undivided one-half interest in said real property owned by the petitioner on the first Monday in March, 1931, but denying any relief as to the one-half interest in said real property owned by E. O. Thompson on said date and thereafter conveyed to the pe-

titioner. From this judgment the petitioner has taken this appeal.

We are here concerned with that portion of the judgment denying relief as to that part of the real property which was owned by E. O. Thompson and later conveyed by him to the appellant. If the tax on this personal property became a lien on his interest in this real property, the appellant acquired title subject to that lien. *Reeve v. Kennedy*, 43 Cal. 643.

It is first contended that there was no valid assessment of this personal property, for the reason that it was assessed to persons other than the owner thereof. This is based upon the argument that the personal property in question was owned by the partnerships, that these partnerships were separate entities, and that, while E. O. Thompson owned an interest in these partnerships and the appellant had an interest in the estate of her husband which later ripened into an interest in the partnerships, neither of them owned the personal property which was assessed, and therefore the assessment, not having been made to the partnership as owners of the property, was invalid and void. In so far as the validity of this assessment in itself is concerned, we think the matter is settled by the reasoning and principles set forth in *RCA Photophone, Inc., v. Huffman*, 5 Cal.App.(2d) 401, 42 P.(2d) 1059, 1061, and by the provisions of section 3628 of the Political Code. E. O. Thompson, as surviving partner, was in possession of the personal property in question, and an assessment to him was a sufficient compliance with the requirement of the Code that it be assessed to the owner or to the one in whose possession or control it was.

[1-4] It is next contended that the assessment, if valid, could not become a lien upon property owned by E. O. Thompson because he was not the owner of the personal property. Section 3717 of the Political Code provides that such a tax on personal property is a lien upon the real property of the owner thereof. We think the word "owner" in section 3717 of the Political Code was intended in the same sense as the word "owned" in section 3821 of that Code; the latter section having been interpreted and applied in the case of *RCA Photophone, Inc., v. Huffman*, supra. As was said in that case: "While it is true that statutes under which taxes are levied for public purposes are to be strictly

construed in favor of the individual and against the taxing power it is equally true that language must not be given an unnatural construction in order to defeat the tax legislation nor the plain intent of legislation disregarded." While property may be said, in a technical sense, to belong to a partnership rather than to the individuals composing the same, in a practical and very real sense such property is owned by the partners, and at least for the purpose of taxation may be so considered. If a person is sufficiently an "owner" to permit the assessment to be made to him, and to become liable for its payment, he is sufficiently an "owner" to permit the tax to become a lien on his real property. This conforms to common experience, and, if it were not true, the tax on partnership property could never be assessed with the real property of the real owners thereof but must always be collected at the time, or the personal property seized and sold. In our opinion, this was not the intention of these statutes, and it is not necessary to give them such an unnatural and technical construction. If E. O. Thompson, as the real owner of a half interest in this personal property and as the one in possession and control of all of it, authorized it to be assessed with his real estate, the same must be held to constitute a valid lien. He was the owner of the property, within the meaning of these statutes, and personally liable for the payment of the tax, and there is nothing in the situation to prevent the tax from becoming a lien on his real property, at his request and with his consent.

[5-8] The appellant contends that the evidence is not sufficient to show that E. O. Thompson authorized the placing of this assessment against his half interest in the real property. The assessment record was introduced in evidence showing a direction to assess this personal property with this real property; the statement being signed by one Jeffords as manager for each partnership. There is evidence that these and all other affairs of these partnerships had been long handled as a family affair; that the assessment of this personal property had been handled in this manner for several years before the year in question; that Jeffords was trying to straighten out the affairs for the family; that E. O. Thompson had in past years directed the assessor to assess the property in this manner, and Jeffords testified that E. O.

Thompson had authorized him to do so in this instance. The appellant testified that she and E. O. Thompson were the guiding spirits in the partnerships, that the tax statements were gotten out in the office, and that she could not recall whether or not E. O. Thompson had promised to pay the taxes. It is argued that Jeffords could have had no authority to turn in this tax statement unless the same was in writing, under the statute of frauds, as otherwise the effect would be to make E. O. Thompson undertake to answer for the debt of another. As a surviving partner, E. O. Thompson was liable for all debts of the partnership, and, if he undertook to pay or secure such indebtedness as this tax, he was not agreeing to answer for the default of another within the meaning of the statute of frauds. While we think the evidence, with the reasonable inferences therefrom, is sufficient to sustain the finding that E. O. Thompson authorized the making of this assessment in this manner, this finding was not necessary to the judgment. A statement was put in and the tax was assessed against this real property. It was the duty of E. O. Thompson to make such a statement under section 3629 of the Political Code. It must be presumed that he did his duty and there is no evidence of any other statement having been made. It must also be presumed that the assessor performed his duty in making the assessment. Moreover this proceeding was brought by the petitioner, and the burden rested upon her to show that the assessment had been illegally made against this property. There is absolutely no evidence to show that the statement was made without the authority of E. O. Thompson, and the petitioner has failed to produce any evidence to show that she was entitled to relief. It is significant, in this connection, that E. O. Thompson was not called by the appellant as a witness.

[9] It may be added that the record sufficiently shows that both E. O. Thompson and the petitioner are estopped from attacking this assessment after the lapse of several years. In so far as is shown by the record, all of the equities are on the side of the respondents.

The judgment appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

13 Cal.App.2d 124

DEPNER et al. v. JOSEPH ZUKIN BLOUSES et al.**Civ. 5443.**District Court of Appeal, Third District,
California.

April 7, 1936.

Hearing Denied by Supreme Court
June 4, 1936.**1. Corporations ⇨617(2)**

Word "voidable" within statute providing that corporation's failure to pay franchise tax suspends powers and privileges of corporation and that every contract made in violation of such section should be voidable means subject to be avoided by court of adequate jurisdiction; voidable act being effective unless set aside by tribunal entitled to do so (St.1929, p. 33, § 32; St.1931, pp. 70, 2228).

[Ed. Note.—For other definitions of "Voidable," see Words & Phrases.]

2. Contracts ⇨98

"Voidable contract" is one which is void as to wrongdoer but not void as to wronged party, unless he elects to so treat it.

3. Corporations ⇨617(2)

Lessees' judgment creditors could not claim that modification of lease authorizing lessor to collect and disburse money collected from sublessees was void because modification was executed after lessees' corporate powers had been suspended for failure to pay franchise tax, where wronged party had not by judicial adjudication or otherwise declared agreement void (St.1929, p. 33, § 32; St. 1931, pp. 70, 2228).

4. Landlord and tenant ⇨184(2)

Agreement for deposit of money as security for performance of lease is valid.

5. Landlord and tenant ⇨184(2)

Where lessees deposited with lessor certain sum to secure payment of rent and lessees defaulted in payment of rent for sum exceeding amount deposited, lessor on date of default had right to apply such sum deposited to payment of overdue rent (Civ.Code, § 1670).

6. Landlord and tenant ⇨184(2)

Lessor with whom lessees deposited certain sum to secure payment of rent was not required to serve notice on lessees demanding payment of rent past due or quit premises in order to obtain title to money deposited, where there was no attempt by lessor to evict les-

sees, and, even if lessor attempted to evict lessees, statutory remedy was not only one to which lessor could have recourse (Civ.Code, § 1670; Code Civ.Proc. §§ 1161, 1162).

7. Creditors' suit ⇨8(1)

Creditor's bill will not lie to reach assets for which debtor himself has not an actionable demand, and which he cannot recover in action in his own name.

8. Creditors' suit ⇨8(1)

Where, by modification of lease, lessees authorized lessor to collect rent from sublessees in payment of overdue rent and other indebtedness to lessor, lessees' judgment creditors could not claim money deposited by lessor in bank on ground that lessor was agent for lessees and as such subject to judgment creditors' execution on their judgment.

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by Herman Depner and another against Joseph Zukin Blouses and others. From a judgment, plaintiffs appeal.

Affirmed.

George Appell, of Los Angeles, for appellants.

Farrand & Slosson and Edward W. Tuttle, all of Los Angeles, for respondent.

JAMISON, Justice pro tem., delivered the opinion of the court.

Plaintiffs brought this action as judgment creditors of defendants Joseph Zukin Blouses, a California corporation, using the name of Joseph Zukin Inc., and Joseph Zukin. The complaint is entitled a creditors' suit and contains two counts, but the second count is merely a repetition of the first, adding an allegation of a controversy and asking for declaratory relief.

The complaint seeks to establish plaintiffs' rights as judgment creditors of the lessees in a money deposit previously made by the lessees with the lessor to secure performance of the lease by the lessees and in a bank account deposited with the Security-First National Bank of Los Angeles, to the credit of defendant Lura A. Hubbard, as trustee. At the trial of this case, with the consent of plaintiffs and defendants, plaintiffs dismissed said action against defendants Joseph Zukin Blouses and Joseph Zukin, it appearing that they made no claim

to the funds in question. Judgment was rendered in favor of defendant Lura A. Hubbard, and from this judgment plaintiffs appeal.

No oral testimony was introduced at the trial. The case was tried and decided upon documentary evidence, admissions in the pleadings, and stipulations of counsel. The facts of the case are substantially as follows:

At all times mentioned in the pleadings the Joseph Zukin Blouses was a California corporation. Some time prior to the events named in the pleadings, said corporation had ineffectually attempted to change its name to that of Joseph Zukin Inc., and thereafter the said corporation continued to do business under the name of Joseph Zukin, Inc.

On January 23, 1931, Lura A. Hubbard, as the owner of the property described in the complaint, entered into a lease of said property with Joseph Zukin and said corporation for the term of twenty-five years at an agreed monthly rental. This lease, among other things, provided that the lessees have deposited \$20,000 with the lessor as security for the full and faithful performance of each and every of the terms, covenants, and conditions of the lease to be performed by the lessees, and further provided that, if at any time the lessor applies the whole or any part of said sum to cure any default of lessees, then the lessees shall deposit an amount equal to the sum so applied by the lessor, so that the security held by the lessor shall be the sum of \$20,000.

On July 16, 1931, the first modification of the lease was executed; the effect of this modification was only to reduce the monthly rental for a short period. The second modification was made on March 22, 1932, and gave to respondent the sole right to collect and disburse the money collected from the sublessees occupying the said property.

On February 2, 1932, the lessor applied the \$20,000 on rents then due, leaving a balance of \$500 of rents still due. On May 24, 1932, appellants recovered judgment against defendant Joseph Zukin Blouses, doing business under the name of Joseph Zukin, Inc. and Joseph Zukin, in the sums of \$6,553.33 and \$8,140, and about December 1, 1932, caused executions to be issued against Joseph Zukin Blouses and respondent, and levied upon various tenants of said leased property, and upon \$8,054.35 deposited in the Security-First National Bank

of Los Angeles by respondent Hubbard from rents collected by her by virtue of the authority given her under the second modification of the lease, also upon the \$20,000 given by the lessees to the lessor as security aforesaid.

On March 8, 1932, the Joseph Zukin Blouses, having failed to pay its franchise tax, was suspended from further exercising its powers, rights, and privileges as a corporation.

Appellants contend that the judgment should be reversed for two principal reasons: First, because the second modification of the lease is void, having been executed after the powers of the corporation had been suspended; and, secondly, because applying the \$20,000 which has been deposited as security for the faithful performance of the lease by the lessees was void because it was a forfeiture, as provided by section 1670 of the Civil Code.

Prior to 1929 every contract entered into by a corporation after its suspension for failure to pay its franchise tax was declared to be void.

In 1929 the bank and corporation franchise tax was enacted, and by section 32 of that act it is provided that failure to pay the said tax suspended the powers, rights, and privileges of the corporation so failing, but also provided that every contract made in violation of this section should be voidable (Stats.1929, pp. 19, 33). In 1931 this same provision making contracts voidable under said section 32 was continued in force by amendment of said section 32 (Stats.1931, pp. 70, 2228).

[1,2] A voidable act takes its full and proper legal effect unless and until it is disputed and set aside by some tribunal entitled so to do. 3 Bouv.Law Dict. 3406. "Voidable" means subject to be avoided by judicial action of a court of adequate jurisdiction. 8 Words and Phrases, First Series, 7342. And a voidable contract is one which is void as to the wrongdoer but not void as to the wronged party unless he elect to so treat it. *Inlow v. Christy*, 187 Pa. 186, 40 A. 823. A voidable contract is one which may be rendered null at the option of one of the parties, but is not void until so rendered. *Meridian Life Insurance Co. v. Dean*, 182 Ala. 127, 62 So. 90.

[3] Inasmuch as the wronged party in the instant case has not by a judicial adjudication or otherwise declared the agree-

ment of March 22, 1932, void, we are of the opinion that the said agreement remains in full legal force and effect.

The second contention of appellants that the application of the \$20,000 deposited as security for the faithful performance by lessees of their obligations contained in the lease, is void for the reason that same is a forfeiture under the provisions of section 1670 of the Civil Code, and therefore respondent holds said sum as bailee for the use and benefit of the said lessees.

[4] An agreement for the deposit of money as security for the performance of a lease is valid and enforceable. *Gallagher v. McMann*, 119 Cal.App. 688, 7 P.(2d) 204. The security clause in the said lease provides:

"As security for the full and faithful performance of each and every of the terms, covenants and conditions of the lease to be performed by lessees, lessees concurrently with the execution of this lease, have deposited with the lessor the sum of \$20,000.00.

"Lessees covenant and agree that if at any time the lessor shall apply the whole or any part of said sum, so deposited for the purpose of curing or towards curing any default hereunder on the part of lessees, lessees will immediately upon demand of lessor deposit with lessor an amount equal to the amount so applied by lessor to the end that the security in the possession of lessor shall always be the sum of \$20,000.00."

[5] One of the terms or covenants of the lease was the payment of the rent as therein specified. Lessees defaulted in the payment of rent until on February 2, 1932; there was \$20,500 of rent due from them. Therefore on said last-named date the lessor applied the \$20,000 to the payment of the overdue rent. That lessor had the right to do this is well settled. *Green v. Frahm*, 176 Cal. 259, 168 P. 114, 116; *Knight v. Marks*, 66 Cal.App. 593, 226 P. 931. In the case of *Green v. Frahm*, supra, the court said: "The other part of the clause, providing for the deposit of \$3,000 as a guarantee for the payment of rent, was for a legal purpose, and was in all respects valid and enforceable. In virtue of that clause, Frahm had the legal right, in case of the failure of Cohn to pay rent, to retain the \$3,000 and apply it on the rent until the same was exhausted."

[6] We see no merit in the contention of appellants that the exclusive remedy of respondent to obtain legal title to the said \$20,000 was to serve notice on the lessees demanding payment of the rent past due or quit the premises as provided by sections 1161 and 1162 of the Code of Civil Procedure.

There was no attempt by this act of respondent to evict the lessees but only to collect the overdue rent. Even if the respondent had attempted to evict the lessees, this statutory remedy was not the only one to which she could have had recourse. *Universal Milk Co. v. Wood*, 205 Cal. 751, 272 P. 745.

The next contention of appellants is that the \$8,054.35 deposited with the First National Bank of Los Angeles is held by respondent as agent or bailee for Joseph Zukin Blouses, and as such it is subject to appellants' executions on their judgments.

On March 22, 1932, when the agreement between Joseph Zukin Blouses and Joseph Zukin and respondent was executed, the said corporation was indebted to respondent for money advanced by her for taxes and insurance on said premises and for unpaid rent in a sum of more than \$20,000. By this agreement she was empowered to collect the rents from all sublessees of the said corporation and apply the sums so collected in payment of the accruing rent and the past indebtedness.

On December 1, 1932, the said corporation and Joseph Zukin were indebted to respondent for taxes and insurance advanced by her and for unpaid rent largely in excess of the amount on deposit in said bank. At the trial of this case Joseph Zukin Blouses and Joseph Zukin each disclaimed any interest in the funds aforementioned, and by stipulation the action was dismissed as to them.

[7] It is a well-settled law that a creditor's bill will not lie to reach assets for which the debtor himself has not an actionable demand, and which he cannot recover in an action in his own name. *Graves v. Arizona Central Bank*, 205 Cal. 715, 272 P. 1063; *Bank of Ukiah v. Petaluma Savings Bank*, 100 Cal. 590, 35 P. 170; *Noonan v. Stein*, 56 Colo. 64, 136 P. 1181; *German National Bank v. First National Bank of Hastings*, 59 Neb. 7, 80 N.W. 48.

[8] Under the agreement of March 22, 1932, and which continued in effect until

after the levy of the appellants' executions, the said Joseph Zukin Blouses and Joseph Zukin surrendered to respondent all interests that they and each of them held in the rents from the premises mentioned therein, and therefore they had no interest in funds collected by respondent arising from said rents.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.



13 Cal.App.2d 69

LOS ANGELES COUNTY v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 10506.

District Court of Appeal, Second District,
Division 1, California.

April 2, 1936.

Rehearing Denied April 28, 1936.

Hearing Denied by Supreme Court
June 1, 1936.

1. Certiorari ⇨68

Writ of certiorari can be used only to ascertain whether board, officer, or inferior tribunal has exceeded its jurisdiction, and not to determine whether evidence was sufficient in opinion of reviewing court to support particular decision complained of, provided inferior tribunal had jurisdiction and record discloses substantial evidence to support decision.

2. Certiorari ⇨68

Where board or inferior tribunal, whose decision is sought to be reviewed by certiorari, has acted upon a conflict of evidence but not upon an entire absence of any competent evidence, it has not exceeded its jurisdiction, and reviewing court will not interfere with or annul its decision.

3. Master and servant ⇨385(16)

County's liability, if any, under Workmen's Compensation Act to nurse who, while employed at county hospital, had become afflicted with poliomyelitis, for expenses incurred in hiring of nurses and for hospitalization at places of nurse's own selection, was of a statutory and not of a contractual nature (St.1929, p. 420, § 9 (a)).

4. Master and servant ⇨385(16)

"Medical treatment" required by Workmen's Compensation Act to be furnished in-

jured employee by his employer is such as will reasonably and seasonably tend to relieve and cure injured employee (St.1929, p. 420, § 9 (a)).

[Ed. Note.—For other definitions of "Medical Treatment," see Words Phrases.]

5. Master and servant ⇨385(16)

Under Workmen's Compensation Act, if treatment supplied by employer does not within reasonable time effect cure and treatment thereafter obtained from injured employee's own physician does seasonably benefit or cure employee, he has established inadequacy of employer's treatment, justifying change to own physician for whose services employer is liable (St.1929, p. 420, § 9 (a)).

6. Master and servant ⇨417(7)

Evidence held to establish that Industrial Accident Commission, had it made further findings, would have found that treatment furnished by county to employee nurse, afflicted with poliomyelitis, was inadequate as compared with treatment received at hospitals of nurse's selection, and hence failure to so find was not ground for annulling award (St.1929, p. 420, § 9 (a)).

7. Master and servant ⇨417(8)

Where findings, if made on an issue, would necessarily have been against appellant, or petitioner, failure to find is not ground for reversal of judgment or annulment of an award.

Certiorari to Industrial Accident Commission.

Proceeding under the Workmen's Compensation Act by Esther Patricia Allen, claimant, opposed by the County of Los Angeles employer. To review an award and supplemental award of the Industrial Accident Commission of the State of California in favor of claimant with a lien thereon inuring to the benefit of Sidney R. Garfield, the employer brings certiorari.

Award and supplemental award affirmed.

Everett W. Mattoon, Co. Counsel, and Fred M. Cross, Deputy Co. Counsel, both of Los Angeles, for petitioner.

Everett A. Corten, of San Francisco, for respondent Industrial Accident Commission

WHITE, Justice pro tem.

Certiorari to review an award and supplemental award of the Industrial Accident Commission, made in favor of Esther Patricia Allen, with a lien thereon inuring to the benefit of Dr. Sidney R. Garfield against unpaid compensation in the sum of \$2,562.98.

The facts are as follows: Esther Patricia Allen, aged 21, was employed by the county of Los Angeles in the Los Angeles County General Hospital as a graduate student nurse. From March 19, 1934, to and including May 27, 1934, the nurse was on duty in the psychopathic ward. From May 28, 1934, to May 31, 1934, she was in the ear and nose clinic. The nurses in the psychopathic ward ate with the nurses in their dining room in what is known as the contagious diseases building. There were ten nurses in the psychopathic ward, and out of this number four contracted poliomyelitis, commonly known as infantile paralysis. There were four nurses and a resident physician in the ear and nose clinic. Out of this number, three nurses and a resident physician contracted poliomyelitis. All told, about 250 nurses and doctors in the county hospital contracted the disease. The ear and nose clinic treats patients afflicted with poliomyelitis, as a nasal discharge or running nose is one of the symptoms of this disease. It was further testified that poliomyelitis is most infectious and contagious.

The employee in this case contracted the disease herself, and was admitted to the general hospital as a patient approximately June 5, 1934. On June 28, 1934, a request was made for special nurses. There was sufficient evidence in the record to justify the commission in concluding that due to the fact that the epidemic was getting under way at that time and the hospital was crowded with new cases coming in at all times, a scarcity of nurses existed, which prevented furnishing of a special nurse to the employee, except during the acute stage of her illness. In this connection, Dr. Vernon Luck, a resident physician at the general hospital, testified: "At that time we were reaching the high point of our epidemic; it would be difficult to describe to you the picture that existed at that time without your actually seeing it. Cases are coming in by the scores, and the wards are filling up and becoming crowded; everyone has more to do than he knows how to accomplish."

Dr. Garfield, who had previously been an interne at the county hospital, and knew the

employee herein, advanced the money to pay for private nurses.

The employee developed a mental condition bordering on psychosis, according to the testimony of Dr. Luck, the resident physician at the county hospital, and Dr. Francis, the resident orthopedist. Dr. Garfield was of the opinion that in order to obtain beneficial results in the treatment of this case it would be necessary to remove the employee to another hospital where special diet could be provided, more detailed care given, and more healthful environment obtained. After various conferences between Dr. Garfield, who was treating the employee, other general hospital physicians, and Dr. Sloane, who was in charge of industrial accident cases for the county arising in the fifth supervisory district, where the general hospital was located, the patient was taken, with the knowledge and consent of Dr. Sloane and other county general hospital physicians, to Dr. Garfield's hospital at Mecca. While there was some conversation with a Mrs. Keese, who arranges for transfer of county employees out of the general hospital, and through her with the county auditor's office, it is conceded that the removal of this employee from the county hospital to Dr. Garfield's hospital at Mecca was without specific authorization of the board of supervisors. The evidence before the respondent commission indicates that after the employee was transferred to the hospital at Mecca, she made steady improvement up to November 2, 1934, when, in the opinion of the doctors at the Mecca hospital, she would be further benefited if she had the advantage of a pool for physiotherapy, also special food, and pleasant environment. Accordingly, Dr. Garfield selected Arrowhead Springs, and transferred Miss Allen there. While at Arrowhead a full-time nurse was in attendance upon Miss Allen. Dr. Garfield from time to time forwarded bills to petitioner and the general hospital for expenses incurred in the hiring of nurses and for hospitalization at the Mecca hospital and Arrowhead Springs Hotel, which bills the county refused to pay.

The county of Los Angeles, petitioner herein, urges that the award and supplemental award of the respondent commission should be annulled, on the grounds: (1) That the finding of the commission that the employee contracted poliomyelitis with resulting disability in the course of and arising out of her employment is unsupported by substantial evidence and is mere specula-

tion and conjecture; (2) that the commission failed to make a finding of any contract or agreement by the county whereby the county became obligated for the charges which the commission awarded against it.

[1,2] We are of the opinion that there was before the Industrial Accident Commission substantial evidence to support its finding that the employee contracted the disease out of and in the course of her employment, and therefore confer upon the commission jurisdiction to render the decision against petitioner herein. The writ of certiorari can be used only for the purpose of ascertaining whether the board, officer, or inferior tribunal has exceeded its jurisdiction. The action of the respondent commission herein sought to be reviewed is final and conclusive upon every question, except questions of jurisdiction. There was an abundance of evidence adduced before the commission upon which it could reasonably find that the employee's exposure to this contagious disease in the course of her employment resulted in her affliction. The writ of certiorari cannot be used for the purpose of determining whether or not the evidence was sufficient in the opinion of the reviewing court to support the particular decision complained of, provided the inferior tribunal had jurisdiction, and the record discloses substantial evidence to support the decision. *Garvin v. Chambers*, 195 Cal. 212, 232 P. 696; *Central Pac. R. Co. v. Board of Equalization*, 43 Cal. 365; *Winning v. Board of Dental Examiners*, 114 Cal.App. 658, 300 P. 866. Where the board or tribunal whose decision is sought to be reviewed has acted upon a conflict of evidence, and where it has not acted upon an entire absence of any competent evidence, it has not exceeded its jurisdiction, and a reviewing court will not, under such circumstances, interfere with or annul the decision rendered by the inferior tribunal, commission, officer, or board. *Osborne v. Baughman*, 85 Cal. App. 224, 225, 259 P. 70.

[3,4] We do not find it necessary to decide whether or not any valid contract existed between the county and this employee or Dr. Garfield, because in our opinion the county's liability, if any, is not of a contractual nature, but is statutory. Section 9(a) of the Workmen's Compensation Act (St. 1917, p. 836, as amended by St. 1929, p. 420) provides that it is the duty of the employer to provide "such medical, surgical and hospital treatment, including nursing * * * as may reasonably be required to cure and

relieve from the effects of the injury, the same to be provided by the employer, and in case of his neglect or refusal seasonably to do so, the employer to be liable for the reasonable expense incurred by or on behalf of the employee in providing the same." Our Supreme Court has held that the medical treatment required by the Workmen's Compensation Act to be furnished an injured employee by his or her employer is such as will reasonably and seasonably tend to relieve and cure the injured employee from the effects of the injury. *Union Iron Works v. Industrial Accident Commission*, 190 Cal. 33, 210 P. 410.

[5] The test of the employee's right to seek private treatment seems to be that if the treatment supplied by the employer does not within a reasonable time effect a cure, and the employee thereafter obtains different treatment from his own physician which does seasonably benefit or cure him, he has established the inadequacy of the treatment previously tendered by the employer, and where the services furnished by the employer were inadequate or inefficient the employee is justified in changing to his or her own physician, for whose services the employer is liable. 71 Cor.Jur. 780.

[6,7] There was evidence before the commission that the treatment being received by the employee from the employer at the general hospital was not such as would seasonably or adequately cure and relieve the employee from the effects of the disease contracted by her. As a part of such evidence, we quote the following testimony given by Dr. Luck, one of the resident physicians at the county general hospital:

"Q. Do you think that her treatment, her medical treatment at the hospital in October up to the time she was removed, was reasonably adequate for that type of case? A. It proved entirely inadequate during the several weeks that preceded her removal, preceding October 11—

"Q. You mean she did not improve, is that correct? A. That's right.

"Q. Were you using your best efforts to the best of your ability and the best facilities of the hospital to treat the patient the best way you knew how in that type of a case? A. Yes.

"Q. Do you think anybody else could have done any better? A. Not at that hospital."

As to whether or not the treatment accorded the employee by Dr. Garfield after the employee's removal from the county

general hospital was successful, we again quote from the testimony of Dr. Luck: "A. * * * That is very well borne out in her case because she left here with muscles that were tender, seriously impaired as far as their strength was concerned, and in a short time after being down there, with essentially the same physical treatment but with an entirely new environment, the tenderness left and she cleared up mentally; the muscle strength came back."

It seems to us this case comes within the holding of the Supreme Court of this state in *Union Iron Works v. Industrial Accident Commission*, supra, where at page 41 of 190 Cal., at page 414 of 210 P., is found the following language:

"Before the injured employee would be entitled to compensation for expenses incurred in the treatment of him by a physician of his own selection, it would have to be shown that the treatment not only was a success, but that it was reasonably and seasonably necessary to cure and relieve the injured employee. Moreover, all the circumstances attending the treatment by the employer's physician would have to be weighed by the Commission in order to determine whether or not the treatment prescribed by the employer's physicians would, if it had been persisted in, have produced as speedy and as satisfactory a cure as did the treatment of the physicians resorted to by the injured employee. And, of course, in coming to a conclusion in this behalf, the Commission would necessarily take into consideration the period of time covered by the treatment of the employer's physicians and the results obtained during that time. In other words, the injured employee will be permitted, at the peril of having himself to pay the expenses of medical treatment, to secure the services of physicians other than those provided by his employer, and this peril will attach unless it can be shown from all of the circumstances of the situation, including the success of the operation, that his desire and decision to secure the services of other physicians was warranted.

"On the other hand, if we were to hold, as petitioners contend, that the only duty of the employer is to provide competent physicians who prescribe a particular course of treatment, it would mean that, if the physicians of the employer, even though they in good faith persisted in a course of treatment manifestly ineffective, and demonstrated ultimately to be wrong and *ineffectual* [italics ours], the employee, nevertheless, would be compelled to continue under such treatment

or secure at its own expense effective surgical treatment. This cannot be so. In *Massachusetts Bonding & Insurance Co. v. Pillsbury*, 170 Cal. 767, 770, 151 P. 419, this court held that, although in the first instance the employer had a right to designate the physician who should attend the injured employee, nevertheless, if, becoming dissatisfied, the injured employee was directed to another physician who was out of town, the injured employee was not bound to wait indefinitely for his return, but could seek the advice of his own physician, and the employer would be liable for the expense so incurred."

So in the instant case, the injured employee, according to the testimony before the commission, became dissatisfied with the course of treatment at the general hospital, and, in fact, according to the testimony, developed a mental condition that bordered on a psychosis; but the employer in this case, by reason of the infantile paralysis epidemic, with which 7 or 8 per cent of the employees in the general hospital were afflicted, was unable to supply special nurses and special diets, and otherwise adequately care for the employee; whereupon the injured employee accepted the services of, and hospitalization by, a physician of her own selection. The action of the employee in this case, it seems to us, was based upon reasonable and proper grounds in availing herself of the services of her own physician in the latter's hospital at Mecca, and later at Arrowhead Springs; and in view of the circumstances shown herein, including the successful result of the treatment after removal from the county general hospital, it cannot be denied that the injured employee acted reasonably and upon proper grounds in availing herself of the services of Dr. Garfield and efficacious treatment at the Mecca hospital and Arrowhead Springs. While it may be, as petitioner contends, that Dr. Garfield voluntarily undertook treatment of Miss Allen, and did not come into the case at her solicitation, we are of the opinion that nevertheless the employee had a right to avail herself of the proffered services of Dr. Garfield if such action on her part was founded upon reasonable grounds in so doing.

It might also here be stated that while it is true the board of supervisors on February 11, 1935, denied the claim for expenses incurred in the treatment of this employee at Mecca and Arrowhead Springs, still, after the employee had been returned to the general hospital on February 5, 1935, we

find from the record that her condition, while then much improved, became worse, and symptoms which manifested themselves during her original stay at the county hospital began to recur. When this was called to the attention of the board of supervisors, notwithstanding the fact that theretofore they had rejected the employee's claim for expenses incurred in obtaining treatment at Mecca and Arrowhead Springs, the record discloses that on March 11 the board of supervisors in regular session ordered that authority be given for the transfer of this employee from the general hospital to the Mecca hospital for hospital care under the Workmen's Compensation Act, and authorized payment for her hospitalization and for a special nurse. It would seem to us that this action of the board of supervisors, taken, as the record shows, on a report by the executive superintendent of the county general hospital, and approved by the superintendent of charities, admitted the inadequacy of treatment at the county general hospital that would prove beneficial to the employee, and conceded the beneficial results that had accrued from her hospitalization at the Mecca hospital.

Petitioner contends that there is no finding by the commission, nor was there evidence, that the treatment being furnished the patient by the county was inadequate or inferior, nor is there any finding or evidence that the employer failed or refused to furnish adequate treatment. While it is true the commission made no finding upon this issue, we do not find ourselves in accord with petitioner's contention that there was no evidence to support such a finding, for the reason that petitioner's own general hospital resident physicians testified that the prevalence of the epidemic, and the large number of general hospital employees stricken with infantile paralysis, impaired considerably the hospital facilities for properly treating this employee, and that the existence of so many infantile paralysis cases around and about her in the general hospital tended to affect her to a point where she was bordering on a psychosis, necessitating, among other things, a change of environment from the county general hospital to effect a cure; and these facts were undisputed. From the facts found, and from the award ordered, it is evident, in the light of the entire record, that if more complete findings had been made they would have been adverse to the contentions of the petitioner on the issue of the adequacy or inadequacy

of the treatment furnished by the county general hospital as compared with the treatment received at Mecca and Arrowhead Hot Springs. That being so, the failure to find further than the commission did is not a ground for annulling the award. *Hulen v. Stuart*, 191 Cal. 562, 572, 217 P. 750. The weight of authority seems to be that where findings if made on an issue would necessarily have been against the appellant, or petitioner, as the case may be, the failure to find is not ground for reversal of a judgment or annulment of an award. *Swim v. Ackel*, 127 Cal.App. 516, 518, 15 P.(2d) 1110.

For the foregoing reasons, it is ordered that the award and supplemental award of the respondent commission be, and the same are hereby, affirmed.

We concur: YORK, Acting P. J.; DORAN, J.



13 Cal.App.2d 180

LOS FLORES SCHOOL DIST. v. INDUSTRIAL ACCIDENT COMMISSION et al.
Civ. 1636.

District Court of Appeal, Fourth District,
California.
April 9, 1936.

1. Master and servant ☞417(7)

Existence of relation of employer and employee is mixed question of law and fact, and Industrial Accident Commission's finding on such question will not be disturbed, unless there is entire absence of supporting evidence (*St.1917*, p. 848, § 19).

2. Master and servant ☞5

As respects whether relation of employer and employee exists, employer has right to direct and give orders to employee concerning means and methods of work and to terminate employment completion, which in case of independent contractor might amount to breach of contract, and employee may quit, while independent contractor is legally obligated to complete contract (*St.1917*, p. 848, § 19).

3. Master and servant ☞5

Payment by day or for piecework is not determinative of workman's status as em-

ployee or independent contractor (St.1917, p. 848, § 19).

4. Master and servant ⇨5

"Independent contractor" is one who renders service for another for specified recompense to attain specified result and who is under principal's control only as to result of work, and not as to means or methods whereby result is to be accomplished (St.1917, p. 848, § 19).

[Ed. Note.—For other definitions of "Independent Contractor," see Words & Phrases.]

5. Master and servant ⇨5

Factor determinative of whether workman is employee or independent contractor is usually found in solution of question as to who has power of control, not as to result of work only, but as to means and method whereby result is accomplished (St.1917, p. 848, § 19).

6. Master and servant ⇨367

Painter who was hired to do entire job for \$5 per day for days he was engaged in painting and had no regular hours of work, and who was not supervised and was given no directions concerning method and was to be paid before work was performed, held an "independent contractor," not entitled to compensation, and not an "employee" (St. 1917, p. 848, § 19).

[Ed. Note.—For other definitions of "Employee," see Words & Phrases.]

Original proceeding by the Los Flores School District, alleged employer, to review an order of the Industrial Accident Commission awarding compensation to Alfred Green, alleged employee, under the Workmen's Compensation Act.

Award annulled and cause remanded.

Stanley Mussell, Dist. Atty., of San Bernardino, for petitioner.

Everett A. Corten and Emmet J. Seawell, both of San Francisco, and H. E. Thompson, of San Bernardino, for respondents.

MARKS, Justice.

This is an original proceeding instituted to review an order of the Industrial Accident Commission awarding Alfred Green compensation for an injury received while painting a water tank on the school grounds of petitioner.

Two grounds for the annulment of the award are urged: (1) That Green was not an employee of petitioner, but an independent contractor; and (2) that the work performed by Green was casual employment and not in the prosecution of the trade or business of petitioner.

The evidence before us discloses that in June, 1935, Green, a painter by trade, was employed as an SERA worker; that he was known to the members of the board of trustees of petitioner as a competent craftsman; that the board of trustees desired to have a water tank painted, and also to have some patch painting done on some of the buildings on the school grounds; that Arthur W. Russell was a member of the school board; that a few days before June 25, 1935, Russell saw Green and discussed with him the doing of this work; that Green was familiar with the work to be done and estimated the time necessary to complete it at three or four days and wanted \$5 per day; that this was satisfactory to Russell and he had Green sign the following receipt: "Summit, California, June 25, 1935. To 4 days labor painting on Los Flores School @ \$5.00 per day 4 days @ \$5.00 * * * \$20.00. Received payment Alfred Green"; that on June 27 an "order requisition" was made out in favor of Green for "4 days painting at 5 dollars per day \$20.00" drawn on the county treasurer of San Bernardino county and sent to the school superintendent of that county for approval prior to payment; that it was returned for correction because of errors in form; that, had it been approved by the superintendent, a voucher in favor of Green would have been drawn and delivered to him. The district furnished the paint for the work. On July 15, 1935, while engaged in the performance of the contract, Green fell from a ladder and was seriously injured, and proceedings were instituted by him before the Industrial Accident Commission which resulted in the award of compensation which is under attack here. It is probable that Green worked at his painting on June 23d and 30th, and on July 7th and 14th, and also July 15, 1935. He was injured on July 15th, the day on which he expected to finish the work.

Section 19 of the Workmen's Compensation Act (St.1917, p. 848) places upon the employer the burden of proving that a laborer is an independent contractor and not

an employee. See *Hillen v. Industrial Accident Commission*, 199 Cal. 577, 250 P. 570; *Murray v. Industrial Accident Commission*, 216 Cal. 340, 14 P.(2d) 301.

[1] It is held that the question of whether the relation of employer and employee exists is a mixed question of law and fact, and that a finding on that question by the commission will not be disturbed unless there is an entire absence of evidence to support it. *Hillen v. Industrial Accident Commission*, supra.

[2,3] Several important rules are well recognized for determining whether a laborer is an employee or an independent contractor. Where there is an employment, the employer has the right to direct and give orders to the employee concerning the means and methods of work. It is the existence of this right, and not its use or lack of use, that is important. *Murray v. Industrial Accident Commission*, supra. An employer has the right to terminate the employment before the work is completed, which, in the case of an independent contractor, would amount to a breach of contract if done without just cause. An employee may quit, but an independent contractor is legally obligated to complete his contract. *Helmuth v. Industrial Accident Commission*, 59 Cal.App. 160, 210 P. 428. Because a workman is paid by the day or for piecework is not determinative of his status as an employee or an independent contractor. *Helmuth v. Industrial Accident Commission*, supra; *Lillibridge v. Industrial Accident Commission*, 4 Cal.App. (2d) 237, 40 P.(2d) 856.

[4,5] An independent contractor is one who renders service for another for a specified recompense to attain a specified result and who is under the control of his principal only as to the result of the work and not as to the means or methods by which that result is to be accomplished. "The determinative factor is usually found in the solution of the question: Who has the power of control, not as to the result of the work only, but as to the means and method by which such result is accomplished?" *Fidelity & Casualty Co. v. Industrial Accident Commission*, 191 Cal. 404, 216 P. 578, 580, 43 A.L.R. 1304.

[6] It is evident from the testimony of Green that he considered himself employed to do the entire work for \$5 per day for the days he was engaged in painting. He first denied that it had been agreed between himself and Russell that he would

do the entire job for \$20. On being shown the receipt of June 25, 1935, which he had signed, he admitted such an agreement, but again denied it during his redirect examination. He admitted that he had no regular hours of work and that he could work evenings and Sundays if he chose; that no one had given him any supervision or directions when he was working and that he was left to employ his own methods. It seems probable, from notations on the signed receipt, that Green worked on Sundays, June 27th and 30th, and July 7th and 14th, and on Monday, July 15, 1935.

Russell testified that Green had agreed to do the painting for \$20; that the receipt for \$20 was in full payment; that the officers of petitioner did not give Green any directions or exercise any supervision over him or his methods of work; that he made the contract with Green; and that his only interest was to see that the job was done for \$20 and that there was no agreement "as to how or when or in what way it was to be done." This quoted evidence was not denied by Green. The only denial by Green of any of this testimony was to the effect that his payment was not to be limited to \$20, but that he was to be paid \$5 for each day he worked. As we have seen, payment of a daily wage is not determinative of the question of whether he was an employee or an independent contractor.

We are of the opinion that the foregoing evidence raises a strong inference, not overcome by any evidence, that Green was an independent contractor and not an employee. The right to discharge is an important element in determining the question of employment. Even Green's testimony leaves the strong impression that he believed he was employed to complete the painting. If petitioner had the right to discharge Green, it is strange that its officers were willing to pay him the total estimated cost of the work before it was performed. It was only due to an inadvertence not contemplated by the parties that Green did not receive the \$20 before July 1, 1935. If he had received it, would he have been in a position to maintain that he could quit before he had earned it and thus put petitioner to the expense of suing him for the unearned portion? This willingness on the part of petitioner to pay all the estimated cost of the work, and Green's willingness to receive payment, raises a strong inference that both parties understood the contract as providing that Green

was employed to complete all of the proposed work and was not subject to discharge before it was completed. The fact that no officer or agent of petitioner exercised any control over Green or gave him any directions concerning the methods to be used should be held to corroborate the testimony of Russell that the contract with Green did not contemplate any right of control over his methods and that the district was only interested in the results attained.

We have reached the conclusion that petitioner sufficiently met the burden of proving that Green was an independent contractor and not an employee, and, in the absence of any evidence in the record contradicting in any degree that of petitioner, the award must be annulled. It is true that Green was not interrogated on the right of petitioner to control or direct his methods of work nor on the right of discharge before the work was completed, but that is not the fault of petitioner.

The award of the Industrial Accident Commission under attack here is annulled and the cause is remanded for further proceedings.

We concur: BARNARD, P. J.; JENNINGS, J.



13 Cal.App.2d 64

In re DAVIS' ESTATE.

DAVIS v. DAVIS.

Civ. 1952.

District Court of Appeal, Fourth District,
California.

April 2, 1936.

1. Wills Ⓒ671

Testamentary trust which is too indefinite in its declarations to be carried into effect is invalid and must fail, but trust sufficiently certain to be effectuated will be upheld.

2. Wills Ⓒ671

Will leaving all testatrix' property to named son, to be distributed to testatrix' sons and grandchildren as he deemed best, created trust which was not void for uncertainty, be-

cause definitely indicating that subject-matter of trust was entire estate of testatrix, that purpose was distribution of estate, and that beneficiaries were three sons and two grandchildren of testatrix (Civ.Code, § 2221).

3. Wills Ⓒ689

Will leaving all testatrix' property to named son, to be distributed to testatrix' sons and grandchildren as he deemed best, created valid power of appointment, and vested named son with power to determine what share of estate he would distribute to each of persons composing class specified in will.

4. Wills Ⓒ440

Primary canon of construction of wills is that, whenever possible, testator's intention, if fairly discoverable from language of will, shall be carried into effect.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Proceeding in the matter of the estate of Mattie S. Davis, deceased, on the petition of Thomas M. Davis against William Wallace Davis, executor of the will of Mattie S. Davis, deceased. From the decree, petitioner appeals.

Affirmed.

Carson B. Hubbard, of West Los Angeles, for appellant.

Lewis R. Kirby and George A. Malette, both of San Diego, for respondent.

JENNINGS, Justice.

This is an appeal which is presented on the judgment roll from a decree entered in a proceeding to determine heirship.

The decedent died testate in San Diego county, leaving as her next of kin and heirs at law three sons and two grandchildren. The will, which is holographic in character and of which the respondent is the duly appointed and acting executor, is in the following language:

"San Diego, Sept. 14-29.

"Being of sound mind, and without any influence from any one, I declare this my last will and testament in case of my death I hereby leave all of my property to my son William Wallace Davis to be distributed to my sons & grandchildren as he deems best Said William Wallace Davis is to act as executor of my estate without bond.

"Mattie S. Davis."

Contending that the will provides only for the appointment of an executor and makes no provision as to the persons to whom or in what shares, the estate is to be distributed, other than it shall be distributed to decedent's heirs at law who are merely referred to in my will as "My sons & grandchildren," the appellant, Thomas M. Davis, one of decedent's sons, commenced this proceeding. The prayer of appellant's petition was that an order be made determining the heirs of decedent and directing that the estate be distributed to the children and grandchildren of the deceased in accordance with the provisions of section 222 of the Probate Code.

At the time appointed for the hearing of the above-mentioned petition, the matter was submitted to the trial court on the following agreed statement of facts:

"That Thomas M. Davis, the petitioner, is a son of Mattie S. Davis, deceased.

"That Mattie S. Davis was a woman of usual intelligence and education and had been, with such assistance as she deemed necessary, attending her own business affairs subsequent to the death of her husband in 1910 until her death.

"That the will of the said decedent be considered in evidence as in evidence upon the hearing."

From this statement, and particularly from the provisions of the will, the trial court concluded that the will was and is a valid will, and that under its terms respondent is the duly appointed and acting executor thereof, and that the language of the instrument, "to be distributed to my sons & grandchildren as he deems best," invested the executor with a power of determination as to what share of the estate he should distribute to each of the persons falling within the class to whom the testatrix directed the distribution should be made. The court accordingly decreed that the three sons and two grandchildren are included within the class of "my sons & grandchildren" mentioned in the will, and that respondent as executor thereof is invested with discretionary power to determine what share shall be distributed to each of said persons.

[1] It is appellant's contention on this appeal that the will attempts to create a trust which is void for uncertainty. That the terms of the instrument clearly indicate an intention on the part of the testatrix to create a trust is apparent. Respondent

so concedes, and the opinion rendered by the trial court, a copy of which is contained in respondent's brief, demonstrates that it concluded that legal title to the entire estate of the decedent was vested in respondent who was constituted a trustee thereof for the express purpose specified in the will. The single question which remains for consideration is whether or not the trust is sufficiently definite to be carried into effect. If the trust is too vague, uncertain, and indefinite in its declarations to be carried into effect, it is invalid and must fail. If, however, the language of the instrument indicates the creation of a trust which is sufficiently certain to be effectuated, the validity of the will must be upheld.

In his attack upon the will appellant relies strongly on the decision in *Wittfield v. Forster*, 124 Cal. 418, 57 P. 219, 220. In that case the testator conveyed all real and personal property which he owned to a specified trustee in trust for an unincorporated association named in the will, "to have and to hold unto said trustee, his successors and assigns forever." There was no further specification of the trust, and it was accordingly held that as the purpose of the trust was not indicated with any reasonable certainty, the trust attempted to be created was void under the provisions of section 2221 of the Civil Code. In its decision the Supreme Court quoted the following language from *Pomeroy's Equity Jurisprudence*: "The declaration of trust, whether written or oral, must be reasonably certain in its material terms; and this requisite of certainty includes the subject-matter of property embraced within the trust, the beneficiaries or persons in whose behalf it is created, the nature and quantity of interest which they are to have, and the manner in which the trust is to be performed. If the language is so vague, general, or equivocal that any of these necessary elements of the trust is left in real uncertainty, then the trust must fail." The court then proceeded to declare that application of the language of section 2221 of the Civil Code and the principle announced in the above-quoted language from *Pomeroy* demonstrated that the language employed in the will was entirely too vague and uncertain to constitute a valid trust.

In the recent decision of *In re Estate of Ralston*, 1 Cal.(2d) 724, 37 P.(2d) 76, 96 A.L.R. 953, a problem was presented which was similar to that which is here offered. The language of the will in the cited case was as follows:

"I give and bequeath in trust to L. R. Kagarise * * * my entire property at my death, both Real and Personal, wherever this property may be situated, and I hereby give and bequeath to the said L. R. Kagarise absolute authority to dispose of this my entire estate as he may see fit. * * *

"I appoint the said L. R. Kagarise as my executor and administrator of my estate as he has always been my good friend, and I have absolute confidence in his honesty, and will do as well in disposing of my estate as I could if I were still alive."

It was there held that although the testator had left no doubt of his intention to create a trust, his failure to designate with sufficient certainty the objects or purposes of the trust made it invalid and unenforceable.

Neither the research of counsel nor our examination of the authorities has produced a California case which more nearly approaches the factual situation presented in the instant proceeding. In *re Dewey's Estate*, 45 Utah, 98, 143 P. 124, 125, Ann.Cas. 1918A, 475, however, presents a case of striking factual similarity. In that decision it appears that the testatrix made certain specific bequests, and then used the following language: "All the rest, residue and remainder of my property of every kind and nature whatsoever, if any, which remain after paying and discharging all the debts, bequests, legacies, and obligations hereinbefore mentioned and provided for, I hereby give, devise and bequeath to the said Hubbard Tuttle, Sr. It is my desire that he shall distribute the same, or the proceeds thereof, among my nephews and nieces, and to such of them, and in such proportions, as he shall deem just and proper, and his decision upon such matters shall be final, conclusive and binding upon all parties."

The will nominated the trustee as executor of the instrument. It was urged by a nephew and two nieces of the deceased who objected to final distribution of the estate in accordance with a petition therefor that there was too much uncertainty both as to the subject-matter and objects of the trust to justify its enforcement by a court of equity. This contention did not prevail. It was declared that the subject-matter of the trust was clearly expressed as being the residue of the estate, and that the objects of the trust as expressed by the testatrix were her nephews and nieces. It was further urged that the vesting in the trustee

of the power to determine as to which ones of the nephews and nieces he would distribute the residuum of the estate and the share thereof which he would set apart to each of those whom he might select vitiated the trust for uncertainty. This contention was likewise declared to be untenable in the following language: "It is not an insuperable objection that the trustee be invested with discretion or be given the power to select one or more beneficiaries from a class named in the will, or even to determine the amount the beneficiary selected by him should receive so long as the trustee is required to divide the property to the class indicated by the testator."

[2] Analysis of the language employed in the will in the instant case demonstrates that there is no uncertainty in the subject-matter of the trust, the purpose thereof, or the persons beneficially interested. Section 2221, Civ.Code; *Estate of McCray*, 204 Cal. 399, 402, 268 P. 647. The subject-matter is the entire estate of the decedent. The purpose is distribution of the estate. The beneficiaries are the three sons and the two grandchildren of the testatrix. The trial court correctly designated the beneficiaries in its decree as included within the class of "my sons & grandchildren," and there is no dispute as to the propriety of the decree in this regard.

[3,4] It is too clear to permit of argument that it was the desire and intention of the testatrix to invest the trustee named in the will with the power to determine what share of the estate he would distribute to each of the persons composing the class specified in the instrument. Unless, therefore, it must be declared that the "power of appointment," i. e., the power to appoint the particular persons to whom the estate shall be distributed is invalid under the law of this state, the primary canon of the construction of wills, which is that, whenever possible, the intention of the testator, if it is fairly discoverable from the language of the will, shall be carried into effect, must govern.

Whatever doubt has heretofore existed with respect to the validity of powers of appointment in California (21 Cal.Jur., p. 428, sec. 7; 13 Cal.Law Review, 1) has apparently been effectually dissipated by the very recent decision in *Re Estate of Sloan*, 7 Cal.App.(2d) 319, 46 P.(2d) 1007, in which a hearing was denied by the Supreme Court. In accordance with this decision we have therefore no hesitancy in declaring that the

power of appointment vested in the respondent by the terms of the will is valid and was properly upheld by the trial court.

The decree from which this appeal has been taken is accordingly affirmed.

We concur: BARNARD, P. J.; MARKS, J.



13 Cal.App.2d 79

BOTELER v. CONWAY (CADWALLADER-GIBSON CO., Inc., Intervener).

Civ. 9697.

District Court of Appeal, Second District,
Division 1, California.

April 3, 1936.

Rehearing Denied April 24, 1936.

Hearing Denied by Supreme Court
June 1, 1936.

1. Guaranty ⇨27

Contract and guaranty of performance executed contemporaneously may be properly read and interpreted as an entire contract.

2. Guaranty ⇨54

Alteration of contract without guarantor's consent in respects so material as to change substantial rights of parties thereto exonerates guarantor, regardless of whether alteration increases or lessens obligation to be performed.

3. Guaranty ⇨54

Alteration of contract for purchase of radio cabinets so as to reduce period in which cabinets were to be purchased and paid for from one year to eight months held to release guarantor from liability for payments, where alteration was made without guarantor's consent.

4. Corporations ⇨425(1)

Where contract for purchase of radio cabinets was altered by seller and secretary of buyer so as to release guarantor from liability for payments, seller could not contend in suit against guarantor that secretary of buyer had no authority to alter contract.

5. Corporations ⇨425(1)

It is a general rule of agency that one who contracts with an agent or officer of corporation cannot question agent's authority to bind corporation.

6. Principal and agent ⇨150(1)

Principal and not third party may complain if agent exceeds his authority.

7. Corporations ⇨425(1)

Where contract for purchase of radio cabinets was altered by seller and secretary of buyer so as to release guarantor from liability for payments, seller could not disaffirm acts of secretary in order to recover from guarantor, especially where parties acted under contract as modified, and did not question secretary's authority.

8. Corporations ⇨636

Generally, a state may refuse to allow foreign corporations to enter state for transaction of business and may admit corporations upon terms and require corporations to comply with state laws (Const.U.S. Amend. 14).

9. Corporations ⇨636

Power of state to exclude foreign corporations from doing business in state is absolute and unlimited, and admitting state may impose conditions which discriminate in favor of domestic corporations, or are prohibitive (Civ.Code, § 322a, as added by St.1929, p. 740; Const.Cal. art. 12, § 3, as amended in 1928; Const.U.S. Amend. 14).

10. Corporations ⇨636

Foreign corporation may not enter state upon prescribed terms and then complain of such terms.

11. Corporations ⇨636

Foreign corporation which was not instrumentality of federal government or engaged in interstate commerce had no unconditional right to transact business in state (Civ. Code, § 322a, as added by St.1929, p. 740; Const.Cal. art. 12, § 3, as amended in 1928; Const.U.S. Amend. 14).

12. Corporations ⇨653

Stockholder of foreign corporation doing business in state held liable for his proportionate share of debt contracted by corporation in state, notwithstanding corporation used word "Limited" in its corporate name (Civ.Code, § 322a, as added by St.1929, p. 740; Const.Cal. art. 12, § 3, as amended in 1928; Const.U.S. Amend. 14).

Appeal from Superior Court, Los Angeles County; Thomas P. White, Judge.

Suit by L. Boteler, trustee for the estate of Lloyd Products, Inc., bankrupt, against

Jack Conway, wherein the Cadwallader-Gibson Company, Inc., intervened. From a judgment for defendant, plaintiff and intervener appeal.

Reversed in part, affirmed in part, and remanded for a retrial.

Loton Wells and Hubert Laugharn, both of Los Angeles, for appellant Boteler.

Bauer, Macdonald, Schultheis & Pettit, Robert H. Edwards, Jr., and Roger B. Smith, all of Los Angeles, for appellant Cadwallader-Gibson Co.

D. Chase Rich, of Los Angeles, for respondent.

SHINN, Justice pro tem.

Appeal by plaintiff and intervener from a judgment in favor of defendant upon a written guaranty.

Plaintiff sues as trustee of the estate of Lloyd Products, Inc., a corporation, bankrupt, upon a contract of guaranty executed by defendant Jack Conway and upon stockholders' liability. Intervener Cadwallader-Gibson Company, Inc., a corporation, is interested in the matter in suit by reason of an assignment of plaintiff's claim to secure an indebtedness to intervener. Lloyd Products, Inc., hereinafter designated as Lloyd, contracted in writing with Monarch Radio Company, Limited, hereinafter referred to as Monarch, to manufacture and sell to the latter, which agreed to buy, certain radio cabinets at stated prices. The contract provided that 10,000 cabinets were to be made and delivered within a year after the date of the contract, August 29, 1929. Monarch agreed to buy all of its cabinet requirements for one year from Lloyd, and was to pay for cabinets according to the design agreed upon, at the rate of \$14.50 each. On September 9, 1929, before any cabinets were delivered, the secretary of Monarch and the president of Lloyd, without the knowledge or consent of defendant Conway, made certain written changes in the contract, by which the period of time for the manufacture of 10,000 cabinets was reduced from one year to eight months, and the time during which Monarch was to purchase all of its cabinet requirements was reduced from one year to about eight months. The guaranty of Conway upon which suit was brought was executed on the same day as the contract between the corporations, and read as follows: "I, Jack Conway, in consideration of the execution of and the performance of the conditions of said contract by

said first party, do hereby personally guarantee all of the payments in this contract specified on the part of the second party to be paid; at the times, of the amounts and in the manner in said contract provided. This guarantee to remain in full force and effect in the event of the transfer or assignment of the interest or rights of either party under said contract. (Signed) Jack Conway. Witness: C. B. Flowers; Dated: August 29th, 1929."

The court found that the two corporations changed the contract in material respects, as we have stated; that there were delivered altogether 849 cabinets of the type specified in the contract at a total price of \$12,310.10; that Monarch gave its trade acceptances in the sum of \$7,250, which were negotiated by Lloyd and are not sued on here. Delivery was tendered of an additional 151 cabinets of this type and was refused; 250 of a different type which the parties had agreed upon were ordered and partly constructed. Other facts were found to the effect that Lloyd was damaged in certain amounts by reason of certain work and material which had gone into the partial construction of cabinets under the mentioned orders and for the loss of certain profits which would have been earned had the contract been performed by the acceptance of the cabinets.

Defendant Conway relied in part upon the modifications of the terms of the contract without his consent as a release from his contract of guaranty, and the court held that he was thereby released. The obligation under the contract of guaranty was to make the payments specified in the contract in case Monarch did not make them, and if effect be given to the modifications of the contract, Monarch and its guarantor would have been obliged to pay in eight months' time what they had agreed would be paid in a year, and both corporations would have been released from the obligation under which Monarch was to purchase from Lloyd all of its cabinet requirements during the last four months of the year.

[1-3] Where a contract and a guaranty of performance thereunder are entered into at the same time, they are properly read and interpreted as an entire contract. Where the main contract is altered without the consent of the guarantor and in respects so material as to change the substantial rights of the parties thereto and in effect to make a new contract, the

guarantor is exonerated. Section 2819, Civ.Code. This is true whether the effect of the alteration is to increase or to lessen the obligation, performance of which is guaranteed. *Driscoll v. Winters*, 122 Cal. 65, 54 P. 387; *McMannus v. Temple Estate Company* (Cal.App.) 51 P.(2d) 1124. The modifications were clearly sufficient to exonerate the guarantor.

[4-7] Plaintiff cannot be heard to say that the secretary of Monarch did not have authority to make the changes in the contract. One who contracts with an agent or officer of, and acting for, a corporation generally cannot question his authority to bind the corporation. 14a C.J. 120. This is a general rule of agency. 2 C.J. 467. If an agent exceeds his authority his principal may complain, but a third person may not. Monarch had the right to affirm or repudiate the acts of its secretary. It did not disaffirm them, and plaintiff may not take unto himself the right to do so. The rule is especially applicable here, where the parties acted under the contract as modified without questioning the secretary's authority.

[8-12] There remains the question of the liability of Conway as a stockholder of Monarch. The court found that on the date of the contract he owned one-third of the issued and outstanding stock of the corporation. This finding is not challenged. Monarch Radio Co., Ltd., is a Nevada corporation. Article 12, § 3 of the Constitution was amended in 1928 so as to exempt from constitutional liability for corporate debts stockholders of any corporation organized under the laws of this state using the word "Limited" (or its abbreviation) in its corporate name. The Legislature was given power to provide a stockholder's liability for such corporations. In 1929 the Legislature adopted section 322a of the Civil Code (St.1929, p. 740), which purported to exempt foreign as well as domestic corporations so using the word "Limited." The section was ineffectual as to foreign corporations because the Legislature did not have power to remove a liability which still existed under the Constitution. But defendant Conway contends that as a stockholder of a foreign corporation using the word "Limited" in its name and qualified to do business in California, he is entitled under the Fourteenth Amendment of the Constitution of the United States to the same privileges as a stockholder of a domestic

corporation using the word "Limited" in its name; that is to say, in this case, exemption from stockholders' liability. The argument commences with the erroneous supposition that a foreign corporation has a constitutional right to enter a state other than that of its origin and to do business therein upon as favorable terms as corporations organized in such state. The argument finds no support in the authorities, which all deny the existence of such claimed constitutional rights. With certain well-understood exceptions, a state may refuse to allow foreign corporations to enter the state for the transaction of business, and may admit them upon terms and require them to comply with state laws. It has been said many times that the power to exclude, where it exists, is absolute and unlimited and that the will of the admitting state may be expressed by imposing conditions which discriminate in favor of domestic corporations, or which are even prohibitive. A foreign corporation may not enter the state upon terms and then complain of the terms. *H. K. Mulford Co. v. Curry*, 163 Cal. 276, 125 P. 236; *Black v. Vermont Marble Co.*, 1 Cal.App. 718, 82 P. 1060; *Jameson v. Simonds Saw Co.*, 2 Cal.App. 582, 84 P. 289; *Francioni v. Soledad Land & Water Co.*, 170 Cal. 221, 149 P. 161; *San Francisco v. Liverpool, etc., Ins. Co.*, 74 Cal. 113, 15 P. 380, 5 Am.St.Rep. 425; *Paul v. Commonwealth of Virginia*, 8 Wall. (75 U.S.) 168, 19 L.Ed. 357; *Pembina Consol Silver Mining, etc., Co. v. Commonwealth of Pa.*, 125 U.S. 181, 8 S.Ct. 737, 31 L.Ed. 650; *Ducat v. City of Chicago*, 10 Wall.(77 U.S.) 410, 19 L.Ed. 972; *Bank of Augusta v. Earle*, 13 Pet.(38 U.S.) 519, 10 L.Ed. 274; *Massachusetts Bonding & Ins. Co. v. Chorn*, 274 Mo. 15, 201 S.W. 1122; *London, Paris & American Bank v. Aronstein* (C.C.A.) 117 F. 601; *Hooper v. State of California*, 155 U.S. 648, 15 S.Ct. 207, 39 L.Ed. 297; *Williams v. Gaylord* (C.C.A.) 102 F. 372; 14a Cor.Jur. 1244. Monarch was not an instrumentality of the federal government nor was it engaged in interstate commerce, and therefore it had no unconditional right to do business in California. The Constitution and laws of California allowed foreign corporations to enter the state upon the condition that there should be a liability upon their stockholders for the debts they might create in this state. Therefore, when Monarch entered the state, as its articles of incorporation gave

it the right to do, it subjected its stockholders to the liabilities prescribed by the Constitution and laws of this state, and defendant Conway was liable for his proportionate share of the debt of Monarch to plaintiff. *Provident Gold Mining Co. v. Haynes*, 173 Cal. 44, 159 P. 155; *Pinney v. Nelson*, 183 U.S. 144, 22 S.Ct. 52, 46 L.Ed. 125. The findings, while stating that Conway was the owner of one-third of the issued and outstanding stock of Monarch, do not show the total amount of the subscribed stock of Monarch nor the proportion of the subscribed stock owned by defendant Conway, which proportion determines the extent of his liability. The allegation of the complaint as to the proportion of the subscribed stock subscribed for by Conway or issued to him was found to be untrue. The findings in other respects are not sufficient to enable this court to direct the entry of judgment upon a reversal.

The judgment is reversed for a retrial of the question of the liability of defendant Conway as a stockholder.

We concur: HOUSER, P. J.; DORAN, J.



13 Cal.App.2d 140

EQUI v. CITY AND COUNTY OF SAN FRANCISCO et al.
Civ. 9781.

District Court of Appeal, First District,
Division 2, California.

April 8, 1936.

Appeal and error ¶781(4)

Where, pending appeal from declaratory judgment declaring invalid an ordinance of the city and county of San Francisco imposing license tax of \$40 per quarter upon automobile service stations, the objectionable ordinance was repealed, and appellants did not contest correctness of judgment on ground tax was unreasonable, oppressive, and confiscatory, but merely sought determination of power of such city and county to impose a license tax for revenue, appeal would be dismissed, since such issue had become moot (St.1931, p. 2991, § 24).

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action for declaratory and injunctive relief by John F. Equi, individually and in behalf of all persons similarly situated, against the City and County of San Francisco and others. From a judgment for plaintiff, defendants attempt to appeal.

Appeal dismissed.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco, for appellants.

Milton Marks, Robert J. McGahie, and Joseph H. Mayer, all of San Francisco (Morris Lowenthal, of San Francisco, of counsel), for respondent.

SPENCE, Justice.

Plaintiff, individually and on behalf of all persons similarly situated, brought this action for declaratory and injunctive relief. Judgment was entered in favor of plaintiff, and defendants have appealed.

The complaint in this action shows that respondent sought to attack the validity of the provisions of ordinance 5132 (new series) of the city and county of San Francisco, in so far as said ordinance imposed certain taxes upon automobile supply stations, commonly known as service stations. A reading of the judgment shows that the trial court declared that the license tax of \$40 per quarter imposed upon automobile supply stations by the provisions of said ordinance was invalid (1) because it was a license tax for revenue rather than for regulation; and (2) because it was unreasonable, oppressive, and discriminatory. The trial court therefore enjoined its collection. Appellants do not complain of the portion of the judgment declaring said tax invalid because it was unreasonable, oppressive, and discriminatory, and enjoining the collection thereof. Their attack is directed solely at that portion of the judgment declaring said tax invalid because it was a tax for revenue rather than for regulation, and declaring that the city and county of San Francisco was without power to impose such a license tax. In other words, appellants do not seek a reversal of the entire judgment, but state that "the judgment of this court should be to the effect that the City and County of San Francisco, under proper circumstances, has the right to levy license taxes for revenue and that the City

and County of San Francisco is not confined to the levy of license taxes for regulation purposes only."

A motion to dismiss this appeal has been submitted with the cause on the merits. Said motion was made upon the ground that "said appeal and said cause have become moot." In support of said motion, respondent filed affidavits showing that shortly after the judgment of the trial court was entered, the city and county of San Francisco adopted ordinance 3.04123, which amended section 19 of said ordinance 5132 to read as therein provided. The result of this amendment was to reduce the quarterly license tax upon automobile supply stations from \$40 to \$6.25. It therefore appears that the provisions of said ordinance 5132, imposing a license of \$40 per quarter, have been repealed. Appellants do not deny the repeal of said provisions imposing the \$40 tax upon automobile supply stations, but contend that their attack upon a portion of the judgment should be considered in order that this court may determine whether the city and county of San Francisco has the power to license for revenue under the provisions of section 24 of the new charter. St.1931, pp. 2973, 2991.

We are of the opinion that the motion to dismiss the appeal should be granted. The provisions of said ordinance 5132 which were attacked in the complaint have been repealed. The judgment declaring invalid the \$40 license tax imposed by the repealed provisions of said ordinance upon the ground that said tax was unreasonable, oppressive, and discriminatory finds support in the record, and is not challenged by appellants. Under the circumstances, we believe that the question of whether the license tax imposed by the repealed provisions of said ordinance was invalid upon the further ground that it was a license tax for revenue rather than for regulation, and the question of whether the city and county of San Francisco had the power to impose such a license tax for revenue have become abstract, academic, and dead issues which no longer present any actual controversy between the parties. It therefore appears that the only issues presented by this appeal have become moot, and that "the appeal should not be entertained solely for the purpose of entering an academic discussion of the legal

questions presented." *Stockwell v. McAlvay*, 117 Cal.App. 583, 4 P.(2d) 167; see, also, *Carter v. Stevens*, 211 Cal. 281, 295 P. 28; *United States v. Alaska S. S. Co.*, 253 U.S. 113, 40 S.Ct. 448, 64 L.Ed. 808; *City of Portland v. Investment Co.*, 59 Or. 598, 117 P. 991; *State Board of Equalization v. People*, 30 Colo. 271, 70 P. 416; *Union E. L. & P. Co. v. City of St. Louis*, 253 Mo. 592, 161 S.W. 1166; *Borchard on Declaratory Judgments*, pp. 282 and 283.

The appeal is dismissed.

We concur: NOURSE, P. J.; STURTEVANT, J.



13 Cal.App.2d 213

MYRICK v. BRUETSCH et al.

Civ. 1903.

District Court of Appeal, Fourth District,
California.

April 11, 1936.

1. Deeds ⇨196(3)

In administratrix' action to set aside transfers whereby property of deceased father was conveyed to father and daughter who lived with him as joint tenants to exclusion of other children, evidence as to undue influence was sufficient to raise presumption in administratrix' favor, and to place on daughter burden of showing that conveyances were fairly made.

2. Deeds ⇨211(4)

Evidence sustained finding and judgment setting aside, on ground of undue influence, transfers whereby all of deceased father's property was conveyed to father and daughter who lived with him as joint tenants, to exclusion of other children.

3. Appeal and error ⇨205

In action to set aside transfer whereby all of deceased father's property was conveyed to father and daughter as joint tenants to exclusion of other children, excluding evidence of father's conversation concerning his property held not reversible error, where no offer of proof was made and there was no statement as to what such evidence was.

4. Appeal and error $\S$ 1068(1)

Alleged error in instruction was cured by court's findings, where jury acted in advisory capacity only.

5. Appeal and error $\S$ 1060(5)

Alleged misconduct of counsel in argument held not to justify reversal, where jury acted in advisory capacity only and findings were finally made by court.

Appeal from Superior Court, Los Angeles County; Lewis Howell Smith, Judge.

Action by Louise B. Myrick, as administratrix of the estate of Conrad Bruetsch, deceased, against Lillian E. Bruetsch, Conrad Bruetsch, Jr., and others. From a judgment for plaintiff, named defendants appeal.

Affirmed.

John L. Fleming, John C. Miles, Joseph Hansen, Friedman & Katzev, Mose Katzev, and Paul Friedman, all of Los Angeles (Albert Pearson, of Los Angeles, of counsel), for appellants.

Gibson, Dunn & Crutcher and E. H. Conley, all of Los Angeles (Robert F. Schwarz, of Los Angeles, of counsel), for respondent.

BARNARD, Presiding Justice.

This is an action to cancel and set aside the transfers of certain real and personal properties and to quiet title to the same in the plaintiff as administratrix of the estate of Conrad Bruetsch.

Conrad Bruetsch died on April 6, 1931, leaving four children of whom the plaintiff and Oscar Bruetsch were the children of a first marriage and the defendants Lillian Bruetsch and Conrad Bruetsch, Jr., were the children of a second marriage. The second wife died on July 11, 1930, and on July 25, 1930, Conrad Bruetsch caused all of his property, consisting of several parcels of real estate and several notes secured by mortgages or trust deeds, to be conveyed to himself and to the defendant Lillian Bruetsch, as joint tenants with the right of survivorship. On April 14, 1931, Lillian Bruetsch took the necessary steps to vest the title to all of these properties in herself and Conrad Bruetsch, Jr., as joint tenants. Some time later the plaintiff and Oscar Bruetsch discovered that all of their father's property had thus

been conveyed to the other children, and this action followed.

A jury returned a verdict in favor of the plaintiff and, on special issues submitted, found that Lillian Bruetsch exercised an undue influence and control over her father in connection with the execution of these conveyances, that Conrad Bruetsch had consented to and joined in these conveyances solely because of the undue influence and control exercised over him by Lillian Bruetsch, and that his acts in connection with the conveyances were not prompted by his own will and desire. Thereafter the court made findings of fact in all respects in favor of the plaintiff, finding, among other things, that a confidential relationship existed between Lillian Bruetsch and her father; that she was present at all times while the conveyances were being executed; that he received no consideration therefor; that he had no independent advice in relation thereto; that he had been in failing health since the death of his wife; that he could neither read nor write English and did not know enough English to understand ordinary business affairs; that Lillian had acquired and exercised a predominant influence and control over him to such an extent that she substituted her will and desires for his own; that she had made false accusations against the plaintiff to her father; that she had obtained the conveyances by the use of undue influence; that the conveyance of his property was prompted by and done solely because of the undue influence of Lillian; and that the same was in conflict with his true wishes and desires. From the judgment entered Lillian Bruetsch and Conrad Bruetsch, Jr., have appealed, but Lillian Bruetsch will be herein referred to as the appellant.

The principal contention is that the evidence is not sufficient to support the findings and judgment. Disregarding the conflicts and omitting some portions of the evidence and many of the details, the following facts appear: Conrad Bruetsch was 69 years old at the time of his death and he could neither read nor write the English language. He spoke English brokenly and the appellant testified, when her deposition was taken: "There was always someone present, either my brother or I, when my father made any transaction because he had to have somebody interpret to make things perfectly clear."

The appellant lived with her father and mother after 1928, and alone with her father after her mother's death. There is some evidence that her father relied upon her in his business affairs, that she acted as interpreter for him, that she had access to his safety deposit box, that his bank account was in their joint names, that she made deposits for him, and that she devoted her entire time and attention to caring for him. The conveyances were made shortly after her mother's death and at a time when he was suffering from the disease which caused his death. It was freely admitted that nothing was paid for the properties, and the appellant testified that her father had never agreed to pay her anything for her services.

The conveyances were prepared by a notary who testified that he did not advise her father to make them, and it appears from the evidence that he had no independent advice. The appellant went with her father to the notary on each occasion when anything was done in connection with making these conveyances. Seven such trips were made in this connection, in taking other papers desired by the notary, in preparing and executing the papers, and in getting the same after they were recorded, and she was present when they were all executed. While the transfers were made more than eight months before the death of the father, nothing was said to the brothers and sister until some time after the father died. After the appellant went to live with her father, in 1928, his visits to the other children became much less frequent. On one occasion, he explained the sale of a mortgage on property owned by his son Oscar, after he had told Oscar that he would not sell it and that Oscar need not pay the principal, by saying that he had to do this in order to please the appellant and her mother. There is evidence justifying the inference that the appellant discouraged the other children from coming to see their father during the last year or so of his lifetime. However, the father expressed the same affection for these children on the few occasions they saw him and seemed unable to understand why they did not come oftener.

There is considerable evidence indicating that the father desired to have his property equally divided among his children. On many occasions, between 1921 and 1928, the father told the other chil-

dren that his property was going to be divided equally among the four. In December, 1930, some months after the conveyances had been made, he told Oscar's wife that he would divide what he had equally among all his children, that he was not feeling well, and at that time he made a request of her in case anything happened to him. The respondent testified that she saw her father three or four times after his wife died in July, 1930, and that each time he talked about his property and told her he was taking care of the four children equally. She also testified that she saw her father three or four days before he died and that "when I came into the room he was pleased to see me and he told me he wasn't going to get well and that he was taking care of us all equally." She also testified that some years before her father's death the appellant told her that she had found and destroyed her father's will, that she asked her why she had done this and that "she said because my father had given Oscar and I the 22nd and San Pedro corner and said she couldn't understand why he had given this to Oscar and I so she destroyed it." There is evidence that during her father's last illness the appellant prevented the other children from seeing him except in her presence, and that on one occasion the appellant falsely told her father that the respondent was drunk.

A number of important and material conflicts appear between the testimony of the appellant at the trial and that given by her in her deposition taken some time before. These discrepancies may well have thrown considerable doubt on her testimony as a whole.

[1] The evidence was sufficient to raise a presumption in favor of the respondent and to place upon the appellant the burden of showing that the conveyances in question were fairly made with a full understanding and intention on the part of the father. A different rule prevails as to the evidence of undue influence necessary in order to set aside a will and that required in such a case as this. In *Longmire v. Kruger*, 80 Cal.App. 230, 251 P. 692, 696, the court said:

"But the law makes a clear distinction between the proof of the existence of undue influence necessary to set aside a will, and that which is required to cancel a deed of gift or conveyance *inter vivos*. No presumptions of undue influence are

indulged in upon the contest of a will, unless confidential relations are first established; but with respect to gifts or conveyances inter vivos, the extreme age and infirmity of the grantor, together with slight evidence of circumstances from which it may be inferred that the instrument was the product of coercion, will suffice to shift the burden and require the beneficiary to show affirmatively that the transaction was fair and free from influence. * * *

"The influence which is undue in the case of gifts inter vivos, is very different from that which is required to set aside a will. In the case of gifts inter vivos, it is considered by the courts of equity that the natural influence which such relations as those in question involve, exerted by those who possess it to obtain a benefit for themselves, is an undue influence. Gifts or contracts brought about by it are therefore set aside, unless the party benefited can show affirmatively that the other party to the transaction was placed in such a position as would enable him to form an absolutely free and unfettered judgment. The law regarding wills is very different."

In *Campbell v. Genshlea*, 180 Cal. 213, 180 P. 336, 341: "It is to be remembered that in a case involving a purported gift inter vivos, based upon an alleged consideration of love and affection, where the donee is a daughter having the control and direction of the aged donor, a strong presumption of confidential relation arises which would place upon the beneficiary in the transaction the burden of showing fairness in dealing and full understanding on the part of the person parting with the property. *Nobles v. Hutton*, 7 Cal. App. 14, 93 P. 289. In the absence of such showing, the conveyance is presumed to have been obtained by undue influence and to be void."

[2] It cannot be said as a matter of law that the appellant met the burden resting upon her. The evidence, with the reasonable inferences therefrom, is sufficient to sustain the findings and judgment. *Nobles*

v. Hutton, 7 Cal.App. 14, 93 P. 289; *Piercy v. Piercy*, 18 Cal.App. 751, 124 P. 561; *Pleasants v. Hanson*, 48 Cal.App. 626, 192 P. 183; *In re Estate of Cover*, 188 Cal. 133, 204 P. 583.

[3] It is next urged that the court erred in excluding evidence of certain conversations had by the deceased with persons not related to him and who had no connection with the transactions involved, concerning what he had done with his property or what he intended to do with it. Several witnesses were asked whether they had had conversations with the deceased concerning his property. They were then asked to repeat the conversation and an objection was sustained. In view of the record before us it is not necessary to consider this point on its merits. No offer of proof was made and there was no statement as to what this evidence might be. It is impossible to tell from the record whether this evidence had any relation to the issues here, or whether, assuming it to have been admissible, its exclusion had any prejudicial effect. Under such circumstances, no reversible error appears. *Taylor v. Kelley*, 103 Cal. 178, 37 P. 216; *Snowball v. Snowball*, 164 Cal. 476, 129 P. 784; *Marshall v. Hancock*, 80 Cal. 82, 22 P. 61.

[4] The appellant attacks certain instructions given to the jury. The jury here acted only in an advisory capacity and a finding by the court was necessary. *Holland v. Kelly*, 177 Cal. 43, 169 P. 1000. Any possible error in the instructions was cured by the findings made by the court, where the final responsibility lay. *Whiting v. Squeglia*, 70 Cal.App. 108, 232 P. 986.

[5] Some contention is made that counsel for the respondent was guilty of misconduct in certain statements made during his closing argument to the jury. The matter in question would not justify a reversal in any event, and any possible effect has been removed since findings were finally made by the court.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

13 Cal.App.2d 186

SUPERA v. MORELAND SALES CORPORATION et al.

Civ. 1389.

District Court of Appeal, Fourth District,
California.

April 9, 1936.

Rehearing Denied May 7, 1936.

1. Automobiles ☞16

Buyer of used truck suing in tort for sellers' negligence in reconditioning and overhauling truck must show that sellers' failure to perform duty owing to buyer resulted in damage which buyer sustained.

2. Automobiles ☞16

Evidence held insufficient to support finding that sellers of used truck, being sued in tort for damages for buyer's deprivation of use of truck while it was being repaired after accident, were not negligent in reconditioning and overhauling steering mechanism.

3. Automobiles ☞16

Evidence held insufficient to support finding that buyer of used truck, suing in tort for sellers' negligence in reconditioning and overhauling truck, was negligent in not discovering faulty condition of steering mechanism before occurrence of accident.

Appeal from Superior Court, Kern County; Allan B. Campbell, Judge.

Action by Pete B. Supera against the Moreland Sales Corporation and others. From a judgment for the defendants, the plaintiff appeals.

Reversed.

Kelso, Berryman, Grua & Counts, of Los Angeles, for appellant.

Richard J. O. Culver, and Irving E. Read, both of Los Angeles, for respondents.

JENNINGS, Justice.

The plaintiff instituted this action against the defendants to recover from them the cost of repairs made to a certain truck which had been purchased by plaintiff from the defendants and damages for deprivation of the use of said truck during the time the repairs were being made. It was alleged in plaintiff's complaint that the property damage which plaintiff suffered was caused by the negligence of defendants in failing properly to overhaul and recondition the truck,

and in installing defective parts therein prior to plaintiff's purchase of the same. Trial of the action took place before the court without a jury and resulted in the entry of a judgment in favor of defendants, from which plaintiff has perfected this appeal.

Appellant contends that the findings of the trial court are irreconcilably conflicting, and that they are not supported by the evidence. Proper consideration of these contentions requires a statement of the facts which were developed by the evidence.

On September 27, 1931, appellant purchased from respondent Sam Tobias a certain Moreland motortruck described as model B 7. At the time the sale to appellant was effected, Tobias was branch manager for respondents Moreland Sales Corporation and Moreland Motor Truck Company in the city of Bakersfield. As part of the purchase price appellant turned in another truck which he owned and paid the remainder of the price in cash. The truck which appellant thus purchased was a used truck which had been reconditioned by the Moreland Motor Truck Company at its factory in Burbank, Cal. When the sale was made, Tobias stated to appellant that the truck carried a 30-day guarantee which he testified meant that the material of which the truck was composed was in good condition, rear end in good condition, and transmission in good condition; that the entire truck was in good condition, and that it was guaranteed so to remain for a period of 30 days after the sale. On October 6, 1931, appellant was operating the truck which contained a load consisting of 10 steers. He was then driving the vehicle along a rough road. About 10:30 at night he arrived at a place where the road made a turn to the right, which was immediately followed by a turn to the left. At this time appellant was driving the truck at a speed of approximately 12 to 15 miles per hour. He negotiated the first turn successfully, but in attempting to make the second turn was unable to steer the vehicle properly, with the result that the truck proceeded straight ahead and overturned in a ditch at the side of the road causing the damage which necessitated repairs to the truck and the consequent deprivation of use. Examination of the steering mechanism of the truck which was made after the occurrence of the accident disclosed that the drag link and pitman arm were disconnected, and that the setscrew in the end of the drag link, which holds the pitman arm and drag link

properly connected, was unscrewed to a point where it was held in the drag link by only two or three threads. The unscrewing of the setscrew had so released the tension on the connections of the pitman arm and drag link as to permit the pitman arm to slip out of its socket in the end of the drag link. It further appeared that the keyholes on the sides of the drag link which were formed for the purpose of receiving a cotter pin or key were filled with grease and paint, and that the cotter pin was absent. The cotter pin was necessary to prevent unscrewing of the setscrew. Appellant had driven the truck a distance of approximately 110 miles from the date of purchase until the occurrence of the accident. The appellant testified that about 15 or 20 minutes before the accident occurred he heard a rattle or dull sound which seemed to come from the bottom of the truck, and that he stopped the vehicle, alighted from the driver's compartment, placed himself beneath the truck, and with the aid of a flashlight examined the bottom part of the truck; that this examination did not disclose to him that anything was wrong, whereupon he resumed his place in the driver's compartment and continued on his way. This witness further testified that, at no time prior to the time he found that he was unable to steer the truck properly, had he felt any lost motion in the steering wheel, and that he did not again hear the rattle after he had brought the truck to a stop and examined it from underneath, as above described. He also testified that no part of the truck had been greased by him or by any one employed by him after it was delivered to him and prior to the occurrence of the accident. Appellant's testimony as above set out was in no respect contradicted.

The trial court found that the appellant lost control of the truck when the pitman arm and the drag link became disengaged, and that the disengagement of these parts was caused by the fact that the setscrew at the end of the drag link became partly unscrewed and that the cause of this condition was the absence of a cotter pin to hold the setscrew in place. The court next found that the drag link and pitman arm and the moveable parts which hold the drag link and pitman arm in place and likewise the setscrew were all in good condition immediately preceding and at the time of the accident. It is impossible to reconcile this last finding with the immediately preceding finding that the cotter pin whose function was to hold the setscrew in place was absent at the time

of the accident. If the cotter pin, whose function in the steering mechanism of the vehicle was so important, was missing, it is difficult to understand how the trial court could have found that the drag link and pitman arm and moveable parts which hold the drag link and pitman arm in place were "all in good condition immediately preceding and at the time of the accident" in view of the uncontradicted evidence which showed that the keyholes provided for the reception of the cotter pin were filled with grease and paint.

However, further examination of the findings discloses that the court found that appellant was an experienced driver of motor-trucks at the time of the accident, and was familiar with the operation of the motor-truck in question, and consequently that he knew or should have known within a reasonable period of time before his arrival at the scene of the accident by the exercise of reasonable care that the setscrew was gradually becoming loose as he drove the truck along the road "due to the gradually increasing lost motion necessarily caused thereby in the steering wheel which he held in his hands."

Analysis of the last-mentioned finding indicates that it is thereby found that appellant should have sooner discovered that the setscrew was becoming loose because of the gradually increasing lost motion which was "necessarily caused thereby" in the steering wheel. The basis of this finding is therefore that there was gradually increasing lost motion in the steering wheel which should have informed appellant that the steering mechanism was out of order. There is not a scintilla of evidence in the record to support a finding that there was any lost motion in the steering wheel. On the contrary, the testimony of appellant that he felt no lost motion in the steering wheel and that the wheel which he held with both hands did not shake at all in his hands stands uncontradicted. There is therefore positive uncontradicted evidence which the trial court was not at liberty to disregard which showed that the fact which the court found must have given warning to appellant of the gradual loosening of the setscrew did not exist.

The court next found that appellant "was therefore negligent in not stopping and ascertaining within a reasonable period of time before arriving at the place of the accident the faulty condition then existing, and his negligence in failing so to do was the sole proximate cause of the accident."

This finding is likewise obviously dependent on the existence of a fact which the evidence entirely fails to show did exist, viz., that there was lost motion in the steering wheel.

The final finding of the trial court is that appellant's allegations of negligence are untrue, and the allegations of respondents as to appellant's negligence are true.

[1-3] It is our conclusion that the last-mentioned finding is lacking in evidentiary support. It is clear that the action brought by appellant is one sounding in tort, and that recovery was sought from respondents for their alleged negligence in reconditioning and overhauling the truck which they sold to appellant. In order to succeed, appellant was required to show, first, that respondents owed him a duty; second, that they failed to perform the duty; and, third, that their failure to perform resulted in the damage which appellant sustained. We think that appellant successfully sustained the burden. It may not be contended with any hope of success that respondents did not owe to appellant the duty of providing him with a motortruck which was in all respects in good condition and would so remain for a period of 30 days. That the failure to install a cotter pin in the place provided for it in the drag link was a breach of this duty is obvious. That the absence of the cotter pin was the direct cause of the failure of the steering mechanism to function properly, which failure caused the truck to overturn, is too clear to permit of any intimation to the contrary.

Finally, it is contended that, assuming that respondents were negligent, nevertheless, since the trial court has found that appellant was himself negligent, and that his negligence was the proximate cause of the accident, therefore, the judgment in respondents' favor must be affirmed because the trial court has in effect convicted appellant of contributory negligence which precludes any recovery by him.

The difficulty with this reasoning is that, as above indicated, the finding of negligence on appellant's part is based on the existence of a fact which the evidence wholly failed to show did exist, viz., loss of motion in the steering wheel. So far as the evidence

shows, the only fact that tended in the slightest degree to inform appellant that something was wrong with the truck was the rattle or dull sound which appeared to him to emanate from beneath the floor board of the vehicle. The evidence indicates that he took prompt action to attempt to discover the source of the noise by bringing the truck to a stop and by placing himself underneath the vehicle and by examining it with the aid of a flashlight. It is true that he admitted on cross-examination that, although he looked at the steering mechanism when he was underneath the truck, he did not take hold of any part of it, and that his examination consisted of merely looking at the bottom of the truck when he was beneath it. However, we cannot discover from the evidence that he was under any obligation to make more detailed examination than he did. It is significant also that appellant's uncontradicted testimony is that, after the visual examination was concluded, he did not again hear the rattle as he proceeded on his way.

Our conclusion that the trial court's findings are lacking in evidentiary support is fortified by the record showing that the trial court granted appellant's motion for a new trial on the grounds of insufficiency of the evidence to justify the decision in favor of respondents and that the decision was contrary to law. Unfortunately for appellant, the order granting a new trial was not made until after the expiration of the 60-day period succeeding the date on which notice of entry of judgment was given. At the time the trial court granted the motion, therefore, its power to pass upon it had expired and it was deemed denied by operation of law. Section 660, Code Civ.Proc. Notwithstanding the fact that the trial court's action came too late to bring about a new trial of the action, the inclusion of evidentiary insufficiency to sustain the judgment as a ground for granting the motion is indicative of an appreciation by the trial court that its findings of fact are fatally lacking in evidentiary support.

The judgment from which this appeal has been taken is therefore reversed.

We concur: BARNARD, P. J.; MARKS, J.

TUTTLE et al. v. CRAWFORD et al. *
Civ. 10474.

District Court of Appeal, Second District,
 Division 1, California.

April 13, 1936.

Hearing Granted by Supreme Court
 June 11, 1936.

1. Negligence ⇨32(1)

Keeper of public place of business must use ordinary care to keep his premises and passageways to and from it in safe condition, and must use ordinary care to avoid accidents or injury to those properly entering on his premises.

2. Negligence ⇨136(15)

In action for injuries sustained by shopper allegedly slipping on lettuce leaves near vegetable concession in market, negligence of owner of concession *held* for jury.

3. Negligence ⇨136(27)

In action for injuries sustained by shopper allegedly slipping on lettuce leaves near vegetable concession in market, contributory negligence of shopper who had passed by concession on way to rear of market and who walked to and fro in market without looking at floor *held* for jury.

4. Appeal and error ⇨1064(1)

Where personal injury action was defended on ground of contributory negligence, giving instruction that law presumes that plaintiff exercised ordinary care for her own safety at time of accident *held* prejudicial error.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by Mary V. Tuttle and husband against W. H. Crawford, individually, W. H. Crawford, doing business under the fictitious name of W. H. Crawford Stores, W. H. Crawford, doing business under the fictitious name of Parket Market, and Walter Yamada and Roy S. Nizuno, individually and as copartners doing business under the fictitious name of Nizuno & Yamada. From an adverse judgment, Walter Yamada and Roy S. Nizuno, individually and as copartners, appeal.

Appeal from order denying defendant's motion for an instructed verdict dismissed, order denying motion for judgment notwithstanding the verdict affirmed, and judgment reversed and cause remanded for a new trial.

Hugh B. Rotchford, of Los Angeles (Everett H. Smith, of Los Angeles, of counsel), for appellants.

Thomas M. Bergin, of Los Angeles, for respondents.

ROTH, Justice pro tem.

Mary V. Tuttle, one of the respondents herein, on November 28, 1934, at or about 8 o'clock in the morning, entered the market premises in which appellants Nizuno and Yamada had a vegetable concession. She passed by the concession of appellants, did some shopping in the rear of the market, and on returning to the front of the market again passed the concession of appellants, slipped and fell. The significant evidence of negligence was that given by the injured respondent. She testified that she fell on a "wet spot on the concrete floor, and on that wet spot there were two or three leaves of lettuce—looked like lettuce—leaves that were on the outside of the lettuce, they were greener and older than the head lettuce would be sold. * * * In another portion of her testimony she testified: " * * * I saw the lettuce in the wet spot. * * * The testimony excerpted is the result of her observations made after she fell. This testimony is partially corroborated by that of her husband, the other respondent, who testified that when she was brought home he washed what looked like "dirty looking slime with small dots of vegetable matter" off his wife's leg and dress.

[1-3] It has been established by a long line of cases in this state that the keeper of a public place of business is bound to use ordinary care to keep his premises and the passageways to and from it in a safe condition, and must use ordinary care to avoid accidents or injury to those properly entering upon his premises. *Brown v. Holzwasser, Inc.*, 108 Cal.App. 483, 291 P. 661. Whether or not appellants used ordinary care in the maintenance of their premises to avoid accidents and injury to those properly entering upon their premises was a question of fact for the jury. *Williamson v. Hardy*, 47 Cal.App. 377, 190 P. 646; *Brinkworth v. Sam Seelig Co.*, 51 Cal.App. 668, 197 P. 427; *Finch v. Willmott*, 107 Cal.App. 662, 290 P. 660; *Siegman v. Feters*, 59 Cal.App. 114, 210 P. 49; *Long v. John Breuner Co.*, 36 Cal. App. 630, 172 P. 1132; *Brown v. Holzwasser, Inc.*, 108 Cal.App. 483, 291 P. 661;

Hodge v. Weinstock, Lubin & Co., 109 Cal.App. 393, 293 P. 80; Hook v. City of Sacramento, 118 Cal.App. 547, 5 P.(2d) 643; McClurken v. Ralph's Grocery Co., 130 Cal.App. 529, 20 P.(2d) 66; Touhy v. Owl Drug Co., 6 Cal.App.(2d) 64, 44 P.(2d) 405; Granucci v. Claasen, 204 Cal. 509, 269 P. 437, 59 A.L.R. 435. The cited cases demonstrate that evidence of the kind here adduced is sufficient to show negligence on the part of appellants in the case at bar. Appellants contend, however, that respondent Mary V. Tuttle was guilty of contributory negligence, because of the admitted fact that she passed by the concession of appellants on her way to the rear of the store, and her admission that she did not look at the floor as she walked to and fro in the market, and that she did not look at the floor immediately before or at the time she fell. Contributory negligence, however, like negligence, is a question of fact for the jury; and "when there is no conflict in the evidence, if different conclusions upon the subject can be rationally drawn from the evidence," it is still a question of fact for the jury. *Wahlgren v. Market Street Ry. Co.*, 132 Cal. 656, 663, 62 P. 308, 309, 64 P. 993.

[4] The case, however, must be reversed because of prejudicial error in the giving of the following instruction: "You are instructed that the law presumes that a person takes ordinary care of his own concerns. I, therefore, instruct you that the law presumes that plaintiff, Mary V. Tuttle, exercised ordinary care for her own safety at the time of the accident here involved."

In the case of *Paulsen v. McDuffie*, 47 P.(2d) 709, 714, our Supreme Court criticizes an identical instruction as follows: "In the present action, plaintiff was not only alive but was called as a witness and testified fully as to all of his actions just prior to and at the time of his injury. * * * It is difficult to see how there was any place for a presumption as to the plaintiff's conduct. What he did on that occasion was entirely covered by the evidence in the case, and there was neither necessity nor reason for indulging in any presumption upon that subject. That instruction had no place in this case and should not have been given. Had this been a case where the contributory negligence of the plaintiff would have defeated his claim for damages, the consequences

following the giving of that instruction might have been most serious, and possibly might have required a reversal of the judgment. In the present action, however, we have, as shown in the discussion herein, been much more concerned with the action of defendant's employees, and with the question of their negligence, than we have in the conduct of the plaintiff. Admitting that the plaintiff was negligent, still he is, as stated above, entitled to recover in this action."

Because contributory negligence was not an issue in the *Paulsen Case*, the Supreme Court held that the instruction quoted was harmless error. In the case at bar, contributory negligence was a vital issue, and we believe that, because it was, the case is such as to require "a reversal of the judgment."

The appeal from the order herein denying defendant's motion for an instructed verdict is dismissed, there being no appeal from such order, and the order denying the motion for judgment notwithstanding the verdict is affirmed. The judgment is reversed and the cause remanded for a new trial.

We concur: YORK, Acting P. J.; DORAN, J.



13 Cal.App.2d 166

THOMPSON v. ROBINSON-ROBERTS CO.

Civ. 10141.

District Court of Appeal, Second District,
Division 1, California.

April 9, 1936.

Rehearing Denied April 28, 1936.

Hearing Denied by Supreme Court
June 8, 1936.

I. Negligence §134(1)

Evidence held to justify judgment for garage mechanic for injuries received while repairing defendant's gasoline engine on ground that such mechanic in being engaged solely to repair that engine without instruction from defendant as to manner in which work was to be done was "independent contractor" and not "servant" (Civ.Code § 2009).

"Independent contractor" is one who is engaged in performing certain acts or work for another, but who, in perform-

ing such acts or work, exercises an independent calling; that is, a calling in which no right of control or direction is reserved or vested in or exercisable by party for whom acts or work are to be done.

[Ed. Note.—For other definitions of "Independent Contractor" and "Servant," see Words & Phrases.]

2. Master and servant ☞5

Test as to whether person is "independent contractor" or "servant" is whether person alleged to be master under his arrangement with other party has or has not any authoritative control over or direction of such party with respect to manner in which details of work are to be performed (Civ. Code § 2009).

3. Negligence ☞135

Evidence held sufficient to sustain finding that garage mechanic, injured when struck in face by crank which came off gasoline engine he was repairing, was free from negligence in not noticing loose pin in crank which caused it to fly off.

4. Negligence ☞25

Owner of gasoline engine who knew of defect in crank which caused it to fly off held to have had duty to inform garage mechanic, injured when struck in face by crank which came off while he was repairing engine, of defective condition of crank before permitting mechanic to use it in repairing engine.

Appeal from Superior Court, Los Angeles County; Georgia P. Bullock, Judge.

Action by Fred Thompson against the Robinson-Roberts Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

John W. Holler, of Los Angeles (A. H. Blum, of Los Angeles, of counsel), for appellant.

John S. Steely, of Los Angeles (Arthur Wm. Green, of Los Angeles, of counsel), for respondent.

WHITE, Justice pro tem.

Appeal by defendant from a judgment awarding damages to plaintiff for personal injuries sustained by the latter while repairing a gasoline engine owned and operated by defendant.

This appeal turns largely on the question as to whether plaintiff stood in the position of an independent contractor, or was the servant or general employee of defendant. There was a sharp conflict in the evidence concerning the nature of plaintiff's employment, but the trial court resolved that conflict in favor of plaintiff.

The trial court found that plaintiff "was not a regular employee of the defendant," but was "employed for this one job." In determining the sufficiency of the evidence to support such finding, and the judgment predicated thereon, we deem it appropriate to epitomize the testimony offered on behalf of plaintiff, which, in its material aspects, was that defendant was employed by the county of Los Angeles to remove a boat grounded on the shore off Redondo Beach. In performing this task defendant utilized the services of a diver. Air was provided the diver by a gasoline engine and compressor. The gasoline engine being in need of repairs, plaintiff, who was regularly employed as a mechanic in a nearby garage, received a call to come onto defendant's barge and fix a gasoline motor. Upon arriving at the barge, plaintiff encountered C. O. Roberts, vice president of the defendant corporation, when, according to plaintiff, Roberts asked plaintiff if the latter was a mechanic, to which plaintiff replied in the affirmative. Roberts then said, "Do you know anything about that motor?" to which plaintiff responded, "Yes—what's the matter with it?" Thereupon Roberts said to plaintiff, "We don't know what's the matter with it, but we have had our own men working on it, and they can't seem to get the motor to run. Can you fix it?" Upon plaintiff's saying, "Yes, I can fix it," Roberts replied, "Go to work on it and fix the motor." According to plaintiff, no price was agreed upon for his work, but he testified he was later paid \$13.25 for his services. The testimony of Mr. Roberts, vice president of defendant corporation, differed sharply from that of plaintiff, in that Roberts testified that plaintiff had been working for two or three days prior to the date of the accident as an operator on the engine, and was paid \$5 per day for his services.

Proceeding to make the necessary repairs, plaintiff cranked the motor a couple of times, and the third time he did so, the crank came off and struck plaintiff in the

mouth, injuring him in and about the mouth, face, and nose. It appears from the testimony that a pin in the crank was loose and came out, thus causing the crank to fly off.

[1] After viewing this evidence from every side, we are brought to the conclusion that, believing plaintiff's evidence, the trial court was justified in determining that plaintiff, in repairing the gasoline engine, was not a regular employee of defendant, but was engaged solely "for this one job"; and that the findings, together with the facts hereinbefore set forth, compel the conclusion that plaintiff was an independent contractor. *Maryland Casualty Co. v. Pillsbury*, 172 Cal. 748, 749, 751, 158 P. 1031; *Bennett v. Truebody*, 66 Cal. 509, 511, 512, 6 P. 329, 56 Am.Rep. 117.

An independent contractor is one who is engaged in performing certain acts or work for another, but who, in performing such acts or work, exercises an independent calling; that is, a calling in which no right of control or direction is reserved to or vested in or exercisable by the party for whom the acts or work are to be done. 13 Cal.Jur. 1015, citing cases.

[2] The real test, therefore, as to whether a person is an independent contractor or a servant, is whether the person alleged to be the master, under his arrangement with the other party, has or has not any authoritative control over or direction of the latter with respect to the manner in which the details of the work are to be performed; and, therefore, this test or element "must, in the last analysis, always determine what was the essential nature of the relationship between the person who performed the given work and the person for whom it was performed." *Labbatt on Master and Servant*, § 18, p. 56; *Barton v. Studebaker Corporation of America*, 46 Cal.App. 707, 715, 189 P. 1025.

As some evidence of the relationship between the defendant corporation and plaintiff Thompson in this case, we may refer to the fact that plaintiff was regularly employed as a mechanic in a garage, and, according to plaintiff's testimony, was engaged by the appellant simply and solely to repair the gasoline engine. The evidence in the instant case indicates that respondent was not told or instructed how he was to do it, in what manner the work was to be done, nor what means he was to employ in accomplishing the result. So far as the evidence shows, he was not required

to report to work at any given or particular time, nor to work for any particular length or period of time each day, nor, so far as plaintiff's evidence shows, was there any specific or definite arrangement entered into with him for a daily wage or other specific compensation. The respondent herein was responsible only for results, and his only duty was to take in hand the task of repairing the engine. Section 2009 of the Civil Code thus describes a servant: "A servant is one who is employed to render personal service to his employer, otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter, who is called his master."

Plaintiff's evidence, which from the findings was apparently believed by the trial court, disclosing the nature of the contractual relationship between the defendant corporation and plaintiff Thompson, it seems to us clearly indicates that the relation of master and servant, within the legal definition of that relation as given by the section of the Code above mentioned, did not exist between the defendant corporation and respondent herein at the time the accident occurred in which respondent was injured. On the other hand, it is clear from plaintiff's testimony that while he was engaged to repair the gas engine he was exercising an independent calling. He was, in other words, an independent contractor, and as to the means by which he was to execute or perform the work which he assumed in his engagement with the defendant corporation to do, the latter had no control over him.

[3, 4] Appellant's second contention is that, conceding respondent herein was an independent contractor, there was not a scintilla of evidence in the record to prove that appellant had any knowledge of the existing defect in the crank, and that the same means of ascertaining the defectiveness of the crank, if any existed, was as much available to the respondent as it was to the appellant or its employees. We are not in accord with these contentions of appellant, because the witness Calvin L. Dain testified that immediately following the accident defendant corporation's vice president, Roberts, said to Dain, "Are you a welder?" to which Dain replied, "Yes," whereupon, according to the witness, Roberts said, "Would you weld this on before we kill somebody with that crank? There

is two men already cracked their heads with it." While the evidence is in conflict as to whether the defect was latent or could with reasonable care have been observed, there is in the record evidence of sufficient substantiality to sustain the trial court's finding that the respondent herein was free from negligence in not noticing the defect in the crank, while there is positive testimony that defendant corporation's vice president knew of the existence of the defect and of previous accidents caused thereby. In our opinion, there rested upon appellant the duty and obligation to inform respondent of the defective condition of the crank before permitting respondent to use the same in repairing the engine.

For the reasons herein given, the judgment appealed from is affirmed.

We concur: HOUSER, P. J.; YORK, J.



COLLIER & WALLIS, Limited, v. ASTOR.*

Civ. 9604.

District Court of Appeal, Second District,
Division 1, California.

April 7, 1936.

Hearing Denied by Supreme Court
June 4, 1936.

1. Brokers $\Rightarrow$ 49(1)

Where employment agency, which had contracted to obtain engagements for actress, secured contract whereby motion picture company agreed to employ actress from January 1, 1931, for not less than 40 weeks during following year, and actress commenced her employment with motion picture company on March 2, 1931, actress held obligated to pay agency agreed commission on all moneys received from motion picture company during 1931, as against contention that such employment was not under contract secured by agency because employment commenced on March 2d instead of January 1st.

2. Master and servant $\Rightarrow$ 14½

Failure of employment agency contract to contain essentials specified by Private Employment Agency Act did not render contract void and preclude recovery thereon (Gen.Laws 1931, Act 2349).

3. Constitutional law $\Rightarrow$ 80(2)

Master and servant $\Rightarrow$ 14½

Provision of Private Employment Agency Act vesting commissioner of labor with authority to determine disputes arising under act held unconstitutional as vesting commissioner with judicial powers (Gen.Laws 1931, Act 2349).

4. Constitutional law $\Rightarrow$ 80(2)

While commissions created by Legislature may be empowered to determine questions of administrative or of ministerial character, Legislature is without authority to vest such commissions with judicial powers.

5. Constitutional law $\Rightarrow$ 43(2)

That employment agency was licensed by commissioner of labor pursuant to Private Employment Agency Act did not estop agency from denying validity of act in action by agency to recover amount due under employment contract (Gen.Laws 1931, Act 2349).

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Collier & Wallis, Limited, formerly Collier & Flinn, Limited, against Mary Astor, also known as Lucile Thorpe. From a judgment for the plaintiff, the defendant appeals.

Affirmed.

Lasher B. Gallagher, of Los Angeles, for appellant.

Mitchell, Silberberg & Knupp, of Los Angeles, for respondent.

DORAN, Justice.

The respondent corporation was engaged in the business of conducting a private employment agency, under a license issued by the commissioner of labor, pursuant to the provisions of the general laws regulating private employment agencies (Act 2349, General Laws 1931). Primarily, its activities pertained to employment in connection with the theatrical and motion picture business.

On November 28, 1929, plaintiff and defendant entered into an agreement the written memorandum of which, signed by the parties, reads as follows:

"November 28th, 1929

"Ruth Collier, Inc.

"Hollywood, California.

"I hereby agree to have you act as my exclusive personal representative in con-

nection with securing engagements for me as a motion picture or legitimate stage artist; the words stage or motion picture artist, as used in this agreement, shall include the legitimate stage inclusive of vaudeville and all types of motion pictures made or manufactured, including sound pictures or talking pictures. This agreement to continue for a period of one year from the above date.

"You will promote to the best of your ability my interest in connection with motion pictures and legitimate stage work, securing for me the most advantageous engagements.

"In consideration of this service, I agree to pay you ten percent of all monies I receive under engagements entered into by me during the term of this agreement with you, with the exception of any engagement I may enter into at the Fox Studio with the Kenneth Hawks Unit.

"During the terms of this agreement, I will authorize you to collect my salary through your office.

"Sincerely,

"Mary Astor.

"Accepted: Ruth Collier, Inc.

"By Ruth Collier, President."

Thereafter, respondent obtained several engagements for appellant in the line of her work, and on September 18, 1930, as a result of the efforts of respondent, an agreement was executed between appellant and the R. K. O. Studios, by the terms of which agreement R. K. O. Studios was given the option to employ appellant at certain times and for certain periods therein specified. The only one of these optional periods relevant to the controversy herein is the following: "(b) To employ the artist from January 1, 1931, or from the date of completion of the picture referred to in Option (a) hereof, whichever of the two dates is the later, for not less than forty (40) weeks guaranteed employment prior to December 31, 1931. The terms and conditions of such employment are as hereinafter set forth, except the salary to be paid the artist during this optional period shall be Two Thousand Dollars (\$2,000.00) per week. The producer may exercise this option by serving a written notice on the artist any time prior to December 1, 1930, and it may be exercised whether or not Option (a) hereinabove referred to shall have been exercised."

On November 12, 1930, R. K. O. Studios exercised said option in the form of a writ-

ten notice delivered to appellant, a copy of which is as follows:

"November 12, 1930

"Miss Mary Astor,

"780 Gower Street,

"Los Angeles, Calif.

"Dear Miss Astor:

"With reference to your contract with us, dated September 18, 1930, this is to advise you that the undersigned elects to and does hereby exercise Option (b) contained in Paragraph One (1) thereof, namely to employ you for not less than forty (40) weeks prior to December 31, 1931, upon the same terms and conditions as are set forth in said contract, except that the amount of compensation to be paid you during the above term shall be Two Thousand Dollars (\$2,000.00) per week. The period for which this option is exercised shall commence on January 1, 1931.

"Very truly yours,

"R. K. O. Studios, Inc.

"By Wm. LeBaron

"Vice President

"And F. H. Smith

"Assistant Secretary.

"Receipt of the foregoing notice, this 12th day of November, 1930, is hereby acknowledged.

"Mary Astor (Mary Astor)."

Up to and including January 5, 1931, and for some time prior thereto, defendant was engaged in making a picture for R. K. O. Studios, Inc., under the terms of an agreement not included in any of the options granted under the contract of September 18, 1930. From January 5, 1931, to March 2, 1931, defendant rendered no service to R. K. O. Studios, Inc. Commencing on March 2d, however, she was continuously employed by R. K. O. Studios, Inc., to and including December 31, 1931, with the exception of the period commencing on April 6, 1931, to and including May 4, 1931, and during the entire period of such employment she received for her services a salary of \$2,000 per week, which amount was paid to her during such entire period of employment by said R. K. O. Studios, Inc.

The defendant under her contract with the plaintiff was obligated to pay to the plaintiff 10 per cent. of all moneys received by her from engagements entered into during the term of that agreement; that is to say, prior to November 28, 1930. She, in fact, paid to the plaintiff 10 per cent. of all amounts received by her from all

engagements which she performed from the date of the execution of the contract with the plaintiff up to and including the 10th day of October, 1931; that is to say, she actually paid to the plaintiff 10 per cent. of the moneys received by her from R. K. O. Studios, Inc., for the services performed from March 2, 1931, to October 10, 1931. From the moneys received by the defendant from October 10, 1931, to December 31, 1931, she refused to pay plaintiff any commission or compensation, and an action was brought for the purpose of recovering the amount alleged to be due. Judgment was entered therein for the plaintiff, and this appeal is from the judgment in said action.

Appellant contends: First, that the evidence is insufficient to support the findings and that the findings do not dispose of the issues raised by the pleadings. Second, that plaintiff's suit is premature in that it did not allege in its complaint that the dispute between plaintiff and defendant had been referred to the commissioner of labor, or that the commissioner of labor had passed upon plaintiff's claim for money; also, that plaintiff had failed to comply with the provisions of Act 2349 of the General Laws as to other more or less minor items.

[1] Appellant's first contention is based upon the claim that the contract and the option provided that the employment was for a period of forty weeks commencing January 1, 1931; and that there is absolutely no provision or agreement in these two documents which states that the employment of defendant was to commence on March 2, 1931. The argument advanced in support of this contention, quoting from appellant's brief, is: "Unless R. K. O. Studios, Inc., actually gave the defendant her employment at \$2,000 per week commencing January 1, 1931, it breached the contract. This failure to perform would excuse the defendant from performing." And further, quoting from appellant's brief: "It (plaintiff) must prove that R. K. O. Studios, Inc., performed the option contract as exercised before it can successfully contend that Miss Astor's employment during 1931 was pursuant thereto."

Thus it is sought by appellant to make the conduct of R. K. O. Studios, Inc., as to its agreement with appellant, the test of appellant's responsibility to respondent. This is clearly beside the issues involved. The question is not whether R. K. O. Studios performed the option according to its

terms, but whether appellant accepted employment under, and as a result of, an agreement entered into between her and R. K. O. Studios, which bound her to the performance of her agreement with respondent. On this question the pleadings were adequate and there was evidence to support the findings in respondent's favor. There is nothing in the record sustaining appellant's contention that the findings do not dispose of the issues raised by the pleadings and that the evidence is insufficient to support the findings in any respect. It does not necessarily follow that simply because appellant commenced work on March 2d instead of January 1st, that her employment was not under, and the result of, the contract obtained for her by respondent.

[2] Referring now to appellant's second contention, it is urged that the contract, which is the subject of the dispute herein, did not contain the essentials specified by the Private Employment Agency Act; that the omission of these essentials renders the contract void; and that therefore no recovery can be had on such contract. For the failure to comply with the act in this respect a penalty is provided, and there is nothing in the act which justifies the assumption or the construction that the legislature intended any other penalties than those specified. Such penalties do not include any which in effect, directly or indirectly, render the contract void. The situation in this respect is somewhat similar to that in *Wood v. Krepps*, 168 Cal. 382, 143 P. 691, L.R.A.1915B, 851. Moreover, the Supreme Court of California, in a discussion of the right to contract about one's affairs, used the following language: "The Supreme Court of the United States, * * * made an exhaustive review of the authorities touching the right to contract about one's affairs, including the right to make contracts of employment, and held that such a right was a part of the liberty of the individual which is protected by the Fifth Amendment to the Constitution of the United States." In *re H. B. Smith*, 193 Cal. 337, 340, 223 P. 971, 972; also, *People v. Holder*, 53 Cal.App. 45, 199 P. 832. For an able discussion and review of the authorities by Mr. Justice Marks, see *Ex parte Ed Moffett* (Cal.App.) 55 P. (2d) 584.

Section 19 of the act in question, namely, Act 2349 of the General Laws, provides as follows: "*Powers of labor commissioner.*

To carry out the purpose of this act, the commissioner of labor is vested with full power, authority and jurisdiction to prescribe rules and regulations, not inconsistent with any provision of this act, for the purpose of facilitating and making certain, uniform and effective the enforcement of the provisions of this act; and in all cases of controversy arising under this act the parties involved therein shall refer the matters in dispute to the commissioner of labor, who shall hear and determine the same, subject to appeal within ten days to the superior court where the same shall be heard *de novo*, and to stay any award for money, the party aggrieved shall execute a bond to be approved by said superior court in a sum not exceeding twice the amount of said judgment. In all other cases said bond shall be in a sum of not less than one thousand dollars to be approved by the said superior court."

Based upon the foregoing provisions of the act, appellant further urges that plaintiff's complaint did not state a cause of action because a compliance with such provisions was not alleged. Plaintiff and respondent, on the other hand, takes the position that this provision of the act is unconstitutional, in reply to which appellant insists that plaintiff is estopped from asserting such a claim for the reason that it had been licensed by the commissioner of labor, pursuant to the Private Employment Agency Act, for a number of years, and having elected to accept the benefits of the statute, is therefore estopped from denying its validity.

[3,4] Respondent, in taking exception to the constitutionality of that portion of the act which purports to vest the commissioner of labor with authority to determine disputes arising under the act, is abundantly supported by authority, and must be sustained. It should be noted at this point that Act 2349 of the General Laws is a product of the Legislature and not of the Constitution. The trial and the determination of the issues involved in the controversy between plaintiff and defendant herein are purely judicial functions, and while commissions created by the Legislature may be empowered to determine questions of administrative or of ministerial character, the Legislature is without authority to vest such commissions with judicial powers. *Department of Public Works v. Superior Court*, 197 Cal. 215, 239 P. 1076;

Van Camp S. F. Co. v. Fish & Game Commission, 75 Cal.App. 764, 243 P. 702.

[5] Finally, it is sought by appellant to foreclose respondent's recovery under the judgment by the application of the doctrine of estoppel, as hereinbefore stated. That is to say, appellant contends that respondent, having been licensed under an act, cannot be heard to question its validity. This issue raises a question of especial importance, for it assails the right of a citizen to invoke the protection of the Constitution. Although first impression might doubt its existence, the courts have approved of a doctrine which effects such a result. 12 Cor.Jur. p. 769. It should be noted, however, that where it is sought to prevent refuge in the Constitution by the application of the doctrine of estoppel, success depends upon the existence of the elements of equitable estoppel. In some of the decisions where these elements do not appear, the doctrine of "waiver" has been held to apply. The application of either doctrine manifestly depends upon the facts involved.

In the case at bar, appellant's reliance upon the doctrine of estoppel is based upon the authority of *Gregory v. Hecke*, 73 Cal. App. 268, 238 P. 787, wherein it was held that the respondent, who had been licensed under the California Economic Poison Act, and whose license had been revoked, was estopped from questioning the constitutionality of the act. That action was between the respondent Gregory and the appellant Hecke as director of the department of agriculture of the state of California. Therein the court held that respondent, having enjoyed the protection of the very statute whose constitutionality he challenged, and having elected to accept the benefits of the statute, was estopped from denying its validity. *Cofman v. Ousterhous*, 40 N.D. 390, 168 N.W. 826, 18 A.L.R. 219, which is cited by the court as authority for the conclusion, serves as an example of the lack of unanimity of opinion on the subject, for that decision is by a divided court, and the dissenting opinion by Mr. Justice Christianson presents an able and enlightening discussion in direct conflict with the prevailing opinion of the court. Mr. Justice Robinson concurred in the dissenting opinion.

It is at once evident by a comparison of the facts in the *Gregory Case*, *supra*, with the facts of the case at bar, that there

is no resemblance between the two; hence, logically, it cannot be said that because the doctrine applies to one it likewise applies to the other. In the case at bar the revocation of the license was not involved; moreover, respondent had not elected to proceed under the provisions of the statute to settle the dispute herein but in the first instance filed an action in the superior court.

When a license is obtained under a particular law, it does not always follow that the licensee will be deemed to have assented to conditions and restrictions sought to be imposed, in violation of his constitutional rights, and, by obtaining such license, waive the right to question the constitutionality of the statute. As was declared by the Supreme Court of the United States in a consideration of this question: "The defendant, however, insists that some of the provisions of the statute are in violation of the Constitution of the United States, and if it obtained the required license, it would be held to have accepted all of its provisions, and (in the same words of the statute) 'thereby to have agreed to comply with the same.' § 1. The answer to this suggestion is that the acceptance of a license, in whatever form, will not impose upon the licensee an obligation to respect or to comply with any provisions of the statute or with any regulations prescribed by the state railroad & warehouse commission that are repugnant to the Constitution of the United States. A license will give the defendant full authority to carry on its business in accordance with the *valid* laws of the state and the *valid* rules and regulations prescribed by the commission. If the commission refused to grant a license, or if it sought to revoke one granted, because the applicant in the one case, or the licensee in the other, refused to comply with statutory provisions or with rules or regulations inconsistent with the Constitution of the United States, the rights of the applicant or the licensee

could be protected and enforced by appropriate judicial proceedings." (Italics added.) *W. W. Cargill Co. v. Minnesota ex rel. Railroad and W. Com.*, 180 U.S. 452, 21 S.Ct. 423, 429, 45 L.Ed. 619, 626.

It is obvious, from an analysis of the Private Employment Agency Act (Gen. Laws, Act 2349), that it was adopted for the benefit of those transacting business with employment agencies. There is nothing in the record which reveals that respondent received any benefit from the act, unless it was the fact that a criminal prosecution was avoided by obtaining a license pursuant to its provisions. Moreover, appellant points to no rights or benefits which may possibly have accrued to respondent, by the adoption of this act, which had not already existed prior to its adoption, and none of the elements of equitable estoppel have been shown by appellant to exist.

There is a limit beyond which the courts in the application of this doctrine have declined to go. As was stated by the Supreme Court of California, with reference to the subject: "We do not think that the principle of estoppel can be so far applied as to prevent a party who may be entitled to the benefits to be obtained by application to an administrative board or officer from asserting in a court of justice that other and severable portions of the law under which he makes such application and receives such benefit, and which impair his full enjoyment thereof, are void because violative of the Constitution; nor do we think the cases cited by the respondents sustain so extreme an application of the principle of estoppel." *Mojave River Irr. Dist. v. Superior Court*, 202 Cal. 717, 730, 262 P. 724, 729.

In view of the foregoing, other minor questions raised by the appeal but related to the principal issues herein reviewed, are unimportant, and for the reasons stated the judgment is affirmed.

We concur: HOUSER, P. J.; YORK, J.

13 Cal.App.2d 159

HELLMAN et al. v. BRADLEY et al.

Civ. 9855.

District Court of Appeal, Second District,
Division 1, California.

April 9, 1936.

Hearing Denied by Supreme Court
June 8, 1936.

1. Automobiles ⇨245(80)

Whether motorist traveling at lawful speed, whose automobile skidded 45 feet before being struck by approaching truck which was making left turn at intersection, was contributorily negligent *held* for jury.

2. Automobiles ⇨246(58)

In automobile collision case, instruction upon doctrine of last clear chance should not be given unless evidence furnishes reasonable basis for finding that driver alleged to have had last clear chance saw other automobile and realized, or should have realized, that other driver was in position of danger from which he could not escape, and that first driver could have avoided accident.

3. Negligence ⇨138(4)

To authorize giving instruction upon last clear chance doctrine, evidence must be sufficient to support reasonable conclusion that party charged with having had last clear chance not only could have seen other party's danger, but that he actually did see it.

4. Automobiles ⇨246(58)

Evidence that truck driver, whose truck collided with approaching automobile when truck made left turn at intersection, saw automobile, realized that its driver was in position of danger, and had opportunity to avoid accident, *held* sufficient to warrant giving of instruction on last clear chance doctrine.

5. Automobiles ⇨246(60)

In automobile collision case, instruction that in absence of evidence to contrary, law presumes that deceased motorist acted with reasonable prudence, unless controverted, *held* not error, where contributory negligence of such motorist on entire evidence was one of fact.

6. Appeal and error ⇨981

Denial of motion for new trial upon ground of newly discovered evidence *held* not reversible error, where no showing was made justifying finding that trial court abused its discretion.

Appeal from Superior Court, Los Angeles County; Minor Moore, Judge.

Action by Mayte B. Hellman and another against Rowland H. Bradley and another, doing business under the fictitious firm name and style of Bradley's Pies. Judgment for plaintiffs, and defendants appeal.

Affirmed.

A. G. Ritter, Cyril S. Tipton, and Elmer E. Sawyer, all of Los Angeles, for appellants.

Meserve, Mumper, Hughes & Robertson, of Los Angeles (Timon E. Owens, of Los Angeles, of counsel), for respondents.

SHINN, Justice pro tem.

Appeal from a judgment after verdict of the superior court in an action for wrongful death.

Plaintiffs sue as the surviving wife and son of decedent Hellman, who met his death while driving an automobile which came into collision with a light delivery truck owned by defendants Bradley and driven by their employee, Hoskins. Vermont avenue is 130 feet wide, divided into two lanes, one for southbound and one for northbound traffic, which are separated by a right of way carrying double tracks of the Pacific Electric Railway. North of One Hundred and Twentieth street the lanes are 40 feet wide and the right of way 50 feet wide. From One Hundred and Twentieth street south the lanes of traffic are 30 feet wide and the right of way 70 feet wide. Hoskins drove south in the west lane until he came to One Hundred and Twentieth street, where he turned to the left across the right of way and ran into the side of a coupé being driven by Hellman north in the east lane of Vermont avenue. The cars came together with terrific force, and both drivers were killed.

[1] It is earnestly insisted by counsel for appellants Bradley that the evidence established as a matter of law that the deceased Hellman was guilty of contributory negligence barring a recovery by his heirs. The evidence is construed to establish that the Hellman car was traveling at a speed of 45 miles per hour (which was not an unlawful speed at that place); that it skidded about 45 feet up to the point of impact; that it is apparent from these

facts that Hellman did not see the truck until he applied his brakes; that although the accident happened after dark the streets were lighted and the truck was in plain sight, and it is argued that, therefore, Hellman was negligent either in not seeing it as it approached across the car tracks or in failing to use due care to avoid the accident after he saw it. There was evidence that Hoskins was driving at a speed of 35 miles per hour; that he made the turn at this speed practically on two wheels; that by reason of his speed the tires of the truck caused a loud screeching sound; and that the truck did not diminish its speed before the collision. Upon this statement, which sets forth the essential facts in evidence, we are unable to say that there was no reasonable basis for a finding of the jury that Hellman was not guilty of negligence. *Seller v. Market-Street Railway Co.*, 139 Cal. 268, 72 P. 1006; *Johnson v. Southern Pacific R. Co.*, 154 Cal. 285, 97 P. 520; *Gregg v. Western Pacific R. Co.*, 193 Cal. 212, 223 P. 553; *Ramsey v. Pasini*, 108 Cal.App. 527, 291 P. 884; *Couchman v. Snelling*, 111 Cal.App. 192, 295 P. 845.

[2] It is next urged that the court erred in giving an instruction upon the doctrine of last clear chance. The form of the instruction is not criticized, and it is therefore unnecessary to quote it. It is contended that the evidence furnished no reasonable basis for the application of the doctrine, and that no instruction on the subject should have been given. The instruction should not have been given if the evidence failed to furnish any reasonable basis for finding that Hoskins saw the Hellman car and realized, or in the exercise of ordinary care should have realized, that Hellman was in a position of danger from which he could not escape by the use of ordinary care, and that thereafter Hoskins could have avoided the accident by the use of ordinary care and voluntarily did not do so. *Starck v. Pacific Electric Ry. Co.*, 172 Cal. 277, 156 P. 51, L.R.A. 1916E, 58; *Girdner v. Union Oil Co.*, 216 Cal. 197, 13 P.(2d) 915. We believe there was sufficient evidence to warrant affirmative findings by the jury upon these questions.

[3] The facts of the case are so unusual as to call for discussion. Both drivers, as we have stated, were killed. Neither had a passenger. What each saw and what his reactions thereto may have been

were necessarily to be determined from the testimony of observers as to the circumstances of the collision. Although the accident happened after dark, the streets were lighted and the visibility was good. All of the witnesses who testified on the subject stated that the two automobiles could be plainly seen. It does not appear that there was anything to obstruct the view of either driver. There was testimony showing that after Hoskins turned to the left to cross the street car tracks and right of way of the railway company he had 100 feet or more to travel before reaching the point of the collision, and while he was traveling that distance he had a clear opportunity to see the Hellman car coming from his right. It is not suggested that there was any other traffic on the street to distract Hoskins' attention from the approaching Hellman car. When we seek for some fact which would justify our taking the view that such affirmative findings would be unsupported we find nothing save the single circumstance that Hoskins did not stop his car as he should have done had he appreciated the danger. The jury was not required to accept this fact as proof that he did not see the other car. That circumstance is to be found in every case in which the doctrine of last clear chance has application. Careful drivers do stop their cars under such circumstances, but the rule of last clear chance is the necessary outgrowth of the conduct of persons who have handled instrumentalities of various sorts in a negligent manner, and in this connection if the jury in considering the probabilities of the case gave weight to the fact that the driver, Hoskins, was intoxicated, which they had a right to do under the evidence, and if they believed that he saw the Hellman car, as they had a right to believe, and to some extent attributed his reckless conduct to his intoxication, we see nothing unreasonable or illogical in their doing so. Whether the driver of one car saw another car and realized, or if careful should have realized, that an accident was likely to happen if he proceeded upon his way, are questions that may be answered without the admission of the driver or any other form of direct evidence. Where ability to see and opportunity to see a physical object are established, there is a basis for believing, in the absence of credible evidence to the contrary, that it was seen. It is to be presumed that automobile drivers look about when they are entering in-

tersections, and it is to be supposed that they see that which is in plain sight. The doctrine of last clear chance does not proceed upon such presumption or supposition. It requires evidence sufficient to support a reasonable conclusion, not that the party charged with having had the last clear chance to avoid the accident might or could have seen, but that he actually did see. If the evidence does not meet this requirement, the doctrine does not apply. Such is the rule to which the courts of this state are firmly committed. But it has been found frequently by trial judges and juries that persons have seen objects which they have denied under oath having seen, and where the circumstantial evidence has been deemed sufficient such findings have been upheld. *Wahlgren v. Market Street Ry. Co.*, 132 Cal. 656, 62 P. 308, 64 P. 993; *Smith et al. v. Los Angeles Ry.*, 105 Cal.App. 657, 288 P. 690; *Handley v. Lombardi*, 122 Cal.App. 22, 9 P.(2d) 867; *Darling v. Pacific Electric Ry. Co.*, 197 Cal. 702, 242 P. 703; *Hoy v. Tornich*, 199 Cal. 545, 250 P. 565. We are unable to say that the evidence was not sufficient to warrant the jury in believing that Hoskins saw the Hellman car.

[4] We have even less difficulty in believing the evidence sufficient to support a finding that after seeing the Hellman car Hoskins realized, or if he had used ordinary care would have realized, that Hellman was in a position of danger from which he could not escape by the use of ordinary care. That he was in such position can scarcely be questioned in view of the fact that within a few seconds he met his death. When Hoskins chose, after crossing the tracks, to continue his course, he could scarcely have failed to realize that he was placing Hellman in a position of danger. The latter might have extricated himself from the danger had he been aware of it, but his position was legally one from which he could not extricate himself if he did not realize his danger. The theory that Hellman did not realize it until too late to avoid the accident finds substantial support in the fact that he applied his brakes suddenly with sufficient force to skid the wheels. The remaining question of fact relates to the ability of Hoskins to avoid the accident after he became conscious of the danger of a collision. With an open view he drove from a place of safety into one of danger. He had ample time to stop after the Hellman car

was plainly to be seen. This was sufficient, with the other evidence which the jury could have accepted, to warrant a finding that he had the last clear chance to avoid the accident. In stating the circumstances under which it is proper to give an instruction on the last clear chance doctrine, this court said, in *Howard v. Worthington*, 50 Cal.App. 556, 195 P. 709, 710: "According to some of this evidence, the jury might have reached the conclusion * * * that the defendant was in a position to see and did see that unless defendant's machine was stopped a collision would occur; that the defendant could have stopped his machine in time to avoid the accident, but voluntarily did not do so. In this condition of the evidence the plaintiffs were entitled to an appropriate instruction in the terms proposed by them or the legal equivalent thereof." Under this statement of the rule, applied to the facts of the present case, the instruction was properly given.

[5] The jury was instructed to the effect that in the absence of evidence to the contrary the law presumes that the deceased Hellman acted with reasonable prudence, and that unless controverted the presumption must prevail. Appellants' criticism is not directed as to the form of the instructions, but to the fact that they were given where, it is claimed, there was evidence to controvert or overcome the presumption. But the presumption does exist, and in doubtful cases it is for the jury to say what weight it carries. The court does not err in giving such instructions in a case where the evidence, including the presumption, reasonably points to an absence of negligence, and we have held that the question of Hellman's contributory negligence on the entire evidence was one of fact and not of law. Therefore, the instructions were properly given. *Smellie v. Southern Pacific Co.*, 212 Cal. 540, 299 P. 529; *Olsen v. Standard Oil Co.*, 188 Cal. 20, 204 P. 393; *Anderson v. Southern Pacific Co.*, 129 Cal. App. 206, 18 P.(2d) 703; *Kerner v. Peacock Dairies, Inc.*, 129 Cal.App. 686, 19 P. (2d) 283; *DeLannoy v. Grammatikos*, 126 Cal.App. 79, 14 P.(2d) 542.

A comparison of the instructions requested by defendants and refused, with those given, satisfies us that the jury was instructed correctly and sufficiently upon the principles to which the refused instructions related.

[6] One of the grounds urged on motion for a new trial was that of newly discov-

ered evidence. There was nothing in the showing made which would justify this court in saying that the trial court abused its discretion in denying the motion upon the ground of newly discovered evidence. In re Estate of Walden, 166 Cal. 446, 137 P. 35; Jones v. Foster, 116 Cal.App. 102, 2 P.(2d) 582; O'Rourke v. Vennekohl, 104 Cal. 254, 37 P. 930; O'Nash v. Booth, 117 Cal.App. 614, 4 P.(2d) 278; Waer v. Waer, 189 Cal. 178, 207 P. 891; Abelseth v. City and County of San Francisco, 129 Cal.App. 552, 19 P.(2d) 53; Toriyama v. Putnam, 134 Cal.App. 201, 25 P.(2d) 34.

The judgment is affirmed.

We concur: HOUSER, P. J.; DORAN, J.

6 Cal.2d 150

**CITY INVESTMENTS, Limited, v.
JOHNSON, Treasurer.**
Sac. 4829.

Supreme Court of California.

April 21, 1936.

Rehearing Denied May 21, 1936.

1. Taxation ☞1

Tax on franchise of corporation at actual cash value held "ad valorem" or "property tax" (Pol.Code, § 3664d; Const. art. 13, § 14 (d), amended in 1926).

[Ed. Note.—For other definitions of "Ad Valorem Tax" and "Property Tax," see Words & Phrases.]

2. Taxation ☞1

Tax on privilege of exercising corporate franchise held tax on right of corporation to do business, familiarly known as "excise" or "license" tax (St.1929, p. 20, § 4; Const. art. 13, § 16, subds. 2(a), 5, adopted in 1928).

[Ed. Note.—For other definitions of "Excise" and "License Tax," see Words & Phrases.]

3. Taxation ☞47(4)

Power to impose charges for public revenue by ad valorem and property tax on franchise of corporation, and excise or license tax on privilege of exercising franchise cannot be challenged on ground of double taxation, or unlawful overlapping (Pol.Code, § 3664d; St. 1929, p. 20, § 4; Const. art. 13, § 14(d), amended in 1926; § 16, subds. 2(a), 5, adopted in 1928).

4. Taxation ☞37

Constitutional amendment authorizing tax on privilege of exercising corporate franchise in lieu of tax on franchise, at actual cash value, held not to destroy right of state to collect tax on franchise which had become due prior to adoption of amendment, but to foreclose Legislature from thereafter exacting ad valorem taxes on franchises (Const. art. 13, § 16, subds. 2(a), 5, adopted in 1928).

5. Taxation ☞117

Collection of ad valorem tax on corporate franchise which had become due prior to adoption of constitutional amendment authorizing imposition of tax on privilege of exercising franchise in lieu of ad valorem tax held not to authorize corporation to do business in state so that tax on privilege of exercising franchise was properly collected thereafter, notwithstanding that period covered

thereby overlapped period for which ad valorem tax had been imposed (Pol.Code, § 3664d; St.1929, p. 20, § 4; Const. art. 13, § 14(d), amended in 1926; § 16, subds. 2(a), 5, adopted in 1928).

In Bank.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by the City Investments, Limited, against Charles G. Johnson, as treasurer of the state of California. From an adverse judgment, the plaintiff appeals.

Affirmed.

Cushing & Cushing, Charles S. Wheeler, Charles S. Wheeler, Jr., and Walter Slack, all of San Francisco (D. L. King, of Riverside, of counsel), for appellant.

U. S. Webb, Atty. Gen., H. H. Linney, Deputy Atty. Gen. (Roger J. Traynor, of Berkeley and Frank M. Keesling, of Sacramento, of counsel), for respondent.

SHENK, Justice.

This is an appeal by the plaintiff from a judgment partially in its favor, in an action to recover taxes paid under protest. The question presented involves the validity of a tax assessed against the predecessors of the plaintiff and collected under the Bank and Corporation Franchise Tax Act of 1929. St.1929, p. 19. The contention is that the tax so assessed and collected was for the first half of the calendar year 1929, and overlapped a previous tax collected for the fiscal year 1928-1929, and was therefore void to the extent of the overlap. The trial court granted a refund on account of the tax applicable to the month of December, 1929, but denied any further relief.

The plaintiff is the successor of four affiliated corporations which were dissolved in December, 1929. In 1928, taxes were assessed and collected on the franchise of the four corporations as provided by subdivision (d) of section 14 of article 13 of the Constitution and section 3664d of the Political Code. That constitutional subdivision adopted in 1910 provided for an annual tax on the franchise of the affiliated corporations, at the rate of 1 per centum of the actual cash value thereof. The first half of the 1928 assessment was paid on August 6, 1928, and the second half on January 28, 1929. In November, 1928, section 16 of article 13 was added to the Constitution. Subdivision 2 (a) of that section

provided that corporations subject to be taxed pursuant to subdivision (d) of section 14, in lieu of the tax thereby provided for, should annually pay to the state for the privilege of exercising their corporate franchises within the state a tax equal to 4 per cent. of their net incomes. Subdivision 5 of said section provided that the taxes should become a lien on the first Monday in March of 1929 and of each year thereafter; also that the Legislature should pass laws necessary to carry the section into effect. In 1929 the Legislature passed the Bank and Corporation Franchise Tax Act which was approved and effective on March 1, 1929. By section 4 thereof, corporations of the class referred to in subdivision 2 (a) of said section 16 of article 13 of the Constitution were required to pay annually to the state, for the privilege of exercising their corporate franchises within the state, a tax according to or measured by their net incomes, at the rate of 4 per centum upon the basis of net income for the next preceding fiscal or calendar year.

[1-5] The four affiliated corporations, predecessors of the plaintiff, filed a joint return in compliance with the new Bank and Corporation Franchise Tax Act, reporting their net income for the calendar year 1928. The ground of the protest accompanying payment of the tax assessed pursuant to that act and based on the joint return was that the payment of any tax under the new act for the period from January 1, 1929, to June 30, 1929, constituted double payment of taxes which was not authorized by section 16 of article 13 of the Constitution because the years covered by both sections 14 and 16 overlapped as to that period. In prosecuting its claim for the alleged double payment, the plaintiff insists that payment in August, 1928, and January, 1929, of the old franchise tax pursuant to subdivision (d) of section 14 of article 13 constituted payment on the basis of the state's fiscal year to June 30, 1929; that, consequently, such payment gave the companies the privilege of exercising their franchise to the latter date, and payment of the full amount of taxes for the year 1929 under the new act was unauthorized. The plaintiff insists that "in an orderly, continuous system of taxation there should be no gaps nor overlaps as to state taxation" and that that is all it now asserts. But a determination that there is an overlap does not solve the problem or necessarily destroy either tax. The nature of the tax and the power to impose it are the vital questions. The tax on franchises

of corporations at their "actual cash value" as authorized by subdivision (d) of section 14 of article 13 (in effect from November 8, 1910, to November 6, 1928) was an ad valorem or property tax. The tax authorized by subdivision 2 (a) of section 16 of article 13, adopted in 1928, is a tax on the right of a corporation to do business in this state, familiarly known as an excise or license tax. The power to impose charges for public revenue by both methods and for identical taxing periods cannot be challenged on the ground that the exaction of both is double taxation or that there is an unlawful overlapping of one on the other. *Kaiser Land & Fruit Co. v. Curry*, 155 Cal. 638, 652, 103 P. 341. Prior to 1927, and during the time that ad valorem franchise taxes were levied, franchise license taxes were also imposed. St.1905, p. 493; St.1915, p. 422. The fact that the two contemporaneous tax charges then overlapped, in whole or in part, was not from a taxing standpoint constitutionally objectionable. It is conceded that the Legislature was without power on March 1, 1929, when it enacted the Bank and Corporation Franchise Tax Act, to provide for an ad valorem franchise tax. Power to enact such a tax had been withdrawn by the constitutional amendment of 1928. That amendment provided exclusively for a franchise license tax. It also enjoined upon the Legislature the duty to pass a law to carry the provision into effect, and specifically provided that such a law should be effective immediately upon its passage. The substance of plaintiff's case is that the Franchise License Act of March 1, 1929, was not operative as to it until July 1, 1929, or that the payment by it of the franchise ad valorem tax levied and collected by the state prior to March 1, 1929, was in effect payment of its franchise license tax to July 1, 1929. For the purposes of this case it may be assumed that the period for which the ad valorem tax was assessed and collected was for the fiscal year beginning July 1, 1928, and ending June 30, 1929. But it does not follow either that the act of March 1, 1929, was not effective immediately upon its passage so as to require payment of a license tax therein exacted, or that the payment of the ad valorem tax theretofore collected constituted payment of the license tax. The ad valorem franchise tax had become a valid charge under constitutional authority prior to the 1928 amendment, and the "in lieu" provision of that amendment cannot be given the effect of destroying the right to collect it. The obvious purpose of

the "in lieu" provision was to foreclose the Legislature from thereafter exacting an ad valorem tax on franchises of the kind here involved. For like reasons it cannot be held that the collection of the ad valorem tax which had become a valid charge under existing constitutional and statutory provisions authorized the plaintiff's predecessors in interest to do business in this state as provided in the 1928 amendment and the act of March 1, 1929, passed in pursuance thereof. The plaintiff's predecessors in interest paid nothing in 1928 for the right to do business in this state and were required to pay nothing in 1929 for that purpose until the act of March 1st went into effect. The immediate effect of that amendment imposed the duty on them to comply with its terms, regardless of prior payments of ad valorem taxes. The plaintiff has not shown that it is entitled to any further relief.

The judgment is affirmed.

We concur: WASTE, C. J.; CONREY, J.; SEAWELL, J.; LANGDON, J.; CURTIS, J.



6 Cal.2d 134

McBRIDE v. SAYLIN et al.
L. A. 15552.

Supreme Court of California.
April 18, 1936.

1. Physicians and surgeons ☞14(4)

Test to determine physician's liability for malpractice is whether treatment was consistent with that reasonable degree of learning and skill usually possessed and rendered by others of his profession in same locality under similar conditions, having regard to state of scientific learning at the time.

2. Physicians and surgeons ☞18(9)

Evidence that physician should have suspected presence of foreign body in eye, that he failed to exercise that degree of care which practice of his profession required in failing to make such examination as would make reasonably certain that there was nothing in eye, and that such lack of care was proximate cause of loss of sight,

established prima facie case of malpractice against physician, and granting of nonsuit was error.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by Clifton R. McBride against Dr. Joseph Saylin and another. From a judgment of nonsuit, plaintiff appeals.

Reversed.

For prior opinion, see 48 P.(2d) 179.

Ben F. Griffith, Malcolm Archbald, and Harry K. Sargent, all of Los Angeles, for appellant.

W. I. Gilbert, of Los Angeles, for respondents.

SHENK, Justice.

[1] In this case a petition for hearing after decision of the District Court of Appeal, Second Appellate District, Division 1, was granted for the reason that there appeared to be some merit in the contention of the defendants that the District Court of Appeal, in concluding that the evidence showed a prima facie cause of actionable malpractice, applied a test not sanctioned by the decided cases, and further because of the pendency before this court at that time of a petition for hearing in the case of *Forbis v. Holzman* (Cal.App.) 45 P.(2d) 215, which has now been finally determined. *Forbis v. Holzman* (Cal.Sup.) 55 P.(2d) 201. Upon a further consideration of the merits of the contention and the evidence appearing in the record in this case, we have arrived at the conclusion that the plaintiff introduced evidence which, under the applicable test, required a submission of the case to the jury. It is apparent that by the opinion of the District Court of Appeal it was not intended to change or alter the test required by law in such cases, which is: Was the treatment given by the defendant consistent with that reasonable degree of learning and skill usually possessed and rendered by others of his profession in the same locality under similar circumstances, having regard to the state of scientific learning at the time? By the use of the term "customary means" either in the testimony or the opinion of the District Court of Appeal, it is not to be supposed that the District Court of Appeal intended to announce a rule that compli-

ance with the test required the use of such customary means only, if a means were employed or were available which would conform to the test stated or to a higher standard. As thus understood the opinion of the District Court of Appeal does not contravene the rule as announced in such cases as *Patterson v. Marcus*, 203 Cal. 550, 265 P. 222; *Hesler v. California Hospital Co.*, 178 Cal. 764, 766, 174 P. 654, and *Houghton v. Dickson*, 29 Cal.App. 321, 325, 155 P. 128, relied upon by the defendants. We therefore adopt, as the opinion of this court, the following portions of the opinion of said District Court of Appeal, prepared by Mr. Justice Edmonds (pro tem.):

"Plaintiff sued the defendant physicians for alleged malpractice in the treatment of an injury. The trial court granted a motion for a nonsuit and entered judgment accordingly.

"The injury suffered by the plaintiff was sustained on August 23d when the head of a nail struck him in the eye. He went for treatment to a medical office owned by the defendant Saylin and operated under the fictitious name of Venice Industrial Emergency Hospital. There he saw Dr. Bulpitt, who was working for Dr. Saylin under a written contract 'as resident physician and surgeon of the Venice Industrial Emergency Hospital * * * and as assistant in the general practice of medicine and surgery,' on a percentage basis with a minimum salary guaranteed.

"According to the testimony of the plaintiff, he told Dr. Bulpitt that he had been struck in the eye by a nail head. The doctor examined the eye with a magnifying glass, and found a lineal laceration of the cornea, with air bubbles present. He removed some particles of rust from the eye, but he did not examine the laceration to see how far it extended, nor did he attempt to extract anything therefrom. The eye was washed out with boric acid, argyrol solution was instilled, and the eye covered with a pad. Plaintiff returned each day for treatments which consisted of washing out the eye and instilling the argyrol. On September 3d, according to plaintiff's testimony, Dr. Bulpitt told him that it would not be necessary to have further treatment. Under date of September 6th Dr. Saylin signed and sent to the insurance carrier of plaintiff's employer a 'Surgeon's Final Report,' stating that first aid had been rendered by him, with professional services thereafter until Septem-

ber 3rd, and that the results were 'Recovery.'

"On October 23d plaintiff returned to Dr. Bulpitt, complaining of pain in the eye and diminishing sight. Dr. Bulpitt treated him for seven days, when he sent him to Dr. Morgan, and later to Dr. Osburn, both eye specialists. When Dr. Osburn examined the eye he found a piece of steel in it which he removed. Some days after this operation the retina collapsed and plaintiff finally lost the entire sight of the eye.

"Dr. Osburn and another physician were called and testified for plaintiff and the points presented on appeal arise from their testimony. In addition to the questions asked of Dr. Osburn concerning the condition of the eye as he found it and the treatment he gave the plaintiff, the two physicians were asked more than sixty questions seeking to bring out that Dr. Bulpitt was negligent in not looking for and finding the piece of steel in plaintiff's eye at the time of the injury, and that the loss of sight resulted from the foreign body remaining in the eye until removed by Dr. Osburn. The trial court sustained objections to practically all of these questions. Plaintiff, however, presents as the first point on appeal that the evidence adduced by the few questions which were allowed to be answered proved a prima facie case. Error is also predicated upon the rulings sustaining objections to plaintiff's offered evidence.

"The scant evidence received shows that when Dr. Osburn examined the plaintiff's eye in October he found a puncturing injury in the cornea, and directly behind it a window or tear in the iris with scars and inflamed vitreous; that by the use of an ophthalmoscope an opaque object was shown to be imbedded in the vitreous; and that this was a piece of steel which was removed in an operation taking about ten minutes. Dr. Osburn expressed the opinion that the piece of steel was probably in the same position when found by him as when it came to rest; that the loss of sight was caused by the entrance, presence and removal of a foreign body; that the route the object took did not necessarily cause the eye to become blind; that the removal had nothing to do with the loss of vision; and that the length of time the particle stayed in the eye contributed considerably to the loss of vision, due to the inflammation resulting from its presence. Dr.

Peters testified that the customary means used by physicians and surgeons to determine the presence or absence of a foreign body in the eye are the ophthalmoscope and the X-ray.

[2] "Under the settled law of this state this evidence was sufficient to prove a prima facie case. In re Estate of Lances, 216 Cal. 397, 14 P.(2d) 768. The legitimate inference which may be drawn from it is that Dr. Bulpitt should have suspected the presence of a foreign body in the eye; that he failed to exercise that degree of care which the practice of his profession requires, in failing to make such examination as would make reasonably certain that there was nothing in the eye; and that this was the proximate cause of the serious and unfortunate injury to plaintiff. The evidence would support such findings, and the action of the trial court in granting the motion for a nonsuit was unwarranted.

"From the evidence in this case it is difficult to understand how a physician, looking at plaintiff's injured eye with air bubbles present and the laceration before him, could feel that he had exercised ordinary professional care and skill without making any examination to see how deeply the injury extended, or doing anything to give reasonable assurance that there was no foreign body in the eye. Dr. Bulpitt had an X-ray in his office but made no use of it in connection with plaintiff's injury. It would seem that with an injury to a portion of the human body as delicate and important as the eye, ordinary professional "care and skill would at once suggest the importance of the most careful examination. In Reynolds v. Struble, 128 Cal.App. 716, 725, 18 P.(2d) 690, 694, in discussing the failure of a physician to use the X-ray in connection with the diagnosis of an injury, the court said: "There is further evidence that ordinary skill and care required the use of the X-ray as an essential aid to a skilful diagnosis, employing that skill and care possessed and used by the ordinary practitioner in that community. Indeed, it might be almost said that the use of the X-ray as an aid to diagnosis, in cases of fracture or other indicated cases, is a matter of common knowledge. Even the layman, when injured, of his own accord seeks the X-ray. And under the rule of Jacobson v. Massachusetts, 197 U.S. 11, 25 S.Ct. 358, 49 L.

Ed. 643, 3 Ann.Cas. 765, the court could, in the absence of testimony, take judicial notice of this scientific advancement.'

"Also, the evidence establishes sufficiently at least for a prima facie case, that Dr. Bulpitt's lack of" professional "care" and skill "was the proximate cause of the loss of sight. 'If * * * it is necessary to demonstrate conclusively and beyond the possibility of a doubt that the negligence resulted in the injury, it would never be possible to recover in a case of negligence in the practice of a profession which is not an exact science.' Dimock v. Miller, 202 Cal. 668, 671, 262 P. 311, 312."

The judgment is reversed.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.



6 Cal.2d 120

LANKTREE v. LANKTREE.

S. F. 15506.

Supreme Court of California.

April 18, 1936.

1. Pleading ⇨165

In quiet title action, affirmative allegations of answer that defendant was owner and entitled to possession of property were deemed denied by plaintiff, so as to put in issue plaintiff's title requiring plaintiff to produce evidence of legal or equitable interest in property in response to defendant's claim of absolute ownership.

2. Judgment ⇨747(5)

Decree in quiet title action quieting title in defendant held to foreclose all legal or equitable interest which plaintiff had in property prior to decree, where defendant's answer affirmatively alleged title and right to possession and plaintiff failed to offer evidence of legal or equitable interest in property.

3. Judgment ⇨713(2)

Judgment is conclusive against parties not only as to issues which were actually litigated therein, but also as to all issues which might have been litigated at trial of action.

In Bank.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Wilbur J. Lanktree against Jane Clark Lanktree. Judgment for defendant, and plaintiff appeals.

Affirmed.

Allen C. Cunha, of Oakland, and Dean Cunha, of San Francisco, for appellant.

W. H. Donahue, A. R. Rowell, and Donahue, Hynes & Hamlin, all of Oakland, for respondent.

CURTIS, Justice.

This action was commenced by the plaintiff to quiet his title to five separate parcels of real property described in the complaint in said action. Defendant in her answer denied that plaintiff was the owner of said property or any part thereof, or that plaintiff was entitled to the possession of any part thereof. She further alleged that she was the owner and entitled to the possession of all of said real property except the parcel last described in said complaint. This parcel, being the last described in said complaint, is not involved, therefore, in this appeal.

The plaintiff introduced no evidence on the trial of said action. The defendant introduced both oral and documentary evidence in support of the allegations of her answer, that she was the owner and entitled to the possession of the four parcels of real property described in said complaint. The court found that the defendant was the owner and entitled to the possession of said four parcels of real property, and rendered judgment quieting her title thereto. Plaintiff has appealed on the judgment roll.

[1-3] The whole contention of plaintiff on his appeal is that the court erred in quieting defendant's title to said real property "against any and all asserted claims and demands of said plaintiff, either legal or equitable." Appellant makes no contention that under the pleadings the court could not properly enter a decree quieting defendant's title to said real property. His objection to the decree only goes to that part thereof which quiets defendant's title against the *equitable* claims and demands of the plaintiff. He bases this contention upon the theory that as the holder of the equitable title to real property cannot maintain a quiet title action against the holder of the legal title, any equitable title or interest which he may have had in

said real property was not put in issue in said action and accordingly the court erred in holding that defendant's title to said real property was quieted against any equitable claim of the appellant. While it is true that no equitable title or interest of plaintiff in said real property was put in issue by the allegations of the complaint and the denials thereof in the answer, the defendant went further than merely making a denial of the allegations of the complaint, and alleged affirmatively that she was the owner of and entitled to the possession of said real property, and asked that her title thereto be quieted. These affirmative allegations of the answer are deemed denied by the plaintiff. There was thus put in issue the question of defendant's title to said real property. If the plaintiff had any interest therein, either legal or equitable, it was his duty to produce evidence of the same in response to defendant's claim of absolute ownership. This the plaintiff neglected to do, and at the trial failed to introduce any evidence whatever of any right, either legal or equitable, in said real property as belonging to him. Plaintiff had the right to interpose in answer to defendant's claim that she was the owner of said real property, any equitable claim he might have had to said real property. *Jeffords v. Young*, 98 Cal.App. 400, 406, 277 P. 163. Having failed to interpose any such defense, the plaintiff is now precluded from claiming that said judgment is not conclusive upon him as to any equitable rights he may have had in said real property at the time of the trial of said action. A judgment is conclusive against the parties not only as to the issues which were actually litigated therein, but also as to all issues which might have been litigated at the trial of said action. *Price v. Sixth District Agricultural Ass'n*, 201 Cal. 502, 511, 258 P. 387.

The case of *South San Bernardino Land & Imp. Co. v. S. B. Nat. Bank*, 127 Cal. 245, 59 P. 699, is readily distinguishable from the present action. In that action the plaintiff brought an action to quiet title. The defendant denied plaintiff's title, but made no claim that it was the owner of the real property involved, nor did the defendant ask to have its title quieted. The judgment was a simple judgment that the plaintiff take nothing by its said action. This court held that in a subsequent action between the same parties, the plaintiff was not precluded by the judgment in the first action from asserting that the defendant

held said real property in trust for plaintiff. Had the defendant in the first of said two actions alleged in its answer that it was the owner of said real property, and had the court under this allegation found that defendant was the owner of said real property and quieted its title to said real property, the plaintiff would have been precluded in the second action from asserting any claim either legal or equitable to the real property involved therein. It is in this latter situation that the appellant finds himself. The trial court upon proper and sufficient allegations has found the defendant to be the owner of said four parcels of land and has quieted her title thereto. Its decree effectually forecloses all the interest of the plaintiff, whether legal or equitable, which he had, or claimed to have had, therein previous to the entry of said decree.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; THOMPSON, J.; SEAWELL, J.; SHENK, J.; CONREY, J.



6 Cal.2d 143

BRANCH v. STATE BAR OF CALIFORNIA.
S. F. 15519.

Supreme Court of California.

April 20, 1936.

Attorney and client §53(2)

Evidence held sufficient to support finding of board of governors of the state bar that attorney misappropriated money received from clients requiring suspension of attorney from practice of law for three years.

In Bank.

Disbarment proceeding against Alfred L. Branch, wherein the Board of Governors of the State Bar recommended a three-year period of suspension. On petitioner's application for review of action of the Board of Governors.

Recommendation adopted, and suspension imposed.

Alfred L. Branch, in pro. per.

Philbrick McCoy, of Los Angeles, for respondent.

CONREY, Justice.

In a proceeding before the State Bar of California, petitioner was charged with violation of his oath and duties as an attorney at law, in a certain transaction whereby he misappropriated money received from a client in connection with a proposed divorce action. A hearing was had before local administrative committee No. 3 of San Francisco, which submitted findings and recommendation that petitioner's license be suspended for a period of six months. Thereafter, upon consideration of the case, the board of governors of the state bar adopted the findings of the local committee, but recommended a three-year period of suspension.

In addition to a finding against petitioner on the principal charge, the committee found that on a prior occasion in the year 1931 petitioner had wrongfully converted to his own use the sum of \$56.10 advanced to him by a client for costs and legal services and that petitioner had been guilty of two similar offenses in the year 1933, each involving the sum of \$20; that in said incident of the year 1931 petitioner had been disciplined by private reprimand.

In petitioner's application for review by this court of the action of the board of governors, he does not attack the findings of the board in the principal case nor its findings with relation to misappropriation in 1931 of said sum of \$56.10. His sole contention, that of insufficiency of the evidence, is confined to the claim that the evidence is insufficient to support the findings with reference to alleged misappropriation of the sum of \$20 in each of two instances in the year 1933.

Even if it might be assumed or found that the evidence was not sufficient to sustain the findings of the committee respecting said two \$20 items, there remains enough of an undisputed record of misconduct to justify the recommendation of the board of governors. Apparently petitioner has succeeded in avoiding more severe penalties by pleading that he is a victim of the "demon rum" and that but for this misfortune he would not be guilty of misappropriating the money of his clients. This particular variety of appeal to sympathy has helped many a man out of a bad hole. But it now appears to be somewhat outdated. When a woman in

search of a lawyer sees a name on a door, with the words "Attorney and counsellor at law," she is entitled to assume that the attorney who occupies that office will perform his duties in accordance with his professional responsibility, and will not waste her money to satisfy his thirst as a common drunkard. We are satisfied that the recommendation of the board of governors in this case is not too severe.

It is therefore ordered that petitioner herein, Alfred L. Branch, be and he is hereby suspended from the practice of law in this state for the period of three years from and after the date of filing of this order.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; SEAWELL, J.; CURTIS, J.



6 Cal.2d 139

BOND et al. v. CITY OF PASADENA.

L. A. 15472.

Supreme Court of California.

April 18, 1936.

Rehearing Denied May 18, 1936.

1. Municipal corporations ☞57

Districts organized under Municipal Improvement District Act *held* not to have independent legal status with capacity to sue or to perform powers ordinarily vested in municipal corporations (St.1915, p. 99, as amended).

2. Municipal corporations ☞353

Fact that city resisting payment of claim on ground that plaintiffs' assignors were indebted to city on account of overpayment from special bond funds of municipal improvement districts might be compelled to reimburse special fund if recovery of such overpayment should be had *held* not to preclude city from setting up such defense (St.1915, p. 99, as amended).

3. Municipal corporations ☞353

Where city charter provided that no demand in favor of any one indebted to city should be approved without first deducting amount of indebtedness, city had right to refuse to pay demand for street improvement made by assignees of contractors who were

indebted to city in amount greater than such demand because of overpayment to them from special bond funds of municipal improvement districts of city in connection with separate street improvements (St.1911, p. 730, as amended; St.1915, p. 99, as amended).

In Bank.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by G. W. Bond and another, co-partners doing business under the firm name and style of G. W. Bond & Son, against the City of Pasadena. Judgment for defendant, and plaintiffs appeal.

Judgment affirmed.

Prior opinion, 46 P.(2d) 801.

Crouch & Crouch and George W. Crouch, all of Los Angeles, for appellants.

Harold P. Huls, City Atty., Leonard T. Diether, Asst. City Atty., and John W. Holmes, Deputy City Atty., all of Pasadena, for respondent.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and Bourke Jones, Deputy City Atty., all of Los Angeles, amici curiæ for City of Los Angeles.

SHENK, Justice.

This is an appeal from a judgment in favor of the defendant city. The plaintiffs sued on a warrant issued by the city on an assessment and diagram after the completion of the work of Ducey and Breitenstein, contractors and assignors of the plaintiffs herein. The warrant was issued in the sum of \$13,213.01, and represented the amount payable from the general or other appropriate fund of the city for intersections in connection with a proceeding for the improvement of Lake and other streets, conducted under the provisions of the Street Improvement Act of 1911 (St. 1911, p. 730, as amended), and the city charter (§ 4, art. IX).

The city resisted the payment on the ground that Ducey and Breitenstein were indebted to the city in an amount of approximately \$55,000, claimed by the city to have been an overpayment to them as contractors, in connection with another and separate proceeding for the improvement of Linda Vitsa avenue and other streets, under the Municipal Improvement Act of 1915. St. 1915, p. 99, as amended.

The trial court found that the plaintiffs' said assignors, at the time of the issuance of the warrant sued on, were indebted to the city in the sum of \$43,156.18, which was later reduced to final judgment in favor of the city by stipulation of the parties in the cause entitled: "City of Pasadena, a municipal corporation, individually and as trustee, v. William F. Ducey and Thomas C. Breitenstein, et al.," No. 301132 in the files of the superior court in Los Angeles county. The judgment was entered herein in favor of the city pursuant to the authority of section 5 (formerly section 12), of article XI of the charter of said city, providing as follows: "No demand shall be approved by the city controller in favor of any person or officer, or the assignee of any person or officer, who is indebted to the city, without first deducting the amount of the indebtedness."

The plaintiffs attack the judgment principally on the ground that since the amounts overpaid to the plaintiffs' assignors, and for which the city obtained judgment in the other action, were paid from special bond funds of Municipal Improvement Districts numbered 3 and 8 in said city, it necessarily follows that the city, in disbursing those funds, was acting in the capacity of trustee for said improvement districts, and that mutuality in the matter of set-off therefore did not exist; citing *Kaye v. Metz*, 186 Cal. 42, 49, 198 P. 1047. Assuming the correctness of the general rule relied upon, namely, that "one who holds a claim as trustee cannot have it set-off against a demand due from him individually" (23 Cal.Jur., p. 262), it remains to be determined whether the city, in the situation here presented, is subject to that rule.

[1,2] It is first observed that the judgment entered in favor of the city by stipulation of the parties in said action of *Pasadena v. Ducey and Breitenstein* provided: "It is ordered, adjudged and decreed that the plaintiff, City of Pasadena, a municipal corporation, have judgment herein upon the fifth, sixth, seventh and eighth counts of the complaint in the total principal sum of \$43,156.18, with interest," etc. The city itself is therein the sole judgment creditor. The form of the judgment may not be controlling in all cases, but it is clear that under this particular judgment the plaintiffs' assignors were indebted "to

the city" in an amount greater than the demand sued on as contemplated by the city charter, and little more need be said on the question of the claimed lack of mutuality. Pursuing the theory of the plaintiffs, it is true that in looking to the judgment roll in that action, which is in evidence, and to the findings in the present action, it is disclosed that the city, in disbursing the special bond funds of the municipal improvement districts, was acting under a special statute which provided, in section 8, that the bond funds should be devoted solely to the purpose for which the bonds were voted. But the same rule applies with reference to the disbursement of funds derived from the sale of general bonds of the city. Overpayment from any of said special bond funds was not authorized by law, and the city, as the legal entity authorized to act, had a direct interest in recovering the same on behalf of the special funds under its control. Districts organized under the Municipal Improvement District Act of 1915 are not legal entities in the sense that they have an independent legal status with capacity to sue or to perform any of the powers ordinarily vested in municipal corporations or governmental subdivisions. See *Anaheim Sugar Co. v. County of Orange*, 181 Cal. 212, 183 P. 809; *Fox v. City of Pasadena (C.C.A.)* 78 F.(2d) 948. It is a matter of no concern to the plaintiffs or to their assignors that the city may be compelled to reimburse the special fund when a recovery is had, based on a judgment in its favor as a municipal corporation. *Johnson v. City of Aberdeen*, 147 Wash. 482, 266 P. 707.

[3] We conclude that, under the facts here presented, the defendant city had the right, indeed it was its duty under the mandatory provisions of its charter, to refuse payment of the demand sued on. *Dadmun v. City of San Diego*, 9 Cal.App. 549, 99 P. 983; see, also, *Richmond, F. & P. R. Co. v. McCarl*, 61 App.D.C. 290, 62 F.(2d) 203.

Other points argued have been considered, but the appeal is determined on the principal point discussed.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.

6 Cal.2d 145

GANE v. GANE.

S. F. 15430.

Supreme Court of California.

April 21, 1936.

Rehearing Denied May 21, 1936.

1. Divorce ☞184(6)

On appeal from motion to set aside interlocutory decree on the ground of undue influence, appellate court may examine the evidence only to ascertain whether it contains sufficient probative facts to support the order of trial court.

2. Divorce ☞165(5½)

Evidence *held* sufficient to sustain denial of motion to set aside interlocutory decree of divorce in favor of wife on her cross-complaint on ground that attorney for wife had unduly influenced her to obtain the divorce.

In Bank.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action for divorce by Robert M. Gane against Florence A. Gane, in which defendant filed a cross-complaint. From an order denying motion to set aside interlocutory decree of divorce in favor of defendant and property settlement, defendant appeals.

Affirmed.

Lelia R. Leep, of San Francisco, for appellant.

Jesse H. Miller, of San Francisco, for respondent.

CURTIS, Justice.

Plaintiff brought an action for divorce against defendant, basing his grounds upon certain acts of cruelty which he alleged were committed by the defendant. Defendant appeared by answer and denied all the allegations of plaintiff's complaint in which she was charged with the commission of acts of cruelty. She also, at the time of filing said answer, filed a cross-complaint for divorce and alleged as grounds of divorce acts of cruelty on the part of the plaintiff. A property settlement was thereafter agreed upon and was signed by both the plaintiff and defendant. Plaintiff with-

drew his complaint, and the case went to trial upon the allegations of defendant's cross-complaint. Plaintiff did not appear at the trial. Defendant was present in person and by counsel. She was sworn as a witness in the case and testified to the facts set forth in her cross-complaint. A witness on behalf of defendant corroborated defendant in all the essential allegations of the cross-complaint. At the conclusion of the trial the court ordered judgment upon defendant's cross-complaint, and in due time a decree was signed and filed by the judge hearing the action, awarding defendant an interlocutory decree of divorce and alimony in the sum of \$50 per month. The decree in respect to alimony followed the property settlement theretofore entered into by the parties to the action, except in one respect. The property settlement provided that the plaintiff should pay to defendant the sum of \$50 per month for a period of two years. The trial court refused to limit the time in which plaintiff should pay the defendant alimony to two years, and by the decree placed no limit upon the time during which the defendant should receive alimony. The interlocutory decree was entered August 16, 1934. On October 29, 1934, a substitution of attorneys for the defendant was filed whereby Lelia R. Leep, an attorney at law, was substituted for and in the place of H. O. Mundhenk as attorney for the defendant. Thereafter the defendant through her newly appointed attorney gave notice of a motion to set aside the interlocutory decree and property settlement on the ground that the same was obtained by undue influence. This motion was noticed for hearing on November 2, 1934. It was evidently continued to November 17, 1934, when it was heard in open court upon evidence presented by the respective parties to this action. At the conclusion of the hearing the court submitted the matter, and on February 5, 1935, denied said motion. From the order denying said motion to set aside said interlocutory judgment the defendant has appealed.

While the notice of motion merely states that the ground upon which said motion would be made was that the interlocutory decree was obtained by undue influence, we gather from the affidavit of defendant filed in support of said motion, and the evidence given at the hearing of said motion, that the undue influence of which the defendant complains was the undue influence exercised

over her by her attorney, appearing for her at the time she secured said interlocutory decree.

The position of the defendant, as appears from the reading of her supporting affidavit and her evidence given on the hearing of said motion, would seem to be that she had a sincere affection at all times for her husband, that she did not want a divorce from him, and so informed her attorney immediately upon his employment and continuously up to the date of said trial. Instead of respecting the defendant's wishes in this regard, her attorney, so she claims, conspired with the attorney for her husband to force her to take the steps and perform the acts which she did and which resulted in the court awarding her an interlocutory decree of divorce. She testified fully as to her position from the inception of the divorce action up to the time of the trial and to the events following the trial. Her former attorney was present at the hearing of said motion as a witness and gave his version of his employment by defendant and of his services as her attorney in this action. The hearing of this motion was not had before the trial judge who presided at the trial of said action, but was transferred to another department of said court and held before another judge thereof. The judge presiding at the hearing of said motion permitted each of said parties the widest latitude in the examination of their own witnesses and in the cross-examination of adverse witnesses. No complaint is made by defendant that she was not afforded every opportunity, on the part of the trial judge, to present her case upon the hearing of said motion. At the conclusion of said hearing, as we have observed, the trial court held that the defendant had not made a sufficient showing to justify the setting aside of the interlocutory decree of divorce rendered in her favor.

[1,2] It is not our province, even if we so desired, to weigh the evidence in this matter. Our only prerogative in the premises is to examine the evidence produced at the hearing of the motion to ascertain if it contains sufficient probative facts to support the order of the trial court denying said motion. We think it reasonably appears from the evidence that the defendant did not wish a divorce from her husband, but, on the other hand, was anxious for a reconciliation with him. The husband, however, insisted on a divorce, and had

instituted an action to obtain such a decree. The defendant was confronted with a contest in which she was charged with being guilty of acts of extreme cruelty toward her husband. The husband refused all offers of reconciliation, and was determined to proceed with the trial of his action against his wife. He was, however, willing to forego his action provided the defendant would institute a like action against him. Confronted with this situation, her attorney advised her to file an answer to his complaint and at the same time by way of cross-complaint ask for a divorce from her husband. She signed and swore to the answer and cross-complaint. This was followed by a property settlement between her and her husband which she signed as one of the parties thereto. The case was then set for trial. The defendant was still protesting that she did not want a divorce. On the morning of the trial, and just before going into court, the defendant again stated to her attorney she did not want a divorce but did want to be reconciled to her husband. The defendant was told then by the attorney for the plaintiff that there was absolutely no chance of a reconciliation with her husband. Her own attorney then said to her, "Well, if you want to go through with it, we are here to go on—to get a divorce if you want to—it is up to you. It makes no difference to me." While the defendant says she wilted after being told this by her attorney, the record shows that she went into Judge Walter Perry Johnson's court and, upon her case being called, testified to the acts of cruelty which she charged in her cross-complaint, and upon such evidence and that of her corroborating witness Judge Johnson granted her an interlocutory decree of divorce. When asked on the hearing of the motion why she so testified before Judge Johnson and why she did not tell Judge Johnson that she did not want a divorce, she answered that she was scared by what her attorney had told her, just before going into court, about being careful what she would say or she would lose out. While this explanation may have been plausible, its soundness was for the determination of the trial judge. Evidently he was not impressed with the reason given by her for testifying as she did before Judge Johnson. Taking her evidence as a whole, it seems incredible that she acted under compulsion of her attorney in the various steps taken by her which culminated in the interlocutory decree of divorce.

**SUPERIOR OIL CO. v. SUPERIOR COURT
IN AND FOR KINGS COUNTY et al.**

S. F. 15576.

Supreme Court of California.

April 14, 1936.

The complaint in this action was filed in May, 1934, and summons and copy of complaint was almost immediately served upon her. The trial was not held until the middle of August of the same year. She had over two months to consider the matter and determine the course to be pursued by her. The information received by her attorney and by him conveyed to her was that her husband absolutely refused to consider a reconciliation. Undoubtedly the information was correct and expressed the true attitude of the husband toward his wife. She and her attorney then began to consider a cross-complaint, and he asked her for her grounds of complaint upon which he could base a cause of action for divorce against him. She gave him a written memorandum prepared by herself unaided by her attorney, which was to be made the basis of her cross-complaint. This document is not in evidence, but upon examination of it by the trial judge he remarked, "The memorandum was stronger than the complaint." After the cross-complaint was prepared, she signed and swore to it. She also signed a property settlement, and then voluntarily appeared in court and testified to the truth of the charges set forth in her cross-complaint. Taking her testimony by itself, it was sufficient to support the finding of the trial court that the interlocutory decree was not the result of any undue influence exercised over the defendant by her attorney. The latter also testified on the hearing of the motion. He conceded that the defendant told him that she did not wish a divorce, but wanted to be reconciled to her husband. He ascertained that a reconciliation was impossible, and he then left it up to the defendant whether she wanted to contest her husband's action for a divorce or file a cross-complaint and have the decree awarded on her cross-complaint rather than on her husband's complaint. She accepted the latter alternative and proceeded accordingly, and, in all his dealings as the attorney for the defendant, he advised her to the best of his ability. On this state of the evidence, this court cannot hold that the order of the trial court denying defendant's motion to set aside the interlocutory decree herein does not find sufficient evidentiary support in the record.

The order is affirmed.

We concur: WASTE, C. J.; CONREY, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.

1. Dismissal and nonsuit ☞45

Retroactive operation of statute requiring that action be dismissed where not brought to trial within five years after filing is subject to exception that a reasonable time must elapse after change in remedy to permit party affected to safeguard his rights as against a mandatory dismissal (Code Civ. Proc. § 583, as amended by St.1933, p. 853).

2. Dismissal and nonsuit ☞60(2)

Period of one year and five months from the effective date of retroactive statute, requiring that action be dismissed where not brought to trial within five years after filing of action, held "reasonable time" within which plaintiff could safeguard his rights as against mandatory dismissal by bringing action to trial (Code Civ.Proc. § 583, as amended by St.1933, p. 853).

[Ed. Note.—For other definitions of "Reasonable Time," see Words & Phrases.]

3. Dismissal and nonsuit ☞60(2)

In suit by state to enjoin alleged waste of natural gas, hearing on preliminary injunction on affidavits and on motion to modify such injunction did not constitute a "trial" of cause within statute requiring action be brought to trial within five years after filing, so as to preclude dismissal for not bringing cause to trial within that time (Code Civ.Proc. § 583, as amended by St.1933, p. 853; and §§ 632, 634, 2048).

"Trial," as applied to one of the steps in disposition of an action, means trial of issues of fact, purpose of which is to determine cause on merits, and trial is not completed until decision of court is made and filed with clerk unless findings be waived; the parties having right of cross-examination.

[Ed. Note.—For other definitions of "Trial," see Words & Phrases.]

4. Dismissal and nonsuit ☞60(1)

Dismissal of an action for lack of prosecution is without regard to merits or demerits of cause of action (Code Civ.Proc. § 583, as amended by St.1933, p. 853).

5. Dismissal and nonsuit $\Rightarrow$ 60(3)

That it was advisable, if not necessary, for sufficient time to elapse before bringing to trial suit by state to enjoin alleged unreasonable waste of natural gas, did not relieve state of burden of bringing case to trial within five years after filing action (Code Civ. Proc. § 583, as amended by St.1933, p. 853).

6. States $\Rightarrow$ 190

Statute requiring dismissal of action where not brought to trial within five years after plaintiff has filed his action *held* applicable to action by state to enjoin alleged unreasonable waste of natural gas, notwithstanding state was suing in governmental or sovereign capacity (Code Civ. Proc. § 583, as amended by St.1933, p. 853).

7. Mandamus $\Rightarrow$ 43

Mandamus will issue to compel trial court to dismiss action where not brought to trial within five years after filing of action (Code Civ. Proc. § 583, as amended by St.1923, p. 853).

In Bank.

Mandamus proceeding by the Superior Oil Company, a California corporation, against the Superior Court of the State of California in and for the County of Kings, and the Honorable K. Van Zante, a judge thereof.

Writ of mandamus issued as prayed.

Chandler, Wright & Ward, of Los Angeles, for petitioner.

U. S. Webb, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for respondents.

SHENK, Justice.

This is a proceeding in mandamus to compel the respondent court to dismiss an action pending therein. Said action was commenced on January 22, 1930, and is entitled: "The People of the State of California, on relation of Fred S. Stevenot, Director of Natural Resources of the State of California, Plaintiff, v. Felix Oil Company, et al., defendants," No. 6222 in the files of said court. The petitioner herein is one of the defendants therein.

The action was brought under the authority of the Oil and Gas Conservation Act. (St.1915, p. 1404, as amended by St. 1929, p. 923.) The purpose of the action was to enjoin the alleged unreasonable waste of natural gas in the north dome

area of the Kettleman Hills oil field. Upon the filing of the complaint an order was issued and served on the defendants requiring them to show cause why a preliminary injunction should not issue enjoining them, pending the trial of said action, from doing the things complained of. Upon the hearing of the order to show cause the court required the parties to make their showing by affidavits. Oral evidence was not permitted. After numerous hearings and a showing by affidavits in the manner prescribed, the court issued a preliminary injunction under date of April 13, 1931. This order contained the following statement: "That the evidence available to the court at this time shows that the unreasonable waste of natural gas from said North Dome Area of Kettleman Hills oil field can be substantially reduced and the equities of all parties be fairly conserved until the trial of this action and the entry of the final judgment herein by a preliminary injunction which will limit the gas-oil ratio at which oil and gas may be produced without unreasonable underground waste and limit the quantity of natural gas which may be released to the air as hereinafter provided." The court reserved in the order itself the jurisdiction to hear and determine any application to modify the terms of the temporary injunction or to discharge the same. On application of certain of the defendants the temporary injunction was modified on April 28, 1931. Again, on June 16, 1934, the injunctive order was modified in accordance with a stipulation of the parties by striking therefrom the requirement that the defendants file certain monthly reports.

Neither "the trial of the action" nor the "entry of final judgment herein," as contemplated by the language of the preliminary injunction, has taken place, and the parties have not stipulated in writing for an extension of the time of trial.

On November 12, 1935, the petitioner, on notice, moved in the trial court to dismiss the action on the ground that the same had not been "brought to trial within five years after the plaintiff has filed his action," and that the parties have not "stipulated in writing that the time may be extended." The motion was denied.

[1] Prior to the amendment in 1933, section 583 of the Code of Civil Procedure required the dismissal of any action unless it was brought to trial within five years after

the filing of the answer. The amendment, effective August 21, 1933 (St.1933, p. 853), required the dismissal of "any action heretofore or hereafter commenced" unless the same be brought to trial within five years after "the plaintiff has filed his action." The requirements of this section are mandatory and they are retroactive by express language of the statute. They apply to actions pending at the time of the enactment, but are subject to one exception, viz., that in order to render the retroactivity of the amendment effective in any particular case, a reasonable time must elapse after the change in the remedy to permit the party affected to safeguard his right as against a mandatory dismissal. *Rosefield Packing Co. v. Superior Court* (Cal.Sup.) 47 P.(2d) 716; *Murphy v. Murphy* (Cal.Sup.) 55 P.(2d) 1169; 9 Cal.Jur., p. 542.

[2] In the present case the five-year period from the filing of the complaint expired January 22, 1935. The time from the effective date of the amendment of section 583, to wit, August 21, 1933, to the expiration of the five-year period, was one year and five months. This period must be deemed a reasonable time within which to bring the action to trial after the effective date of the amendment. The action must therefore be dismissed unless the respondent is right in either one of two main points.

[3, 4] It is first contended that there was in effect a trial of the action as contemplated by section 583 when the court received and considered evidence by affidavit on the order to show cause why a preliminary injunction should not be granted and on the motion to modify the preliminary injunction. No authority is cited in support of this contention and none has been discovered. The term "trial" as applied to one of the steps in the disposition of an action is well understood in the practice in this state. It is the trial of the issues of fact (*Perrin v. Miller*, 35 Cal.App. 129, 169 P. 426), the purpose of which is to determine the cause on the merits, and it is not completed until the decision of the court is made and filed with the clerk (*Broder v. Conklin*, 98 Cal. 360, 33 P. 211; section 632, Code Civ.Proc.), unless findings be waived (section 634, Code Civ.Proc.). Whether made and filed or waived, judgment may then be entered and the cause thus be disposed of on the merits. On the trial the parties have the right of cross-examination. Section 2048, Code

Civ.Proc. On the hearings on the order to show cause the privilege of orally examining and cross-examining witnesses was denied by the court. All answers to the complaint were required to be filed on or before December 2, 1930, and it must be assumed that the cause was ready to be set for trial after the issues of fact were thus joined. In *Bandini v. Superior Court*, 284 U.S. 8, 52 S.Ct. 103, 76 L.Ed. 136, 78 A.L.R. 826, involving the effect of a preliminary injunction in a similar case, it was correctly assumed that under the practice in this state a trial on the merits would ordinarily follow the hearing and issuance of the preliminary injunction. In June, 1932, one of the defendants in said action moved the court to set the cause for trial. There was much discussion as to a trial date convenient to counsel for all parties, but no date prior to the service and filing of the notice to dismiss was fixed. The defendant's motion to set was continued from time to time until February 27, 1934, when said motion and other motions and matters on the calendar that day were, on motion of counsel for the plaintiff in said action, stricken from the calendar. It does not appear that the attention of the court was ever called to the fact that time was running under section 583, or that the five-year period thereunder was about to expire. It may be assumed that the trial court had considerable evidence before it in order to enable it to determine whether the preliminary injunction should issue, and it is undoubtedly true that this evidence, if properly introduced at the trial, would have been determinative of some or many issues of fact. But the dismissal of an action for lack of prosecution is without regard to the merits or demerits of the cause of action. *Los Angeles v. Superior Court*, 185 Cal. 405, 414, 197 P. 79; *Bell v. Solomons*, 162 Cal. 105, 121 P. 377.

[5] It is argued that because of the peculiar nature of the subject-matter of the action and the relief sought it was advisable if not necessary that sufficient time elapse before the trial to enable the parties to accumulate evidence of wastage of gas and related subjects as shown by tests and experience in operations in the field so that the court could with more certainty establish an equitable gas-oil ratio and other regulations for the benefit of all parties. However desirable this course of procedure might have been, the fact is that the statu-

tory time was running and the plaintiff could have protected its rights either by a stipulation of the parties for an extension of time, or by having the case brought on for trial. It is not unusual for a court, when the trial has once commenced, to continue the hearing from time to time upon a proper showing in order that further evidence be available. The detriment suffered by a dismissal of the action is that in order to pursue the remedy further another action will have to be commenced. It is conceded by all parties that a dismissal of the pending action will not operate as a bar to a subsequent suit. If such suit be filed, undoubtedly the facts obtained by tests and experience in operation since the filing of the pending action will be available.

[6, 7] The second point made by the respondent is that the state of California is not bound by a general statute unless by its terms such statute expressly binds the state; and that since section 583 is a general statute and does not expressly bind the state, the state is not bound thereby. In support of the contention numerous cases are cited, all of which relate to substantive rights of the state and are not in point here.

The question is: When the state enters the courts as a litigant, is it bound by general rules of practice and procedure established for the proper functioning of the courts in the discharge of their duties?

The respondent has cited no authority which would warrant a negative answer to the question. The cases cited by the petitioner in support of an affirmative answer are numerous. Very much in point is *People v. Kings County Dev. Co.*, 48 Cal.App. 72, 191 P. 1004. There the trial court, on motion of the defendant, had dismissed the action on the ground that summons had not been served within three years after the commencement of the action, as required by section 581a of the Code of Civil Procedure. The order was affirmed after a thorough consideration and discussion, with citation of supporting authorities, of the question whether the state was bound by the rules of procedure laid down in section 581a, which has the same general purpose as the rule prescribed by section 583 here

involved. The one requires summons to be served and a return thereon within three years after the action is brought. The other requires the action to be brought on for trial within five years after the filing of the complaint. Failure to comply with either section makes the dismissal of the action mandatory on the court. The respondent seeks to distinguish that case from the present proceeding on the ground that there the state was suing to enforce or protect a proprietary right; that here a governmental or sovereign right is involved; and that the rule should be different, depending on the capacity in which the state sues. No such distinction can be made. Referring to section 581a, the court in *People v. Kings County Dev. Co.*, supra, 48 Cal.App. 72, at page 79, 191 P. 1004, 1007, stated: "It will be observed that the section is in such sweeping language as to admit of no other construction than that the Legislature intended not to except from its operation any litigant or any action by whomsoever commenced. It reads: '*No action heretofore or hereafter commenced shall be further prosecuted,*' etc." So here section 583 is likewise all-inclusive. It reads: "Any action heretofore or hereafter commenced shall be dismissed," etc.

In addition to the cases cited by the court in support of the holding in the *Kings County Development Company Case*, other cases announcing the same doctrine are the following: *State v. Kilburn*, 81 Conn. 9, 69 A. 1028, 129 Am.St.Rep. 205; *State v. Bowen*, 38 W.Va. 91, 18 S.E. 375; *People v. Canal Board*, 55 N.Y. 390, 395; *State v. Buttles' Executor*, 3 Ohio St. 309, 319, 320, and *State v. Kennedy*, 60 Neb. 300, 83 N.W. 87.

We conclude that the pending action has not been brought to trial within the statutory period and that the plaintiff therein is bound by the provisions of section 583 of the Code of Civil Procedure. It was therefore the duty of the court to dismiss the action. Mandamus is a proper remedy. *Andersen v. Superior Court*, 187 Cal. 95, 200 P. 963.

Let the peremptory writ issue as prayed.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.; THOMPSON, J.; CONREY, J.

13 Cal.App.2d 249

GUTLEBEN v. CROSSLEY et al.

Civ. 9467.

District Court of Appeal, First District,
Division 1, California.

April 16, 1936.

Hearing Denied by Supreme Court
June 15, 1936.

1. Judgment ¶113, 150

Pleading which has been amended in matter of substance must be served on all adverse parties affected thereby, including defaulting party, and such amendment operates to open default, and unless so served precludes acquisition of binding additional adverse rights.

2. Judgment ¶113

Failure to serve on adverse parties amended answers whereunder for first time affirmative relief, based on adverse claims, is sought against codefendant who has previously defaulted, precludes acquisition of binding additional adverse rights thereunder.

3. Eminent domain ¶241

Failure of purchaser of property involved in condemnation proceeding to serve copy of his amended answer, alleging that he was sole owner of property involved, on defaulting parties who held trust deed on property, held to render judgment in such proceeding ineffective as between such parties, entitling holders of trust deed to recover from purchaser amount of award.

4. Eminent domain ¶158

Holders of trust deed on property involved in condemnation proceeding who, after defaulting in such proceeding, were not served with amended answer wherein purchaser of property claimed to be sole owner, could recover from purchaser amount of award paid to him, although holders did not move to set aside their default and re-enter condemnation case or appeal from decree.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Emma W. Gutleben against Nat M. Crossley and another. From an adverse judgment, named defendant appeals.

Affirmed.

Breed, Burpee & Robinson, of Oakland, for appellant.

A. G. Kazebeer, of San Francisco, and Carlisle C. Crosby, of Oakland, for respondent.

KNIGHT, Justice.

Plaintiff, as assignee and successor in interest of Wilhelmine and Ernest Wolkenhauer, brought this action to collect certain moneys claimed to be due as the result of a transaction involving the sale of real estate. The complaint contains four counts. The first two are for the recovery of \$7,195 theretofore paid to the defendant Nat M. Crossley by the city of Oakland as an award in an eminent domain proceeding affecting the property involved, and the remaining two are for the recovery of a deficiency of \$13,083.20 following a sale under a deed of trust covering said property. The action was tried without a jury and judgment was rendered in plaintiff's favor and against the defendant Nat M. Crossley for the amount sued for under the first two counts, and accrued interest, and against plaintiff under the remaining two counts. From that part of the judgment so entered against him the said Nat M. Crossley prosecutes this appeal. The other parties defendant to the action are in no way affected by the judgment nor interested in the appeal.

The facts, as they appear from the findings, which appellant concedes are supported by the evidence, and from the allegations of the complaint which the trial court found to be true, are as follows: In November, 1926, the city of Oakland instituted eminent domain proceedings to condemn a strip of land for street purposes. The properties affected thereby belonged to plaintiff's assignors, Wilhelmine Wolkenhauer and Ernest Wolkenhauer, the appellant Nat M. Crossley and his wife, Walter E. Crossley, and others, all of whom were made parties to the proceeding, and the separate parcels owned by each were specifically described in the complaint. At that time the Wolkenhauer property was encumbered with a deed of trust given to the Oakland Bank as trustee. It was so alleged in the complaint; also that the trustee and beneficiary, who were likewise named in said complaint and made parties to the proceeding, claimed an interest in said property.

Before the Wolkenhauers' time for answering said complaint expired and on August 11, 1927, the appellant Nat M. Cross-

ley entered into a written contract with them to purchase their property for \$14,900. The terms called for a down cash payment of \$1,400 and the execution and delivery of a five-year note for \$13,500 secured by a deed of trust on the property. Four days after the execution of the contract and on August 15, 1927, the default of the Wolkenhauers was entered in said condemnation proceedings for failure to answer. Appellant then assigned the sales contract to Walter E. Crossley, and on September 6, 1927, the Wolkenhauers conveyed the property to him. The down cash payment of \$1,400 was made through a bank, and Walter E. Crossley, as the ostensible purchaser, executed the necessary five-year note for \$13,500 and the deed of trust securing the same. In this regard the trial court found that "the said Walter E. Crossley and also the defendant, Nat M. Crossley, stated and represented to the said grantors that the said Walter E. Crossley was the purchaser of said property, whereas in truth and in fact, the said Nat M. Crossley and Blanche M. Crossley, his wife, were the purchasers of said property and were the undisclosed principals, and the said Walter E. Crossley was acting merely as an agent and for the convenience of said Nat M. Crossley and Blanche M. Crossley and without the knowledge or consent of the said Wilhelmine Wolkenhauer and Ernest Wolkenhauer, or either of them." Furthermore, the court found that appellant supplied the money to make the down cash payment, and that although Walter E. Crossley executed said promissory note and trust deed in his own name, he did so for "the use and benefit of and as the act and contract of the defendants, Nat M. Crossley" and his wife, and as their agent.

The trust deed was recorded a few days after its execution; and about two weeks later Walter E. Crossley conveyed the property to appellant, subject to said deed of trust. The deed was not placed on record, however, for more than two years after its execution, which, as will hereinafter appear, was nearly two years subsequent to the entry of the interlocutory decree in the condemnation proceedings.

After appellant had thus obtained title to the property under said unrecorded deed and the Wolkenhauers had allowed their default to be taken in said condemnation proceeding, appellant on October 27, 1927, filed an amended answer in the condemna-

tion proceeding, alleging that he was the sole owner "in fee simple absolute" of the Wolkenhauer property, but he made no mention whatever in said answer nor otherwise in said proceeding of the outstanding deed of trust against the property given to the Wolkenhauers as part payment of the purchase price thereof; and accordingly, as such owner in fee simple absolute, he asked that the entire award be paid to him. Neither of the Wolkenhauers was served with a copy of said amended answer, nor with any notice of application to file the same or that it had been filed. Furthermore, appellant testified as a witness in said proceeding as to his ownership of the property, but he did not reveal the existence of said trust deed. Consequently on March 19, 1928, the court rendered its interlocutory decree in said proceeding, directing that the sum of \$7,195, which was the entire amount allowed as compensation for the taking of a portion of the Wolkenhauer property and as severance damages to the remainder of the tract be paid to appellant. A final decree was entered accordingly, and thereupon appellant assigned the award to his bank as security for the payment of an obligation due from him to the bank, and the award was paid to the bank.

Following the entry of the final decree appellant defaulted in making payments due on the promissory note and deed of trust given to the Wolkenhauers as part of the purchase price, and the property was sold at trustee's sale. It was bid in by plaintiff and after deducting the expenses of sale there was due a deficiency of \$13,083.20. Subsequently the Wolkenhauers assigned and transferred said note and deed of trust, and their right to recover said award of \$7,195, to plaintiff, who instituted the present action to recover said award and the amount of the deficiency due on the note and trust deed.

Appellant frankly concedes "that if the Wolkenhauers had filed an answer [in the condemnation proceeding] setting up the fact that, although they were not the owners of the real property as alleged in the complaint, but were the owners of a first deed of trust thereon, they would have been entitled to an award up to the amount secured by the deed of trust owned by them" (*Rose v. Conlin*, 52 Cal.App. 225, 198 P. 653); but he contends that in the absence of such an answer the decree in said condemnation proceeding awarding

the entire amount of said compensatory damages to him precludes them and their assigns now from asserting any claim against him for any portion thereof.

[1,2] Admittedly, however, as before stated, appellant did not serve either of the Wolkenhauers with a copy of the amended answer nor with any notice of application to file the same or that it had been so filed; and it is well settled that where a pleading is amended in matter of substance, as distinguished from mere matter of form, it must be served on all adverse parties affected thereby, including a defaulting party; that the amendment operates to open the default and unless it is so served no binding additional adverse rights may be acquired thereunder. Such is the established rule governing the filing of amended complaints and amended answers setting up cross-complaints (14 Cal. Jur. 889; 21 Cal. Jur. 226; *Linott v. Rowland*, 119 Cal. 452, 51 P. 687), and for obvious reasons the same rule applies to the filing of amended answers whereunder for the first time affirmative relief, based on adverse claims, is sought against a codefendant who has previously defaulted. *Strong v. Shatto*, 201 Cal. 555, 258 P. 71.

[3,4] In the present case, at the time the Wolkenhauers defaulted in the condemnation proceeding, the pleadings therein presented no adverse or conflicting claims as to the Wolkenhauers' ownership of the property. Consequently, in that state of the record, they were, as such owners, entitled to receive whatever award of damages was made respecting said property, subject, of course, to the rights of the Oakland Bank as trustee; and it was thereafter that appellant amended his answer setting up his ownership of the property and asserting his exclusive right to said award,

but omitting entirely any reference to the outstanding deed of trust then held by the Wolkenhauers. Therefore, under the rules above mentioned, appellant's failure to serve the Wolkenhauers with a copy of the amended answer rendered any judgment based thereon, as between appellant and the Wolkenhauers, ineffectual as to the Wolkenhauers, and left the way open to them to recover from appellant the amount of the award so paid thereunder to him. Nor, under the doctrine declared in *Rose v. Conlin*, supra, were the Wolkenhauers, as the holders of the deed of trust on said property, required, as appellant contends, either to move to set aside their default and re-enter the case or to appeal from the decree entered therein. Manifestly an appeal would have availed nothing; and while, if they had chosen so to do, they could have followed the other course appellant suggests, it is evident that if they had done so they would doubtless have been met, as said in *Rose v. Conlin*, supra, with the proposition that the remaining property covered by the trust deed would suffice to pay their debt, and that they should exhaust their remedies thereunder before they could claim the right to any part of the compensation to be awarded in the condemnation proceedings. The excerpt quoted by appellant from the decision in *Anderson v. Citizens' Savings & Trust Co.*, 185 Cal. 386, 197 P. 113, and upon which he mainly relies in support of his position, is not in our opinion applicable here for the reason that it is based upon an entirely different state of facts.

The judgment is affirmed.

We concur: TYLER, P. J.; CASH-IN, J.

13 Cal.App.2d 151

COMSTOCK v. FINN.
Civ. 1908.District Court of Appeal, Fourth District,
California.

April 8, 1936.

1. Adverse possession ☞13

"Adverse possession," to constitute a defense under the statute of limitations, must be actual occupation, open and notorious; hostile to true owner's title; under a claim of title, exclusive of any other right, as one's own; continuous and uninterrupted for a period of five years prior to the commencement of the action; and all taxes levied or assessed upon the land must have been paid; and generally all these elements must concur (Code Civ.Proc. §§ 318, 325).

[Ed. Note.—For other definitions of "Adverse Possession," see Words & Phrases.]

2. Adverse possession ☞40

Continuous and uninterrupted possession for a period of five years prior to commencement of action of ejectment, so as to justify occupant's claim of title by adverse possession, need not be for the period immediately next preceding action (Code Civ.Proc. §§ 318, 325).

3. Adverse possession ☞92

Finding that occupant and her vendor between them had paid taxes on property for a continuous period exceeding five years was sufficient to satisfy statutory requirement that taxes be paid by claimants on property to which title by adverse possession is sought (Code Civ.Proc. § 325).

4. Adverse possession ☞58

Where possession of occupant of premises lacks hostility and adversity to the title of the owner, claim to title of land by occupant fails (Code Civ.Proc. §§ 318, 325).

5. Appeal and error ☞931(1)

Findings of trial court are conclusively presumed to be supported by the evidence on appeal on judgment roll alone, notwithstanding findings set forth fully all the facts upon which they are based.

6. Trial ☞404(1)

Findings will be liberally construed so as to uphold rather than defeat judgment thereon, and any ambiguity or inconsistency will be resolved in favor of sustaining the judgment.

7. Mortgages ☞143

Possession of a mortgagor is not inconsistent with rights of mortgagee, since such possession does not become adverse till mortgagor denies mortgagee's rights under mortgage and sets up an exclusive title in himself so openly and notoriously that mortgagee must have known of the adverse claim.

8. Adverse possession ☞117

Finding that possession of distributee of mortgage and her vendee was open and notorious under claim of right and continuous and uninterrupted for five years held not inconsistent with finding that such claim was not hostile or adverse to person to whom agent of distributee had assigned mortgage, as security for a loan, without distributee's knowledge (Code Civ.Proc. §§ 318, 325).

9. Adverse possession ☞42

Where agent of distributee of mortgage assigned mortgage without distributee's knowledge as security for a loan and assignee foreclosed and purchased property thereunder, distributee's vendee did not acquire title adverse to assignee, where suit in ejectment was brought within five years after sale under foreclosure, since five-year period of limitation did not begin to run until delivery of sheriff's deed (Code Civ.Proc. §§ 318, 325).

10. Limitation of actions ☞19(1)

Statute precluding recovery of real property by plaintiff unless he was seized of the property within five years preceding the action had no application where trial court expressly found that plaintiff had been so seized (Code Civ.Proc. § 318).

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge presiding.

Action by W. H. Comstock, as receiver of the United States Building & Loan Association of Los Angeles, a corporation, against Georgiana Finn. Judgment for the plaintiff, and defendant appeals.

Affirmed.

Harmel L. Pratt, of Los Angeles, for appellant.

Williamson, Ramsay & Hoge, Fulton Hoge, and Kenneth E. Ramsay, all of Los Angeles, for respondent.

MARKS, Justice.

This is an action in ejectment brought by W. H. Comstock, as receiver of the United

States Building & Loan Association of Los Angeles, against defendant to obtain possession of real property situated in the city of Altadena, county of Los Angeles, state of California, and to recover damages for its wrongful detention, its rents, issues, and profits. The trial court found that plaintiff was owner in fee simple of the property and entitled to its possession. From this judgment defendant has appealed upon the judgment roll alone.

The facts found by the trial court show the following: On May 18, 1925, Richard D. Johnson and wife were the owners of the property and upon that day they executed a mortgage on it to secure their promissory note for the sum of \$5,000, payable four years after date, to E. P. Janes. The mortgage was duly recorded on the 1st day of June, 1925. On June 8, 1925, E. P. Janes indorsed the note in blank and assigned it and the mortgage to John P. Whitaker. John P. Whitaker died. His estate was probated and the note and mortgage were distributed to Frances H. Whitaker, his widow, by a decree of distribution dated August 5th, and recorded August 11, 1927.

On December 12, 1925, Richard D. Johnson and his wife executed a deed conveying title to the real property to Wilbur T. Little, who subsequently conveyed it to Alfred Brandt and wife. They conveyed it to Lillian M. Dixon. All of the deeds were duly recorded, the last one on October 21, 1926.

In the month of July, 1927, A. H. Dixon, the husband of Lillian M. Dixon, acting as her ostensible agent, informed Mrs. Whitaker that he and his wife could not pay the mortgage and that they desired to turn over the real property to her. Mrs. Whitaker assented to this arrangement, and prior to August 12, 1927, instructed her attorney, Robert H. Harms, "to wipe out the mortgage and get the property in my name."

On August 12, 1927, Mrs. Whitaker, without consideration, assigned the mortgage and note to Robert H. Harms, in whose possession these instruments then were, the note being payable to bearer. At that time there was no default under their terms.

On August 17, 1927, for the purpose of securing a loan of \$2,500 from the United States Building & Loan Association, Robert H. Harms executed and delivered to it an assignment of the note and mortgage. He also delivered the note and mortgage together with the assignment of the mortgage from Mrs. Whitaker to him and received the \$2,-

500. The United States Building & Loan Association had no notice of any defect in the title of Robert H. Harms.

After the oral agreement to surrender the property, A. H. Dixon delivered the keys to Mrs. Whitaker and told her to take possession. Some time in the fall of 1927 A. H. Dixon and his wife signed and acknowledged a deed to the property and mailed it to Robert H. Harms as agent of Mrs. Whitaker. Harms kept the deed and it was neither found nor recorded. The mortgage and note were not surrendered to A. H. Dixon and his wife or their predecessors in interest and the mortgage was never released.

Simultaneously with the transaction with the Dixons, Mrs. Whitaker negotiated with defendant Georgiana Finn and her husband, Cornelius M. Finn, for the sale of the property. An oral agreement of sale was entered into between Mrs. Whitaker and Mrs. Finn, and her husband. On September 1, 1927, the oral agreement was reduced to writing, the terms of which called for a total payment of a purchase price of \$6,500 in installments of which \$4,795 was paid to Mrs. Whitaker. In August, 1927, Mrs. Whitaker was informed by her attorney, Robert H. Harms, that the title to the property was "all fixed" and that it was now hers. She believed that the title was in her name; that she owned the property; that the mortgage had been released and on the 19th of August she delivered the keys to the defendant and her husband, who then began to take possession. They completed the move on August 30, 1927, and have resided on the premises ever since.

On January 29, 1931, Cornelius M. Finn, by grant deed recorded on January 31, 1931, conveyed all of his interest in the property to his wife, the defendant. On October 24, 1930, upon foreclosure proceedings brought by the United States Building & Loan Association against Lillian M. Dixon, Robert H. Harms and his wife, upon the note and mortgage of Richard D. Johnson and Bertha E. Johnson, all of the defendants defaulted, and a decree of foreclosure was made and entered and the property ordered sold. Thereafter sale of the premises was made to plaintiff as receiver of the United States Building & Loan Association, and on the 6th of June, 1932, a deed was executed and delivered to him.

Mrs. Whitaker paid the taxes levied against the property for the fiscal year 1927-28 and was reimbursed by defendant. Defendant paid all taxes levied or assessed up-

on the property for the four succeeding years.

The complaint in this action was filed August 31, 1932. In addition to the foregoing facts the trial court found as follows: "That after taking possession of said real property above described on said 30th day of August, 1927, said defendant occupied the said premises under a substantial enclosure, openly and notoriously, under a claim of right, and said occupancy was continuous and uninterrupted for a period of five years prior to the commencement of the action; said occupancy, however, was not hostile or adverse to the plaintiff herein or to his title in said real property, nor to the preceding owner of the mortgage lien thereon."

Defendant bases her defense upon two theories: (1) That she is lawfully in possession by virtue of the agreement of sale executed by Mrs. Whitaker and that Mrs. Whitaker's possession was adverse to the mortgagors and those claiming under them and therefore was adverse to that of plaintiff who derived title to the property from the assignees of the mortgagor; and (2) that the plaintiff's cause of action is barred by section 318 of the Code of Civil Procedure.

[1, 2] There are five elements required to establish an adverse possession sufficient to constitute a defense under the statute of limitations: (1) The possession must be actual occupation, open and notorious, and not clandestine. (2) It must be hostile to the true owner's title. (3) It must be held under a claim of title, exclusive of any other right, as one's own. (4) It must be continuous and uninterrupted for a period of five years prior to the commencement of the action, not, however, necessarily the next before the commencement of the action. (5) It must appear that the claimant has paid all taxes levied or assessed upon the land. As a general rule there must be a concurrence of all these elements. 1 Cal.Jur. 522.

As we have seen, the trial court found that the possession of defendant "was not hostile or adverse to the plaintiff herein or to his title in said real property, nor to the preceding owner of the mortgage lien thereon."

[3, 4] Inasmuch as it is through Mrs. Whitaker that the defendant is claiming title, the finding that the 1927 taxes were paid by Mrs. Whitaker and the subsequent taxes paid by the defendant would satisfy the requirements of section 325 of the Code of Civil Procedure. Therefore, the trial court found four of the five elements neces-

sary to establish an adverse possession sufficient to constitute a defense under the statute of limitations. However, as a general rule, there must be a concurrence of all of these elements. The court expressly found that the necessary element of hostility and adversity on the part of the disseisor is the failure of an essential element of adverse possession. It follows, therefore, that defendant's claim that she was in lawful possession under a title in Mrs. Whitaker which had ripened by adverse possession must fail as neither Mrs. Whitaker nor defendant had any such title.

[5, 6] Defendant earnestly urges that the trial court's finding that possession was not adverse to plaintiff or the preceding holders of the mortgage is not binding on us where all facts are fully set forth in the findings and do not sustain such conclusion. She further contends that although the trial court found the occupation of defendant was not hostile or adverse to the plaintiff, the other findings show that the possession of defendant was actually hostile and adverse.

"This is an appeal upon the judgment roll alone, the findings are conclusively presumed to be supported by the evidence; furthermore, it is also elementary that they are to receive, if possible, such a construction as will uphold rather than defeat the judgment thereon; they are to be liberally construed and, if possible, any ambiguity or inconsistency will be resolved in favor of sustaining the judgment." *Ochoa v. McCush*, 213 Cal. 426, 2 P.(2d) 357, 359.

[7, 8] It is true that the court found that Mrs. Whitaker put defendant into possession believing that she was the owner of the fee of the property free and clear of the mortgage. It is true also that the court found that the possession was not hostile or adverse to plaintiff. "The possession of a mortgagor, or his assignee, is not only entirely consistent with the rights and estate of the mortgagee, but, as a general rule, cannot be adverse thereto until he has denied the mortgagee's rights under the mortgage and set up an exclusive title in himself, so openly and notoriously that the mortgagee must have known of the adverse claim." 1 R.C.L. 748. Under this rule the finding that the possession of Mrs. Whitaker and defendant was open and notorious, under claim of right and continuous and uninterrupted for five years, is not inconsistent with the finding that it was not hostile or adverse to plaintiff.

[9] A further reason appears why the judgment must be affirmed. In California a mortgage does not give the mortgagee right of possession of the mortgaged premises in the absence of a special agreement to that effect. Neither the United States Building & Loan Association, nor plaintiff, had any right of possession of the mortgaged premises during the period allowed for redemption and until delivery of the sheriff's or commissioner's deed. *First National Trust & Savings Bank of San Diego v. Staley*, 219 Cal. 225, 25 P.(2d) 982. A situation involving a legal principle similar to the one before us was before the Supreme Court in the case of *Leonard v. Flynn*, 89 Cal. 535, 26 P. 1097, 1098, 23 Am.St.Rep. 500, where it was said: "Plaintiff's grantor, as we have already seen, was not possessed of the legal title to this tract of land until he received the deed from the sheriff, May 28, 1888. He had no right of entry until that time, and it was only at that time that his cause of action accrued. The statute of limitations does not begin to run until the cause of action has accrued. *Collins v. Driscoll*, 69 Cal. 550, 11 P. 244. If he had no right of entry until 1888, it would be a harsh rule to hold that a title by adverse possession was undergoing the process of creation against him prior to that time; yet there are some reasons and also authority from other states supporting such rule of law. *Pratt v. Pratt*, 96 U.S. 704 [24 L.Ed. 805]. We will not enter into a detailed discussion of this question, owing to the fact that it is essentially a rule of property, and therefore it is of vast importance that the law as heretofore laid down by this court should be deemed unquestioned and conclusive. 'The statute of limitations does not commence running against a purchaser of land at a sheriff's sale until the sheriff's deed has been delivered to the purchaser.' *Jefferson v. Wendt*, 51 Cal. 573." It follows that as plaintiff's right of possession did not accrue until June 6, 1932, and as there had been no holding of possession hostile and adverse to his interest prior to that time, no title by adverse possession was established against him or his predecessor in interest.

There are cases holding that a person in possession may gain title by adverse possession, against a mortgagee, where the adverse possession antedated the mortgage. Those cases are not controlling here, as in the instant case the asserted adverse possession started, if at all subsequent to the date and recordation of the mortgage.

Defendant claims that the cause of action is barred by section 318 of the Code of Civil Procedure. That section reads as follows: "No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the property in question, within five years before the commencement of the action."

[10] The trial court expressly found that plaintiff is now, and ever since June 7, 1932, has been, the owner and entitled to possession of the property; that Mrs. Whitaker, through whom defendant claims, was not an adverse possessor; that plaintiff was seized of the property in question on June 7, 1932. Therefore, section 318 of the Code of Civil Procedure has no application to the facts of the instant case as plaintiff was seized of the property within five years before the commencement of his action.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.



13 Cal.App.2d 274

PEOPLE v. WHELAN.

Cr. 293.

**District Court of Appeal, Fourth District,
California.**

April 16, 1936.

Criminal law — 1182

Under statute providing that judgment may be affirmed but cannot be reversed without argument, conviction would be affirmed on motion of people, where no briefs were filed and no appearance made for defendant on date upon which case was placed on calendar for argument (Pen.Code, § 1253).

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Clifford W. Whelan was convicted of an offense, and he appeals.

Affirmed.

Edgar G. Langford, of San Diego, for appellant.

Thomas Whelan, Dist. Atty., and William P. Mahedy, Deputy Dist. Atty., both of San Diego, for the People.

MARKS, Justice.

The clerk's and the reporter's transcripts in this action were filed in the office of the clerk of this court on March 3, 1936, and the case was placed on the calendar for argument on April 14, 1936. No briefs have been filed and no appearance has been made for defendant. The people moved to affirm the judgment under the provisions of section 1253 of the Penal Code. It is evident that the motion must be granted.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.



13 Cal.App.2d 259

PEOPLE v. ESCOFFEN.

Cr. 1873.

District Court of Appeal, First District,
Division 2, California.

April 18, 1936.

1. Burglary $\Rightarrow$ 41(6)

Evidence of identification of defendant by witnesses who were present at time of his arrest, one of whom had seen him come out of building which had been broken into, *held* sufficient to sustain conviction of burglary.

2. Criminal law $\Rightarrow$ 1166½(12)

In burglary prosecution against four defendants, question asked witness by court as to which of defendants had pleaded guilty *held* not prejudicial error, as to defendant pleading not guilty, where reference in district attorney's opening statement to such plea of guilty had not been objected to, and court had not been asked to admonish jury.

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Charles Escoffen was convicted of burglary, and he appeals.

Affirmed.

A. J. Hennessy, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

STURTEVANT, Justice.

The district attorney filed an information against William Pierce, Ernest Vidal, Gerald McMahon, and this defendant, charging them with having committed the crime of burglary. All pleaded not guilty. Before the trial William Pierce changed his plea to guilty. The other defendants were tried before the court sitting with a jury. The latter returned a verdict against all of the defendants on trial and found the offense to be burglary in the second degree. Escoffen made a motion for a new trial and also one for probation. Both motions were denied. From the judgment of conviction, and from the order denying his motion for a new trial, the defendant Escoffen has appealed.

[1] He presents and argues two points. He contends that the evidence was insufficient and in that connection he asserts that the evidence of identification was insufficient. The point may not be sustained. All four of the persons named above left the Uptown Club on Market street, entered an automobile owned by the defendant Vidal, and started out to locate a place to burglarize. They started on their ride about 11:30 p. m. on September 20, 1935, and drove to different places. At about twenty minutes after 2 the next morning a disturbance was heard in front of the store located at 1021 Golden Gate avenue. On the opposite side of the street there is an apartment house under the management of Leo Bercu. One of his tenants was Harry Mervine. The latter testified that his attention was attracted to the noise across the street. He looked out of the window and saw two men at first walk away from the store at 1021 Golden Gate avenue and then return, break open the door, and enter. After they entered the store Mervine reported to Bercu and the latter called the police. Before the police arrived, Escoffen came out, crossed Golden Gate avenue, and stood near the automobile. Still standing at the window and watching Escoffen when the police arrived Mervine called from the window informing them that one person had gone into the store and was still in there and that Escoffen, who stood by the automo-

bile, had just come out. Later Mervine went down stairs and there saw Escoffen and the other defendants, all of whom were placed under arrest. Both Mervine and Bercu appeared at the trial and identified this defendant. Under these circumstances, we think it is perfectly clear that it may not be said the evidence of identification was insufficient.

[2] In making his opening statement to the jury the district attorney, among other things, stated that the defendant Pierce had pleaded guilty. No objection or exception was taken to the remark. Indeed, it is difficult to appreciate what objection could have been taken to the statement. Near the end of the trial, in clarifying the testimony of one of the police officers, the trial court asked him if Pierce was the man who had pleaded guilty. He replied that he was. Thereupon counsel for the defendant stated, "I move to strike that out and assign that as misconduct." However, he did not ask that the jury be admonished to disregard it. Counsel have not cited any authority, and we know of none that would justify us in holding that the question propounded by the court, the answer thereto, or both taken together were, under the facts contained in this record, prejudicial error.

The judgment and the order denying the defendant's motion for a new trial are both affirmed.

We concur: NOURSE, P. J.; SPENCE, J.



13 Cal.App.2d 284

**STATE COMPENSATION INS. FUND v.
DALTON et al.**

Civ. 9902.

District Court of Appeal, First District,
Division 2, California.

April 17, 1936.

Hearing Denied by Supreme Court
June 15, 1936.

I. Automobiles ⇨244(36)

Evidence held to show that deceased's death proximately resulted from operation of truck which ran wild on mountain side.

2. Automobiles ⇨181(2)

County employee whose employment commenced when he boarded truck in morning to leave road camp for scene of roadwork and ended at night when he got out of truck on its return to camp, was not "guest" or "passenger" in truck returning to camp from scene of roadwork, and hence owner of truck who had been employed by county to use truck on road-work was liable for death of employee who was killed when owner negligently permitted truck to run wild on mountain side.

3. Master and servant ⇨347

Statute permitting employer or insurance carrier paying compensation to maintain action against tort-feasor for recovery of damages sustained by heirs of deceased employee held not unconstitutional as authorizing additional recovery against tort-feasor of all sums paid by employer or insurance carrier to heirs (St.1931, p. 2370, § 26).

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by the State Compensation Insurance Fund against John J. Dalton and others. From a judgment against the defendant John J. Dalton, the latter appeals.

Affirmed.

McEnerney, Morris, Gillen & McEnerney and Charles B. Morris, all of San Francisco, for appellant.

Keith & Creede, Walter J. O'Connor, Frank J. Creede, Edmund D. Leonard, and Percy J. Creede, Jr., all of San Francisco, for respondent.

STURTEVANT, Justice.

In an action to recover damages for personal injuries, the plaintiff recovered a judgment against the defendant John J. Dalton, and the latter has appealed. Other defendants were named in the complaint, but they were not served and no judgment was rendered against them.

Prior to the 27th day of February, 1933, the county of Alameda was doing certain roadwork on a road leading from the eastern side of Berkeley toward the top of Grizzly Peak. It had many men employed, and it was operating a number of trucks. John J. Dalton was the owner of a certain Bethlehem truck, and he was employed by Mr. Wilhelm, the engineer for Alameda county, to take his truck and assist in do-

ing the work. His compensation was fixed at \$1.50 an hour for himself and truck. A Mr. Pixley was the foreman in charge of the work. Dalton was directed to take the truck and report on the job to Mr. Pixley, who would give him his instructions. On Sunday, the 26th day of February, 1933, Dalton drove the truck to the job and parked it. The next morning he commenced the performance of the work for which he had been employed. The men had established a camp at the junction of Grizzly Peak and Fish Ranch roads which is some distance down the side of the mountain, although the actual labor was being performed at a point up toward the top of the mountain. Acting under the direction of the foreman, the men boarded the trucks in the morning and were hauled to the place where the actual labor was to be performed. At the end of the day the men were directed to board the trucks and be transported down the mountain to the camp. Some of the trucks hauled men, and others hauled tools. Their time ran from leaving camp until returning there. At about 4 p. m. on the 27th day of February, 1933, 25 or 30 men, including Jesse Bradley, one of the employees, boarded the truck being driven by the defendant Dalton. After they had started down the mountain in a very few minutes it was found that the speed of the truck could not be controlled by the driver. As some of the witnesses stated, the truck ran wild, and so continued down the grade. It passed the camp and continued still further down until it came to an oil station where the road forked. At first the driver attempted to turn to the right, but at once shifted and turned to the left on the branch that was slightly uphill. After passing the gas station a short distance it came to a stop. After leaving the top of the mountain some of the men jumped off or were thrown off in different places. Jesse Bradley remained on the truck, but, according to the evidence, he was at different places on the truck as it speeded down the mountain. The point where the roads branched is termed the intersection of Fish Ranch road and the Tunnel road. On reaching the intersection the truck had commenced to slow down. At that time Jesse Bradley was standing on the right running board. About 100 feet back from the place where the truck came to a standstill Bradley either jumped off or was thrown off. He was seen to light on his feet, but he fell backward and the rear wheel of the truck passed over his head,

crushing it, and he died almost immediately.

As the driver started down the mountain he was driving in second gear. When the truck commenced to accelerate its speed he attempted to shift the gear and a snapping was heard. One of the employees attempted to operate the safety brake, but it would not control the truck. The driver applied the footbrake and it would not control the truck. After the accident had happened an examination disclosed that the brake linings were very defective. There was some expert evidence to the effect that the linings had been worn out for some time. On the other hand, Dalton testified that the day before the accident he had a mechanic go over the truck and that the mechanic reported to him it was in number one working order.

Jesse Bradley left surviving a widow, Jackie Bradley, and a son, Gerald. They made an application to the Industrial Accident Commission to fix their compensation, and it was fixed in the sum of \$1,000 as a death benefit and \$150 as a burial expense, making a total of \$1,150. This plaintiff being the insurance carrier of Alameda county, the commission found that the plaintiff had become obligated to pay the claim above stated. Having become so obligated, the plaintiff commenced this action seeking to recover \$21,150 from the defendant Dalton. After the action was tried before the court sitting without a jury, the court awarded a judgment in favor of the plaintiff for the sum of \$7,500.

In its complaint the plaintiff inserted two counts. In the first count it alleged: "That at said time and place, by reason of the negligence and carelessness of the defendants in maintaining, operating and controlling said truck, the said truck got out of control of said defendants and ran away at an excessive and dangerous rate of speed on the steep grade of said roads, thereby causing Jesse Bradley to be thrown from said truck to the road and causing him to sustain serious injuries which proximately caused his death on said day. That the injuries so sustained and the death of said Jesse Bradley on said day were directly and proximately caused by the said negligence and carelessness of defendants in maintaining, operating and controlling said truck at said time and place."

In the second count the plaintiff alleged that the brakes and other parts of the truck were defective, that defendant knew they

were defective, and that Jesse Bradley did not know they were defective. Otherwise the allegations are the same as in the first count. The trial court found the facts in each count against the defendant and in favor of the plaintiff.

[1] The defendant contends that the evidence is insufficient to support the judgment as there is no evidence that the death of Jesse Bradley proximately resulted from the operation of defendant's automobile. We think it is sufficient to state that the foregoing facts clearly show the contrary.

[2] The defendant next contends that Jesse Bradley was riding in defendant's automobile as a guest and therefore the evidence is insufficient to justify a judgment against the defendant predicated upon negligence. The facts clearly indicate that Bradley was neither a passenger nor a guest, but was merely in the discharge of his duty as an employee of Alameda county. When, upon leaving camp, Bradley boarded a truck, his day's employment commenced and it continued until at camp, at night, he stepped out of the truck. In the meantime he was acting under the control and direction of his employer. *Harlan v. Industrial Accident Commission*, 194 Cal. 352, 356, 228 P. 654; 71 C.J. 722.

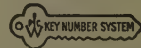
[3] The defendant further contends that the judgment herein is dependent for its validity upon section 26 of the Workmen's Compensation Act (St.1917, p. 854, § 26, as amended by St.1931, p. 2370) which is unconstitutional and void, and hence the judgment is invalid. This contention is based upon the claim that said section 26 of the act provides for the recovery against the tort-feasor of all damage sustained by the heirs of the deceased employee, and in addition thereto a further recovery against the tort-feasor of all sums paid by the employer or insurance carrier to said heirs. The vice in this claim rests in the assumption that the statute authorizes such double recovery. While the section is not altogether clear, a reading of the entire section leads us to the conclusion that the portions to which defendant refers deal primarily with procedural matters rather than substantive rights and should not be construed to provide for such double recovery. *San Bernardino County v. Industrial Accident Commission*, 217 Cal. 618, 20 P.(2d) 673; *Dighton v. Martin*, 4 Cal.App.(2d) 401, 41 P.(2d) 197. We are, therefore, of the opinion that defendant's claim of unconstitu-

tionality may not be sustained. We may further state that the record contains no evidence that such double recovery was permitted in the present case.

The allowance of an attorney fee is no concern of this defendant. The statute does not authorize an attorney fee against the defendant. When the action is maintained by the employer or his insurance carrier, the statute authorizes the trial court to fix an attorney fee which the employer may deduct from the amount which would otherwise be payable to the employee. But in the instant case the record does not show that any attorney fee was fixed or paid. The validity of the provision on the subject of attorney fees is not, therefore, involved.

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.



**DRAPEAU, Building and Loan Commissioner,
v. FULLERTON SECURITIES COR-
PORATION, Limited.***
Civ. 9609.

District Court of Appeal, Second District,
Division 1, California.

April 15, 1936.

Hearing Granted by Supreme Court
June 11, 1936.

1. Building and loan associations § 2

Act authorizing building and loan commissioner to enforce stockholders' liability for association's debts, which did not define that liability, held unconstitutional, so that liability of stockholder for debts of association was limited to liability imposed by Constitution, being direct liability to creditor for part of each debt, proportioned to stock held by stockholder (St.1911, p. 607; Const. art. 12, § 3).

2. Building and loan associations § 6(2)

Clause in act creating stockholders' liability for debts of building and loan association collectible by building and loan commissioner, which provided that "rights" of prior investors should not be impaired, held to exempt stockholder who had become such prior

*For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 64 P.2d 944.

to enactment of the act, since exemption and limitation of liability were "rights" of stockholder who was thus liable only under law as it existed when he purchased stock (St.1931, pp. 483, 509, 510, 548, §§ 1.01, 7.01 to 7.03, 14.04).

[Ed. Note.—For other definitions of "Right; Rights," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Action by Louis C. Drapeau, building and loan commissioner of the state of California, substituted in the place and stead of Friend W. Richardson, building and loan commissioner of the state of California, against the Fullerton Securities Corporation, Limited. From an adverse judgment, the plaintiff appeals.

Affirmed.

Roland Tognazzini, of San Francisco, and Roscoe C. Andrews, of Los Angeles, for appellant.

Elliott & Aberle, of Los Angeles, for respondent.

WHITE, Justice pro tem.

This is an appeal from a judgment in favor of the defendant in an action brought by appellant, as building and loan commissioner of the state of California, to recover the amount of an assessment levied by the building and loan commissioner on the stockholders of Pan American Building-Loan Association while the latter was in process of liquidation under the provisions of the Building and Loan Association Act of 1931 (St. 1931, p. 483).

Section 7.01 of the 1931 Building and Loan Association Act (St.1931, p. 509), with which we are concerned, provides that stockholders of building and loan associations "shall be held individually liable, equally and ratably, and not one for another, for all contracts, debts and engagements of such association, including investment certificates and shares, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such stock."

Section 7.02 of the act (St.1931, p. 509) provides as follows: "The liability of stockholders pursuant to section 7.01 of this act shall be enforced exclusively pursuant to this section and the next succeeding three sections of this act. Whenever

the commissioner, or a receiver or trustee of any association appointed by any court, being in lawful possession of the property, business and assets of such association, shall determine that it is necessary to do so for the purpose of paying the contracts, debts and engagements of such association, such officer may enforce the said individual liability of the stockholders, and for such purpose may levy a ratable assessment upon the stockholders of such association without previous judicial ascertainment of the necessity for such action and the action of such officer in levying such assessment shall be conclusive on the stockholders as to the necessity for such assessment."

Section 7.03 of the act (St.1931, p. 510) reads: "If any stockholder of such association shall fail to pay said assessment in full upon the date specified in said order as the date on which said assessment shall be due and payable, a right of action shall immediately accrue to the commissioner or receiver or trustee in possession of the property, business and assets of such association to recover the amount of said assessment or the amount remaining unpaid thereon from the stockholder or stockholders failing to pay said assessment in full. Such officer shall have full power to maintain an action or actions in this state, or in any other state or country, to enforce and collect any sum or amounts due and payable and remaining unpaid upon any such assessment from any stockholder or stockholders failing to pay the same in full."

The complaint alleges the matters and things necessary to show compliance with the provisions of the statute above set forth, including the due levy of an assessment of \$100 per share upon the stockholders of said Pan American Building-Loan Association, and the refusal of the defendant to pay. Defendant demurred to the complaint. The demurrer was sustained, and upon failure of plaintiff to amend, a judgment was entered in favor of defendant.

[1] Several grounds are urged by appellant for reversal, and it is the position of the trial court and of respondent here, which appellant concedes, that defendant acquired its stock on June 24, 1929; that on this date section 3 of article 12 of the Constitution of this state, declaring the liability of corporation stockholders, and also section 634 of the Civil Code and the

Building and Loan Commission Act of 1911 (St.1911, p. 607), were still in force. The act of 1911 purported to authorize the building and loan commissioner to enforce the liability of holders of guarantee stock in a building and loan association for its debts, but did not attempt to define that liability. Our Supreme Court, however, in the case of *Wood v. Hamaguchi*, 207 Cal. 79, 277 P. 113, 63 A.L.R. 861, held that a provision of the Bank Act, empowering the superintendent of banks to levy and collect assessments on the stockholders of a bank for the purpose of paying the bank's debts, was in violation of section 3, article 12, of the State Constitution, and therefore void. For the same reasons it is our opinion that the above-mentioned similar provisions of the Building and Loan Commission Act of 1911 were in conflict with the Constitution, and, therefore, of no force or effect. It follows, therefore, that the liability of defendant as a stockholder for the debts of the Pan American Building-Loan Association, at the time defendant acquired its stock therein, was limited to that imposed by the then existing section 3, article 12, of our Constitution; that is to say, a liability directly to the creditor for a part of each debt, proportioned to the stock held by the defendant.

In 1930, section 3, article 12, of the Constitution, was repealed, and section 1 thereof was amended so as to commit the whole matter of stockholders' liability to the Legislature. In 1931 (St.1931, p. 444), section 322 of the Civil Code, which was substantially the same as section 3, article 12, of the Constitution, was repealed, and the existing law, under which this litigation was commenced, was adopted. This act of 1931 is the only provision to be found in the present Constitution or statutes of this state concerning the liability of stockholders in a building and loan association.

[2] It is true that section 7.01 of the Building and Loan Association Act of 1931 imposes upon stockholders of such an association a liability such as plaintiff seeks to enforce in this proceeding, while the

ucceeding sections, 7.02 and 7.03, authorize the building and loan commissioner to enforce that liability by assessment and suit. However, section 14.04 of the same act (St.1931, p. 548), contains several very general saving clauses, among which we find the following: "Nothing in this act is intended or shall be construed to impair in any manner the rights of those who have heretofore become investors in any association." The definition of "investors" appearing in section 1.01 of the act (St. 1931, p. 483) includes a stockholder such as defendant was, thereby bringing the defendant within the protection of the saving clause. It is therefore apparent that in June, 1929, when defendant acquired its stock, and up to August, 1931, when the present Building and Loan Association Act became effective, defendant's liability was only to each creditor for a pro rata part of such creditor's claim. A reading of the above-mentioned saving clause impresses us that if this exemption and limitation of liability were "rights" of the defendant as a stockholder, then the saving clause in the 1931 act prevented any impairment of such rights. We find ourselves in accord with the holding in *Close v. Noye*, 147 N.Y. 597, 603, 41 N.E. 570, that a stockholder's exemption from liability for the debts of a corporation is a "right," and therefore preserved to him by the saving clause contained in an act repealing such exemption.

Concluding as we do that at the time defendant acquired its stock it was, under the then existing laws, exempt from assessment and suit by the building and loan commissioner, and its liability was limited to each creditor for a pro rata part of such creditor's claim, and that such exemption and limitation were preserved to defendant by the saving clause in section 14.04 of the present act, makes it unnecessary for us to consider the additional grounds urged on this appeal. The defendant's demurrer was properly sustained.

The judgment is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.

13 Cal.App.2d 279

AMERICAN TRUST CO. v. GREUNER.

Civ. 9755.

District Court of Appeal, First District,
Division 1, California.

April 17, 1936.

1. Alteration of instruments Ⓒ11(2)

Material alteration made by payee, or party seeking to enforce instrument, avoids it, but instrument is not avoided by alteration made by stranger acting without authority (Civ.Code, § 3206).

2. Alteration of instruments Ⓒ11(1)

Notation of change in interest rate made on note by teller of payee bank for purpose of his own information, without instruction to make change from any one in authority, *held* not "alteration," but mere "spoliation," which did not affect validity of note (Civ.Code, § 3206).

[Ed. Note.—For other definitions of "Alter; Alteration" and "Spoliation; Spoliation," see Words & Phrases.]

3. Alteration of instruments Ⓒ12

Material alteration in note made in accordance with agreement between maker and payee does not avoid note (Civ.Code, § 3206).

4. Alteration of instruments Ⓒ13

Maker of note who did not refuse to pay additional interest, or make objection when his account at payee bank was charged with such increased interest, *held* to have ratified change, precluding him from avoiding note on ground of alteration in placing of notation of change of interest rate thereon (Civ.Code, § 3206).

5. Alteration of instruments Ⓒ13

In suit on note defended on ground of material alteration, instructions that payee had right to alter instrument if maker agreed thereto, or if alteration were innocently made, and that material alteration might be ratified, *held* proper (Civ.Code, § 3206).

6. Pleading Ⓒ403(3)

Any defect in complaint, in action for deficiency judgment on note secured by underlying notes which were themselves secured by trust deed, in not stating sale under trust deed, where complaint was not demurred to, *held* cured by answer alleging prior sale and crediting of proceeds upon note.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by the American Trust Company against W. M. Greuner. Judgment for plaintiff, and Philip Greuner, as special administrator of the estate of W. M. Greuner, who was substituted as defendant in place of W. M. Greuner, appeals.

Affirmed.

Alfred Nelson, of Oakland, for appellant.

Ben F. Woolner and John H. Tolan, both of Oakland, for respondent.

TYLER, Presiding Justice.

Action upon a promissory note to recover an unpaid balance due thereon. The complaint alleged that defendant W. M. Greuner, on the 5th day of December, 1929, executed a promissory note in favor of plaintiff American Trust Company in the sum of \$65,000 with interest at the rate of 6½ per cent. per annum and that the note became due June 5, 1930. It was further alleged that the sum of \$37,063.94 had been paid thereon, leaving a balance of \$27,936.06 together with interest. Defendant Greuner by answer admitted the execution of said note, but alleged that it had been altered on the face thereof, by increasing the interest from 6½ per cent. to 7 per cent., with the resulting release of all its obligations. Trial was had before a jury which rendered a verdict in favor of the plaintiff in the amount claimed, and judgment was rendered in conformity with the verdict. Motion for a new trial was made and denied. Since the rendition of judgment, defendant has died and his special administrator has been substituted in his place and stead.

[1-4] The main ground relied on for a reversal is the claim that the note was erroneously received in evidence. Whether the note was properly admitted revolves upon the question of whether there was a material alteration of the instrument as to avoid it under the provisions of section 3206 of the Civil Code. It appeared in evidence that the note sued upon was an unconditional promise to pay although it was secured by several other underlying notes which in turn were secured by deeds of trust. Defendant failing to pay, foreclosure upon the trust deeds was had in 1932 and the amount received was credited on the note sued upon. Prior to the foreclo-

sure and at the time of the maturity of the note on June 5, 1930, defendant became apprehensive that the bank would start proceedings against him and secure a deficiency judgment, and he visited offices of the bank requesting further time to meet his obligation. He was informed that the note would be allowed to run for a while longer but that defendant would have to pay an additional $\frac{1}{2}$ per cent., or 7 per cent., interest for the period of the extension. Defendant denied that he ever expressly agreed to the increase. At the time the forbearance was agreed upon one of the officers of the bank informed a note teller who had charge of the note of the increase in interest, whereupon the teller for his own guidance, in order to keep his instructions before him and without any directions from anyone in authority so to do, placed a pencil notation or memorandum on the note, reading "7%, 6-5-30." It is under these facts that appellant claims the case is brought within the provisions of section 3206 of the Civil Code, which provides in effect that any alteration which changes the sum payable, either for principal or interest, is a material alteration which voids the instrument. It is true that any material alteration in an instrument avoids it. This rule, however, has application to cases where such alteration has been made by the payee or party seeking to enforce it. It has no application where the alteration has been made by a stranger who acts without authority. *Walsh v. Hunt*, 120 Cal. 46, 52 P. 115, 39 L.R.A. 697. It is thus manifest that the facts do not bring the case within the provision invoked. The mere placing of the notation on the instrument by the note teller for the purpose of his information in computing the interest does not constitute a material alteration of the instrument. He had no instructions from any one in authority to make any change whatsoever in the note. Such act amounts at most to a spoliation, which will not prevent a recovery upon the contract in accordance with its original terms. This is obviously upon the principle that the act of a mere interloper, without the privity of the parties, should not be permitted to defeat a contract to the extent that it would otherwise be valid and binding, and an agent, as here, without authority is in this sense a stranger to the transaction. It is clear that what was done here was at most a spoliation as distinguished from an alteration which did not affect the validity of the note. *Central California Creditors'*

Ass'n v. Seeley, 91 Cal.App. 327, 267 P. 138; *Vanderford v. Farmers' & Mechanics' Nat. Bank*, 105 Md. 164, 66 A. 47, 10 L.R.A.(N.S.) 129; *Carr v. Welch, Executor, etc.*, 46 Ill. 88; *Port Huron Engine & Thresher Co. v. Sherman*, 14 S.D. 461, 85 N.W. 1008; *Paterson v. Higgins*, 58 Ill. App. 268. We are cited by appellant to the case of *Nissen v. Ehrenpfort*, 42 Cal.App. 593, 183 P. 956, as supporting the contention that the notation constituted a material alteration. In that case, however, there was an intentional alteration, made by one of the officers of the payee. Totally aside from our conclusion that the act in question did not constitute a material alteration and the instrument was in no manner affected by the notation, there is evidence of ratification sufficient to bind the maker even assuming the notation to be an alteration. A material alteration in a note, made in accordance with an agreement between the maker and payee, does not avoid the note. In addition to the evidence that defendant did not refuse to pay the additional interest when informed that he would have to do so to obtain the forbearance and avoid a deficiency judgment, it appeared that he kept a commercial account with plaintiff bank and that for a long period of time he was charged with the increased interest, and monthly statements were rendered to him which indicated this fact, and he never at any time made objection thereto.

[5] Appellant takes exception to several instructions. The court instructed the jury that plaintiff had a right to alter the instrument if defendant had agreed to the alteration or if the same had been made innocently and without fraudulent intent. The jury was further instructed to the effect that a material alteration might be ratified and that such ratification might be evidenced by the failure to object to the charge in his account within a reasonable time. What we have heretofore said in relation to the admissibility of the note disposes of the objections to the instructions.

[6] Appellant makes the further contention that as the note was secured by deeds of trust, and the complaint fails to state a sale thereunder, the deficiency judgment is invalid. No such question was raised at the trial. The note sued upon was not secured by any deed of trust, but by underlying notes which themselves were so secured. While plaintiff did not allege a sale under the deeds of trust, the complaint was

not demurred to, and defendant in his answer supplied whatever defect might exist in this particular for the answer alleged a prior sale and the crediting of the proceeds thereof upon the note and no claim is made that the sale was in any manner fraudulent or unfairly conducted, or that the price obtained was inadequate. The security having been exhausted prior to suit upon the note, plaintiff was entitled to sue for any deficiency suffered.

The order and judgment are affirmed.

We concur: KNIGHT, J.; CASHIN, J.



13 Cal.App.2d 304

NEBLETT v. NEBLETT.

Civ. 10933.

District Court of Appeal, Second District,
Division 2, California.

April 20, 1936.

Hearing Granted by Supreme Court
June 19, 1936.

1. Divorce ☞226

After husband obtained interlocutory divorce decree, wife's affidavit seeking to compel husband to pay wife's counsel fees took place of "complaint" under statute authorizing court to grant any relief consistent with case made by complaint and embraced within issues (Code Civ.Proc. § 580).

[Ed. Note.—For other definitions of "Complaint," see Words & Phrases.]

2. Divorce ☞228

Order requiring plaintiff husband in divorce action to pay counsel fees to wife *held* authorized as being consistent with allegation of wife's affidavit that she was wholly without means, and was embraced within issues, as against objection that show cause order required payment to wife's attorneys instead of to wife (Code Civ.Proc. § 580).

3. Divorce ☞228

Order to show cause why plaintiff husband in divorce action should not pay counsel fees to wife's attorneys took place of prayer for relief in complaint, as respects whether order was embraced within issues within statute relating to relief to be granted (Code Civ.Proc. § 580).

4. Pleading ☞193(7)

Prayer for relief is not demurrable.

5. Judgment ☞252(1)

If prayer asks relief which cannot be granted, court may grant other and appropriate relief.

6. Divorce ☞226

Jurisdiction is determined by allegations of complaint or of affidavit seeking to compel plaintiff in divorce action to pay wife's attorney's fees, and not by prayer of complaint or show cause order requiring payment of attorney's fees to wife's attorney rather than to wife (Code Civ.Proc. § 580).

7. Divorce ☞228

Where hearing in divorce action on wife's affidavit to compel husband to pay counsel fees was conducted by both parties on assumption that issue involved was right of wife rather than her attorneys to have counsel fees awarded, order directing payment of fees to wife instead of to her counsel, as required by show cause order, if otherwise legally proper, should be upheld.

8. Divorce ☞152

Entry on minutes setting forth items from memorandum signed by judge, not intended as final disposition of issues in divorce suit, but merely as guide for preparation of formal judgment, *held* not final adjudication, but mere memorandum for later formal order.

The minute entry set forth that defendant was granted leave to take child of parties from the county "for reasonable length of time at reasonable intervals," but did not set forth length of time or period at which child could be taken from the county, nor did such minute entry purport to cover certain modifications of previous order concerning custody of child which was set forth in detail in the subsequent final order nor did it order payment of attorney's fees, but merely fixed amount thereof.

Appeal from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Action by William H. Neblett against Leona Walton Neblett. From adverse orders, plaintiff appeals.

Affirmed as to one order, and appeal from other order dismissed.

R. Dean Warner, of Los Angeles, for appellant.

Joseph L. Lewinson, and Donald Y. Armstrong, both of Los Angeles, for respondent.

WOOD, Justice.

Plaintiff obtained from defendant an interlocutory decree of divorce January 28, 1928, in which it was provided that defendant should have custody of the minor son of the parties under certain conditions and that plaintiff should pay to defendant the sum of \$50 per month for the support of the child. On June 18, 1934, plaintiff filed an affidavit for an order to show cause in which he sought to modify the order providing for the child's custody. Defendant thereupon filed affidavits and had issued orders to show cause by which she sought to increase the support allowance to \$400 per month and to compel plaintiff to pay counsel fees in the sum of \$5,000. At the hearing both parties were denied the relief sought, except that certain changes were made in the order concerning the custody of the child, and defendant was awarded counsel fees in the sum of \$1,500. Plaintiff appeals from the order for counsel fees.

[1-7] Defendant's order cited plaintiff to show cause why he "should not pay to defendant's attorneys, Messrs. Joseph L. Lewinson and Donald Armstrong, the sum of \$5,000." Plaintiff now contends that, since he was not ordered to show cause why he should not pay counsel fees to defendant rather than to her attorneys, there is no basis in this proceeding upon which an order can be legally made requiring him to pay counsel fees to defendant. This contention cannot be sustained. The foundation for the order to show cause was the affidavit of defendant, in which she stated that she was "wholly without means to either employ an attorney or defray the costs to represent her and her said minor in said proceeding." Section 580 of the Code of Civil Procedure provides: "The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case, the court may grant him any relief consistent with the case made by the complaint and embraced within the issue." In proceedings of this kind the affidavit may be considered as taking the place of the complaint referred to in this section. Plaintiff appeared and contested the matter. The relief granted was consistent with the allegations of the affidavit and with the evidence introduced, and was embraced within the issues. The affidavit being considered as taking the place of the complaint, the order to show cause may be

considered as taking the place of the prayer for relief. A prayer for relief cannot be the subject of demurrer. *Bailey v. Dale*, 71 Cal. 34, 11 P. 804. If the prayer asks for relief which cannot be granted, the court may nevertheless grant other and appropriate relief. *Miller v. Superior Court*, 59 Cal.App. 334, 210 P. 832. Jurisdiction is determined by the allegations of the complaint, in this case the affidavit, and not by the prayer. *Greenwood v. Greenwood*, 112 Cal.App. 691, 297 P. 589. Moreover, plaintiff did not raise the question of the jurisdiction of the court to order counsel fees paid to defendant, but appeared at the hearing and contested the application upon several other grounds. In addressing the court counsel for plaintiff stated: "First, that the proposition with regard to the payment of attorneys' fees in connection with this matter or any other matter is covered by the contractual relationship between the parties; and, second, that they are seeking to assert attorneys' fees for services that have been rendered, not services to be rendered in the future." Manifestly the hearing was conducted upon the assumption that the issue involved was the right of defendant, rather than her attorneys, to have counsel fees awarded. It was apparently so understood by plaintiff, for in his notice of appeal from the order (so designated) of August 6, hereinafter referred to, he appeals "from that part of an order of the superior court of Los Angeles county entered on the 6th day of August, 1934, ordering the plaintiff to pay to the defendant as attorneys' fees the sum of \$1,500." The issue of the awarding of counsel fees to defendant was undoubtedly tendered at the hearing by the parties, both of whom treated the issue as if properly presented. Under such circumstances an award made, if otherwise legally proper, should be upheld. *Slaughter v. Goldberg, Bowen & Co.*, 26 Cal.App. 318, 147 P. 90; *Russell v. Ramm*, 200 Cal. 348, 254 P. 532.

[8] The issues were submitted to the court for decision on July 20, 1934. The trial judge on August 6, 1934, filed a memorandum, part of which is as follows: "The part of said application that said decree of divorce be modified 'to permit defendant to take said minor child from the county of Los Angeles, state of California, for reasonable lengths of time, at reasonable intervals, as may seem just and reasonable to the court' should be and is

granted. The attorneys' fee to be paid by said plaintiff to said defendant's attorneys, Messrs. Joseph L. Lewinson and Donald Armstrong, for representing said defendant in the matters of the proceedings and orders to show cause herein heard by this court in and during the month of July, 1934, is allowed and fixed at and in the sum of \$1,500." On the same day the clerk entered the following in the minutes of the court: "In this cause, heretofore submitted, the court now renders his decision and denies defendant's application for modification as to amount of support for minor child but grants leave for defendant to take minor child from the county of Los Angeles for reasonable lengths of time at reasonable intervals and fixes the attorney's fees to be paid to defendant's attorney by plaintiff at \$1,500. (See memorandum on file.)" On August 8, 1934, it was stipulated by the parties, upon plaintiff's request, "that execution on any decree or order made by the court might be stayed for and including ten days from and after the date of said stipulation, or from the date of the signing of any formal order or decree herein." On August 18, 1934, plaintiff filed notice of appeal from the minute entry of August 6, 1934, which is referred to in said notice as an order. On August 29, 1934, the trial judge signed and filed a formal order and decree covering the various issues of the proceeding and providing, among other things, for a modification of the order previously in effect concerning the custody of the child and specifically setting forth certain weeks and months during which the child could be taken from the county of Los Angeles. It was provided in the said formal decree as follows: "That, good cause appearing therefor, defendant's application for attorney fees should be, and the same hereby is, granted, except that attorney fees are allowed to defendant and fixed at and in the sum of fifteen hundred dollars (\$1,500), and plaintiff shall forthwith pay said sum to defendant." Plaintiff appeals from that part of the order which requires him to pay attorneys' fees to the defendant.

Plaintiff contends that the minute entry of August 6 was a final adjudication of the issues, that it is void on its face, and that upon his filing notice of appeal on August 18, 1934, the trial court was without jurisdiction to make any further order in the premises. Defendant contends that the minute entry of August 6, 1934, was a

mere memorandum for a later formal order and that it was embraced in and superseded by the order of August 29, 1934. The contention of defendant must be upheld. It has been held in a number of cases that a minute order may serve only as a memorandum for the entry of final judgment. In *Ferris v. Baker*, 127 Cal. 520, 59 P. 937, 939, it was argued that an appeal from a formal order should be dismissed because it was taken more than six months after a previous minute entry of the court's decision. The court in rejecting this contention said: "The order in this case was a mere narration by the clerk as follows: 'Defendants move the court for nonsuit on the grounds stated. Said motion is argued, and thereupon granted.' The order did not show what were the grounds of the motion. It did not purport to be a dismissal of the action, nor a judgment of any kind, and was in fact but a memorandum affording data from which a judgment or proper order might be drafted, similar to the minute made when final judgment is announced, directing that it pass for one party or the other. Obviously, no execution could have issued on such an order when a cause is submitted on evidence for both sides." In *Re Estate of Yale*, 208 Cal. 102, 280 P. 358, 359, the court dismissed an appeal from the minute order and denied a motion to dismiss an appeal from a later formal order. The court said: "It is our conclusion, founded on a reading of the several minute orders and of that portion of the formal judgment hereinabove quoted, that the minute orders were intended by the trial court, and must have been understood by the parties, to be and to serve merely as memoranda affording data from which a proper final judgment might thereafter be drafted disposing of the entire cause. In such a case an appeal is held to lie from the formal judgment." In *Scrimsher v. Reliance Rock Company*, 1 Cal.App.(2d) 382, 36 P.(2d) 688, 691, the court said: "But, where the minute order was intended by the trial court and must have been understood by the parties to be, and served merely as memoranda affording data from which a proper final judgment might thereafter be drafted disposing of the entire cause, the appeal lies from the formal judgment, and the time within which it may be taken begins to run from the date of its signing." See, also, *Macnevin v. Macnevin*, 63 Cal.

186; *Gullick v. Interstate Drilling Co.*, 111 Cal.App. 263, 295 P. 549.

In the minute entry of August 6, 1934, the clerk briefly set forth items taken from the memorandum signed by the judge. The memorandum was manifestly not intended to provide final disposition of the issues. The minute entry set forth that defendant was granted leave to take the child from Los Angeles county "for reasonable lengths of time at reasonable intervals," but did not set forth the length of time or the period at which the child could be taken from the county. These matters were set forth in full in the formal order of August 29, 1934. The minute entry did not purport to cover certain modifications of the previous order concerning the custody of the child which were set forth in detail in the final order. It did not order payment of attorneys' fees, but fixed the amount thereof. The minute entry was merely the guide for the preparation of a formal judgment. Apparently it was so considered by the parties, who stipulated two days later for a stay of execution for ten days "from and after the date of said stipulation, or from the date of the signing of any formal order."

The appeal from the minute entry of August 6, 1934, is dismissed. The order dated August 29, 1934, is affirmed.

We concur: CRAIL, P. J.; GOULD, Justice pro tem.



13 Cal.App.2d 310

MERGENDOLLER v. MERGENDOLLER.
Civ. 10927.

District Court of Appeal, Second District,
Division 2, California.
April 20, 1936.

Hearing Denied by Supreme Court
June 18, 1936.

1. Divorce ⚡286

Reviewing court has no authority, in absence of abuse of discretion, to interfere with

decision of lower court as to period during which alimony should be allowed for support of wife (Civ.Code, § 139).

2. Divorce ⚡235

Trial court *held* not to have abused discretion in limiting alimony allowed for support of wife to period of six months, where evidence was conflicting and there was substantial showing in record to sustain trial court's action (Civ.Code, § 139).

3. Divorce ⚡249(4)

Court *held* without power to award automobile to husband as his separate property in divorce proceeding where automobile had not been mentioned either in pleadings or testimony.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Suit by Hermena Mergendoller against Frederick Manuel Mergendoller. From an adverse judgment, plaintiff appeals.

Judgment modified, and, as so modified, affirmed.

Daniel A. Knapp, of Los Angeles, for appellant.

Rosalind G. Bates, of Los Angeles, for respondent.

GOULD, Justice pro tem.

Plaintiff and appellant complains that upon awarding her a decree of divorce from defendant the court limited her alimony allowance to a period of six months and set aside an automobile to her husband as his separate property.

[1,2] An allowance for the support of a wife may be made for such period "as the court may deem just, having regard to the circumstances of the parties." Civ. Code, § 139. "Unless there appears a manifest abuse of discretion, this [the higher court] has no authority to interfere." *Lamborn v. Lamborn*, 80 Cal.App. 494, 251 P. 943, 945; *Duffey v. Duffey*, 79 Cal.App. 734, 251 P. 218. With conflicting evidence and a substantial showing in the record to sustain the trial court, we cannot say that there is any abuse of discretion in its order in this case.

[3] As to the automobile, the court's attempt to award it to the husband as his separate property cannot be sustained. There was nothing in the pleadings con-

cerning the automobile or any other item of property, and no testimony was offered concerning it. Consequently, the court lacked power to make any adjudication as to the matter. *Gamache v. South School District*, 133 Cal. 145, 65 P. 301.

With the single exception as to the disposition of the automobile, the judgment is affirmed, each party to bear own costs of appeal.

We concur: CRAIL, P. J.; WOOD, J.



13 Cal.App.2d 226

DORAN v. SHERMAN.
Civ. 10054.

District Court of Appeal, First District,
Division 1, California.
April 13, 1936.

Courts ⇨190(9)

Motion to dismiss appeal or affirm judgment was denied, where record contained everything necessary for proper consideration of question presented, which involved validity of judgment of municipal court, and required further consideration.

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Action by Nellie V. Doran against Carrie Sherman. Judgment for defendant, and plaintiff appeals, and a motion was filed to dismiss the appeal or affirm the judgment.

Motion denied.

Joseph M. Trusty and Henry J. Kleefisch, both of San Francisco, for appellant.

Kenneth R. McDougall, of Palo Alto, for respondent.

TYLER, Presiding Justice.

Motion to dismiss appeal or affirm judgment. The motion to dismiss is based on the contention that the record on appeal has not been properly prepared. In our

opinion the record contains everything necessary for a proper consideration of the question presented. The motion to affirm the judgment is made upon the ground that the appeal is not meritorious. The question presented for determination upon the merits involves the validity of the judgment of the municipal court, which question requires further consideration.

The motion to dismiss or affirm is denied.

We concur: CASHIN, J.; KNIGHT, J.



13 Cal.App.2d 231

GLEASON v. GLEASON.
Civ. 10930.

District Court of Appeal, Second District,
Division 2, California.
April 15, 1936.

1. Divorce ⇨127(3)

Statute that divorce cannot be granted on uncorroborated testimony of parties is mainly to prevent collusion (Civ.Code, § 130).

2. Divorce ⇨127(4)

Though corroboration of parties to divorce action need not be as to all matters alleged, there must be corroboration as to at least considerable number of material facts (Civ.Code, § 130).

3. Divorce ⇨127(4)

In husband's action for divorce on ground of extreme cruelty, corroboration of husband's testimony held insufficient to warrant judgment for husband (Civ.Code, § 130).

4. Divorce ⇨186

Where trial court made no findings respecting wife's cross-complaint for divorce on ground of extreme cruelty and entered no judgment as to it, appellate court would make no findings on record, but matter should be disposed of in trial court.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action for divorce by Eugene C. Gleason against Marjorie L. Gleason. Judgment for plaintiff, and defendant appeals.

Reversed.

G. Harold Janeway, of Los Angeles, for appellant.

William Barnett Spivak, of Los Angeles, for respondent.

GOULD, Justice pro tem.

[1, 2] It is a primary tenet of California divorce law that no divorce can be granted upon the uncorroborated statement, admission, or testimony of the parties. Civ. Code, § 130. True, it has been held that this provision is mainly for the purpose of preventing collusion (*Andrews v. Andrews*, 120 Cal. 184, 52 P. 298); and even though the corroboration need not be as to all matters alleged in an action for divorce on the ground of extreme cruelty (*Avery v. Avery*, 148 Cal. 239, 82 P. 967), yet the general rule is that there must be corroboration as to "at least a considerable number of important and material facts" (*Wolff v. Wolff*, 102 Cal. 433, 36 P. 767, 1037).

[3] In the within action for divorce upon the ground of extreme cruelty the court granted plaintiff husband a decree, and defendant wife appeals upon the sole ground that there was insufficient corroborating evidence to sustain such action. Prior to the commencement of this suit, the wife, on June 26, 1933, obtained an interlocutory decree of divorce from respondent upon the ground of extreme cruelty; they later became reconciled and in November of that year started to live together again, the husband signing a statement to the effect that he sincerely regretted his past actions and that he would give his wife no future cause for divorce. Less than two months thereafter the husband filed the action here under consideration, to the complete surprise of the wife, she testified.

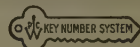
We have examined the record carefully, and aside from corroboration as to the residence of respondent for the statutory period there is almost a complete lack of corroborative testimony bearing upon any material matter. The corroboration claimed by respondent is only in the testimony of one witness, Young, and he supports respondent's charges of extreme cruelty only in quite inconsequential points. In fact, the only tangible shred of corroboration in his testimony is his statement that appel-

lant, in the presence of the witness and respondent, stated that "she believed that all he [her husband] was doing was just being damned onery, getting her to move." We cannot reach the conclusion that the corroboration required by law is present in this case.

[4] Appellant also had a cross-complaint for divorce before the court for consideration. No findings with respect to its allegations were made and no judgment was rendered as to it. Her suggestion that this court enter findings and judgment upon the evidence in the record is not warranted, but the matter should be disposed of upon rehearing in the trial court.

Judgment reversed.

We concur: CRAIL, P. J.; WOOD, J.



13 Cal.App.2d 275

Ex parte GIANPE.

Cr. 191.

District Court of Appeal, Fourth District,
California.

April 16, 1936.

1. Statutes $\S$ 77(3)

Constitutional provision authorizing Legislature to divide state into fish and game districts and to enact laws for protection of fish and game appropriate to respective districts *held* to permit local and special laws protecting fish and game in sections of state set apart for that purpose (Const. art. 4, § 25½).

2. Statutes $\S$ 77(2)

Constitutional provision authorizing Legislature to divide state into fish and game districts and to enact laws for protection of fish and game appropriate to respective districts *held* to confer authority to enact local laws only where deemed appropriate to entire district, and not to authorize local legislation affecting anything less than district (Const. art. 4, § 25½).

3. Fish $\S$ 9

Section of Fish and Game Code providing that it was unlawful to fish with net

within radius of four miles from designated place without giving such area any number or other designation as fish and game district *held* not to create new fish and game district in view of fact that preceding section of Code creating district was not altered and title of amending statute contained no reference to creation of new district (St. 1935, p. 1205, § 844; Const. art. 4, § 25½).

4. Statutes ⇨76(1)

Section of Fish and Game Code providing that it was unlawful to fish with net within radius of four miles from designated point within fish and game district *held* unconstitutional as local and special law where general law could be made applicable and not within provision of Constitution authorizing special law for protection of fish and game within fish and game districts (St. 1935, p. 1205, § 844; Const. art. 4, § 25½).

Proceeding in the matter of the application of Joseph Giampe, also known as Joe Giampe, for a writ of habeas corpus to secure his release after having been taken into custody upon charge of violating section 844 of the Fish and Game Code.

Writ granted.

Lloyd M. Tweedt, of San Francisco, J. F. Harvey and Arch E. Ekdale, both of San Pedro, and Derby, Sharp, Quinby & Tweedt, of San Francisco, for petitioner.

W. F. Menton, Dist. Atty., and J. E. Walker, Deputy Dist. Atty., both of Santa Ana, for respondent.

BARNARD, Presiding Justice.

Application for writ of habeas corpus.

The petitioner was taken into custody on a charge of violating section 844 of the Fish and Game Code as amended in 1935 (St. 1933, p. 471, § 844, as amended by St. 1935, p. 1205), it being charged that he unlawfully operated a net, other than a bait seine, for the purpose of taking fish within that portion of district 19 lying between the northern boundary of Orange county and San Mateo Point at or near the southern boundary of said county, and extending oceanward two miles from the line of mean high tide.

It is petitioner's contention that section 844 of this Code is unconstitutional and void as local and special legislation, and that in adopting the same the Legislature

exceeded the authority conferred upon it by section 25½ of article 4 of the Constitution. This provision authorizes the Legislature to provide for the division of the state into fish and game districts and to enact such laws for the protection of fish and game as it may deem appropriate to the respective districts. The questions here presented are whether the Legislature, under the authority thus granted, may enact laws applying only to a portion of a fish and game district so established, and whether the Legislature, in amending section 844 in 1935, intended to and did create a new district.

[1] The first question, although suggested in the case of *In re Mascolo*, 25 Cal. App. 92, 142 P. 903, seems not to have been decided. Section 25½ of article 4 of the Constitution was adopted for the purpose of removing the restriction which formerly prohibited local and special laws where a general law could be made applicable and to permit local and special laws protecting fish and game, in certain sections of the state to be set apart for the purpose, in order to meet varying conditions in these areas. *Paladini v. Superior Court*, 178 Cal. 369, 173 P. 588; *In re Makings*, 200 Cal. 474, 253 P. 918, 920.

[2] We think the language used in this section of the Constitution and the very purpose which is apparent in the section, indicate a specific intention to limit the authority thus given to enact such local laws, and that it was intended that this freedom from the former restriction should extend only so far as to permit the enactment of such laws as might be deemed appropriate to an entire district as formed in accordance with the authority given. The section recognizes the need of different regulations of this nature in different parts of the state, and gives the Legislature the widest discretion in forming such districts, which may be made small enough to cover any area in which special legislation may be needed. In giving this right to form districts and to enact laws appropriate thereto, the section plainly excludes smaller areas and fails to authorize local legislation affecting a portion of a district or anything less than the district which is made the only basis for an exception to the general rule.

In discussing this section of the Constitution, the court said, in *Re Makings*, *supra*: "As we read the section, we think it most apparent that its purpose was to

clothe the Legislature with ample power to adequately protect the fish and game of the state. This was to be accomplished by authorizing the Legislature to divide the state into fish and game districts and to enact such laws for the protection of the fish and game as the Legislature might deem appropriate for the respective districts. The fish and game of the state are made up of various kinds and species, differing from each other in so many respects that it would be difficult, if not impossible, to enumerate such differences. On account of this great variety of kind and species, it was necessary that the regulations adopted by the Legislature for the protection of the fish and game be in some measure commensurate with the various kinds and species of fish and game existing in the different parts of the state. Very often in a given territory there may exist a number of different varieties of fish and game, each requiring special legislation in order that they may be properly protected. It may be necessary, on account of the peculiar and varied conditions under which the deer in this district are found, to divide the area into a number of different game districts in order to properly protect the deer found therein. On the other hand, the conditions under which the quail in this territory are found appear to be the same in the several parts of this territory. It is necessary, however, on account of the deer therein, to divide this territory into a number of districts."

The reasoning there used supports our conclusion here. Using the same illustration, the larger district which would be appropriate for laws affecting quail would also suffice for the adequate protection of deer if the Legislature had the power to pass different laws affecting various portions of the district.

[3,4] The respondent argues that the 1935 amendment to section 844 of the Fish and Game Code had the effect of creating a new and independent fish and game district, although the amendment does not designate the described portion of district 19 as a new district or give to the same a number or other designation.

While the power of the Legislature to redistrict the state or form a new district may be conceded, we think that no such result was here accomplished. In the Fish and Game Code, as adopted in 1933, division 2 (St. 1933, p. 398, § 60 et seq.) is devoted to the creation of fish and game districts. In the sections under that division the entire state is divided into a number of districts, each being numbered and its boundaries described. Division 4 of this Code (section 400 et seq.) contains regulations applying to the various districts, one of which was section 844 which then provided that it was unlawful to use a net for the purpose of taking fish in the waters of the state within a radius of four miles from San Juan Capistrano Point in Orange county. In view of the fact that division 2 of this Code expressly purported to divide the entire state into fish and game districts as set forth in that division, each with an appropriate designation, it could hardly be argued that it was intended by the Legislature to create a new and additional district by section 844 as then adopted. The amendment to section 844, adopted in 1935, did not purport to create a new district and did not mention or purport to amend any part of division 2 under which the various districts in the state had been created. The area affected by this amendment was not given a number or other designation, and the same still remains a part of district 19, under the express terms of one of the sections included in division 2. Moreover, the title of the act (St. 1935, p. 1205) amending section 844 contained nothing, by reference or otherwise, which could be said to relate to such a matter as the creation of a new fish and game district. We conclude that section 844, as amended in 1935, did not have the effect of creating a new district. It follows from what has been said that section 844 is unconstitutional and void as not coming within the exception to the general rule authorized by section 25½ of article 4 of the Constitution.

It is ordered that petitioner be discharged and his bail exonerated.

We concur: MARKS, J.; JENNINGS, J.

13 Cal.App.2d 289

**SCHOEFER v. FARMERS AUTOMOBILE
INTER-INSURANCE EXCHANGE.**

Civ. 5417.

District Court of Appeal, Third District,
California.

April 17, 1936.

Hearing Denied by Supreme Court

June 15, 1936.

I. Insurance Ⓒ435

Automobile liability policy protecting owner from liability imposed because of another's operation of automobile with owner's consent held not to cover liability of person operating automobile with owner's consent to person injured, and recovery could not be had against insurer by virtue of judgment rendered against operator alone (Civ.Code, § 1714¼).

2. Insurance Ⓒ514

Where judgment was recovered against operator and not owner of automobile and operator paid or caused to be paid the judgment, recovery could not be had from owner's insurer on policy protecting owner from liability imposed through operation of his automobile by another with his consent (Civ.Code, § 1714¼).

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Theodore Schoefer against the Farmers Automobile Inter-Insurance Exchange, a corporation. Judgment for the defendant, and plaintiff appeals.

Affirmed.

John C. Peppin, of Oakland, for appellant.

Thomas B. Leeper, of Sacramento, and James W. Hughes, of Oakland, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This appeal arose out of an accident wherein an automobile owned by Wayne Smythe and being driven with his permission by Eugene P. Hughes struck and injured Ralph H. Field.

Field commenced an action against both Smythe and Hughes, and recovered judgment against each defendant. Thereafter the judgment against Smythe was vacated upon the ground that he was a minor and no guardian ad litem had been appointed for him. Execution was issued against

Hughes, and the judgment was paid by a third party, and repayment to such third party guaranteed by security pledged by Hughes. Fields thereupon assigned the judgment against Hughes to Schoefer, plaintiff and appellant herein, acting for the third party above referred to, who brought the present action against Farmers Auto Inter-Insurance Exchange, Inc., respondent herein, the insurance carrier for Smythe.

This action was brought by appellant on the theory that the insurance carried by Smythe covered the liability of Hughes to Field and also contended that the Insurance Exchange, having taken control of the defense of Hughes in the action brought by Field against Smythe and Hughes is now estopped to deny that the policy covered and enured to the benefit of Hughes.

[1] The liability of respondent is fixed and defined by the terms of an indemnity contract entered into between Smythe and respondent herein, wherein the Exchange insures Smythe against legal liability imposed upon him resulting solely and directly from an accident by reason of the ownership, maintenance, or use of the automobile described in the policy, for bodily injury suffered by any person. The policy contains a provision that the Exchange shall not be liable for loss or damage caused while the automobile is being operated by any person other than the insured, or a member of his immediate family, or paid driver, unless said person is operating said automobile with the consent of the insured, except that this extension shall not be applicable to any public garage, repair shop, sales agency, or service station.

Appellant contends that when the automobile was being operated by one otherwise qualified, with the consent of the insured, the Exchange was liable. Appellant devotes considerable space to a discussion of the meaning of this provision of the policy, but we do not believe it necessary to go into that phase of the matter in view of the fact that until a judgment is shown to exist against Smythe, the owner of the car, the Exchange cannot be held liable. It is clear from the policy that it insures only against legal liability imposed upon the owner Smythe, and unless there is some legal liability against the owner there is no liability under the policy.

The appellant here is not the insured, nor has he nor any one else a judgment against the insured, and no legal liability exists against Smythe the beneficiary under the policy. A study of the terms of the policy indicates that it is a contract of strict indemnity and the Exchange is not called upon to act until some legal obligation has been imposed upon Smythe, the second party to the contract. It is the owner of the car who is insured and no legal liability nor judgment existing as to him, he having obtained a judgment in his favor in the trial court, we can find no obligation to appellant upon the part of the company.

[2] The second point urged by appellant is that the Exchange is estopped from setting up the claim that the policy did not cover liability to Hughes by reason of the fact that it assumed complete charge of and control over the defense of Hughes in the action brought against Smythe and Hughes. It does appear from the record that the same attorneys who were engaged by the Exchange and defended Smythe also appeared and filed a separate answer on behalf of Hughes, and represented him during the trial, but nothing further appears as to who paid the attorneys for said defense of Hughes, nor if they were engaged by the company or by Hughes, or whether they were rendering their services gratuitously.

This point might become very material were it not for the provision of section 1714¼ of the Civil Code, now embodied in section 402 of the Vehicle Code (St.1935, p. 153). That section provides that the owner of a motor vehicle shall be liable and responsible for the death or injury to persons or property resulting from negligence in the operation of such vehicle by any person using the same with the permission of such owner. It is further provided that in such action against the owner, the operator whose negligence is imputed to the owner shall be made a party defendant, and upon recovery of judgment recourse shall first be had against the property of such operator, and if the owner is compelled to pay any judgment or costs, such owner is subrogated to the right of the injured person and may recover from the operator all such judgment and costs paid by the owner.

Inasmuch, therefore, as Hughes, the operator, has paid or caused to be paid, the

judgment of Field, he cannot recover against Smythe nor against respondent herein, the indemnitor of Smythe.

The judgment is affirmed.

I concur: THOMPSON, J.



13 Cal.App.2d 208

PEOPLE v. HURLEY.

Cr. 329.

District Court of Appeal, Fourth District,
California.

April 10, 1936.

1. Automobiles ⇨355(8)

Evidence *held* sufficient to sustain conviction for failure to stop and render aid after an automobile accident (St.1935, p. 170, § 480).

2. Criminal law ⇨327

In criminal case, people have burden to prove necessary elements of offense charged beyond reasonable doubt.

3. Automobiles ⇨355(13)

In prosecution for manslaughter by automobile, evidence *held* insufficient to sustain finding that motorist whose automobile struck and killed pedestrian was at time of collision driving while under influence of intoxicating liquor.

4. Statutes ⇨231

Various sections of the Penal Code must be construed together so as to bring all provisions into harmonious operation.

5. Homicide ⇨34

Lack of "due caution and circumspection," referred to in manslaughter statute placing criminal responsibility on defendant who acts without due caution and circumspection, *held* equivalent to "criminal negligence" (Pen.Code, §§ 20, 192).

[Ed. Note.—For other definitions of "Criminal Negligence" and "Due Caution," see Words & Phrases.]

6. Homicide ⇨34

Want of care that will support conviction of involuntary manslaughter committed

while performing a lawful act must at least equal gross negligence.

7. Automobiles Ⓒ346

In prosecution for manslaughter by automobile, contributory negligence of pedestrian struck by motorist may have important bearing on degree of culpability of motorist, notwithstanding contributory negligence of pedestrian is not defense.

8. Automobiles Ⓒ344

Failure of motorist, whose automobile struck and killed pedestrian, to see pedestrian who was walking on right-hand side of highway, on which side motorist was driving at night at moderate speed, *held* not "criminal negligence" necessary to sustain conviction of involuntary manslaughter (Pen.Code, §§ 20, 192; St.1935, p. 188, § 564).

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Information filed against H. B. Hurley and R. B. Hurley, charging manslaughter and charging R. B. Hurley with failure to stop and render aid after an accident. R. B. Hurley was found guilty on both charges, and he appeals.

Affirmed as to failure to stop and render aid after an accident, and reversed as to charge of manslaughter.

Hodge & Evans, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., and Walter L. Bowers, Deputy Atty. Gen., for the People.

MARKS, Justice.

By an information filed by the district attorney of San Bernardino county, the appellant and his brother, H. B. Hurley, were accused of the crime of manslaughter. Appellant was further accused of failing to stop and render aid after an accident. Section 480, Vehicle Code (St. 1935, p. 170). The two cases were tried together, and upon the same evidence, by the court without a jury. H. B. Hurley was found not guilty. R. B. Hurley was found guilty on both charges. The latter has appealed from the judgments and from the orders denying his motions for new trial. We will refer to him as the appellant, and to H. B. Hurley as the defendant.

Appellant urges as his sole ground for reversal of the judgments and orders that the evidence introduced in support of each charge was in each instance insufficient to support either judgment pronounced upon him.

[1] A study of the record discloses the following facts: The appellant and the defendant were brothers. On November 9, 1935, the defendant purchased a second-hand Cord sedan in Los Angeles. On that day he and appellant drove to San Bernardino, their first stop on a trip to the Parker Dam site where they were going in search of employment. They each drank a glass of beer somewhere between Los Angeles and San Bernardino. Upon reaching San Bernardino they spent some time visiting friends and acquaintances. One of the brothers bought three whisky sours which they shared with a friend. During the evening they resumed their journey but took a wrong road from San Bernardino. They stopped at a sandwich shop about eight miles out and got into a fight with the proprietor and another. They again resumed their journey with defendant driving. They came back through San Bernardino proceeding south on E street to Highway No. 99. A short distance south of San Bernardino the road crosses the Santa Ana river. At the north end of the bridge over this river a road from the city of Colton intersects the highway at right angles forming a "T." As the Cord drove south along this highway a car was standing at a "stop" sign on the Colton road at this intersection. When the Cord had passed, the stopped car made a right turn following the Cord over the bridge. This car was being driven by Howard T. Black, whose wife and child were riding with him. Beyond the bridge the road makes two distinct curves to the left. Mr. Black testified that the Cord came almost to a full stop on the bridge and that in making these curves swung to the extreme left side of the roadway; that it returned to its own side of the road and after traversing the second curve it stopped; that he drove past it; that after traveling about one-half mile the Cord passed him and proceeded easterly on its own right-hand side of the road at a speed of 37 or 38 miles an hour; that he followed at a distance of about 100 feet; that he saw the body of a man fly from the side of the Cord into the gutter at the side of

the roadway; that he saw broken glass flying from the Cord; that at that time the Cord had swerved to its left; that it proceeded about 100 feet and stopped; that he drove to the left-hand side of the Cord and stopped; that his wife put down the window in the right front door of his car and said, "You better go back and pick him up"; that he had no way of knowing whether this remark was heard by either of the Hurleys; that he drove on easterly along the highway about a block and a half and turned into a farm house where he attempted, without success, to arouse the occupants; that as he was backing from the driveway of this house the Cord passed proceeding easterly toward the city of Redlands; that he stopped at the police station in Redlands and reported the accident; that the accident happened at about one o'clock on the morning of November 10, 1935.

At about 6:30 o'clock on the morning of November 10, 1935, a truck driver saw Joseph Schwitz lying unconscious in the gutter on the south side of Highway No. 99, opposite broken glass on the right-hand side of that roadway. The truck driver secured aid and Schwitz was taken to the San Bernardino county hospital, where he died from a severe fracture of the skull, hemorrhage, and injuries of the brain. One of his legs was broken, and the autopsy surgeon stated it had been broken from a blow from the rear which would indicate Schwitz had been walking easterly along Highway No. 99, on his own right-hand side of the road when he was struck by the Cord automobile.

Highway No. 99, at the point of the accident, has a twenty-foot pavement in its center, with six-foot hard oiled shoulders on either side and added gravel shoulders about six feet in width. On the morning of November 10, 1935, broken glass was found on the southerly oiled shoulder opposite where Schwitz lay in the gutter. About twenty-three feet westerly from that point tire burns appeared on the southerly edge of the paved portion of the highway and proceeded northeasterly for a distance of twenty-seven feet. This would indicate that the driver of the Cord, upon seeing Schwitz in front of him, swerved to his left in an attempt to avoid the collision, and that Schwitz had been walking on or close to the southerly edge of the paved portion of the highway.

At the time of its purchase the Cord had two glass wind wings. At the time of the arrest of the Hurley brothers both these wind wings were missing. There were scratches on the right front fender and a dent on the right rear fender with some paint missing on the right bracket which supported the front bumper. There was hair similar to that of Schwitz in one of the hinges of the right rear door.

On the day of their arrest the defendant and the appellant made statements to the district attorney of San Bernardino county in which each denied that he was driving the car at the time of the accident. Later the appellant asked permission to correct the statement which he had made. In this corrected statement he said: "Well, I'm charged with manslaughter. They said I ran over a man and killed him and I did. * * * I hit the man. I said 'Harold, I hit some one' and he says, 'You did?' and he got out of the car and he said 'Why I don't see nothing', and I says 'All right' and we drove on." He further stated that the defendant just stepped out of the door of the car and right back in again, and did not walk back, but merely looked back down the highway saying that the car must have hit a stick.

The defendant, in his statement, said that at the time of the accident he was asleep on the right-hand side of the front seat of the car and was awakened by broken glass flying into his face. When the car was stopped the first time the brothers changed places and appellant was driving at the time of the accident.

Both the Hurleys admitted that the right wind wing and the glass in the right front door of the Cord were broken in the collision. They further admitted taking the wind wings from the car and throwing them away, and also that they replaced the broken glass in the right front door. While on the witness stand they each told very different stories of their departure from San Bernardino than the ones contained in their statements to the district attorney.

A mere statement of the evidence is sufficient to force the conclusion that it was entirely sufficient to support the conviction of the appellant under the charge of failing to stop and render aid after an accident. *People v. McIntyre*, 213 Cal. 50, 1 P.(2d) 443. Joseph Schwitz was a large man over six feet tall, weighing about

one hundred eighty pounds. Appellant admitted hitting a man while driving a Cord automobile on Highway No. 99, west of the city of Redlands. That he did not know he had struck a human being is inconceivable in view of the admitted facts of the damage to the car and the necessary conclusion from the evidence that the body of Schwitz was thrown over the right front fender of the car along its side, breaking the right wind wing and the glass in the right front door, his head coming into violent collision with a hinge on the right rear door. All these things could hardly happen without appellant being conscious that the car he was driving had hit a human being. The judgment against appellant, and the order denying his motion for new trial under the charge of failure to stop and render aid after an accident, must be affirmed.

The question of the sufficiency of the evidence to support the judgment in the case in which involuntary manslaughter was charged presents more difficulties.

Section 192 of the Penal Code defines involuntary manslaughter as follows: "Manslaughter is the unlawful killing of a human being, without malice. It is of two kinds: * * * Involuntary—in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection."

[2,3] It is only suggested that appellant was engaged in the commission of an unlawful act at the time of the accident, namely, driving while under the influence of intoxicating liquor. The sole evidence supporting any such theory is the liquor consumed by appellant on November 9th, and the manner in which the automobile was driven in crossing the Santa Ana river bridge and in rounding the two curves of the road. The undisputed evidence shows that defendant, and not appellant, was driving the car across the bridge and around the curves. The manner of driving at those times can have no bearing on the question of the sobriety of appellant. The only other evidence bearing on this subject is the admission of appellant that he had consumed one beer on the trip from Los Angeles to San Bernardino and one whisky sour in the latter city. The beer was imbibed more than seven hours, and the whisky several hours, before the accident. This evidence is insufficient to sus-

tain the burden placed on the people in criminal cases of proving the material and necessary elements of the offense charged beyond a reasonable doubt. Therefore, the conviction of appellant of involuntary manslaughter must be upheld, if at all, under the theory that he was engaged "in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." We are not referred to any unlawful act committed by appellant at the time of the accident and therefore must determine the sufficiency of the evidence by answering the question: Was he acting "without due caution and circumspection" at that time?

This is the question to which the Attorney General devotes his chief attention in his brief. He bases his argument upon the rule well established in civil cases that a driver of an automobile is required to watch for vehicular and pedestrian traffic that may be upon the highway in front of him and that his negligence may be inferred from his failure to do so. He cites numerous cases where judgments for damages have been affirmed when the triers of the facts had predicated negligence upon the failure of defendants to perform this duty. Were this a civil action in which Schwitz had recovered judgment against appellant, it must be conceded that a finding of negligence on the part of the driver of the car would probably be affirmed on appeal. This brings us to the question of whether the rule in civil cases of the degree of lack of "due caution and circumspection" which will support a judgment will also support a judgment in a prosecution for involuntary manslaughter.

We have studied many California cases in which the crime of involuntary manslaughter was considered where the death of deceased was caused by having been struck by an automobile which was being driven by the defendant. In several of these cases it is stated that the driver would be guilty if he operated his automobile without due caution and circumspection. From this it is argued that the guilt would be equally established if it were considered that the operation was without due or ordinary care. In these cases there appears either the violation of an express statute or a wanton and reckless disregard of the safety of another. For examples, see *People v. Wilson*, 193 Cal. 512, 226 P. 5; *People v. Collins*, 195

Cal. 325, 233 P. 97; *People v. Marconi*, 118 Cal.App. 683, 5 P.(2d) 974; *People v. Frantz*, 138 Cal.App. 499, 32 P.(2d) 670.

[4, 5] Section 20 of the Penal Code provides that: "In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence." In the instant case it is admitted there was no intent on the part of appellant to kill Schwitz. Therefore, when applied to the facts before us, the section must be read as requiring proof of union, or joint operation of act, and criminal negligence. It is true that section 192 of the Penal Code in no manner refers to criminal negligence but bases the criminal responsibility of a defendant upon his acting without due caution and circumspection. It is well settled that the various sections of the Code must be construed together so as to bring all provisions into harmonious operation. If it is necessary that before a crime such as we are here considering can be committed there "must exist a union, or joint operation of act and * * * criminal negligence," it should necessarily follow that the lack of "due caution and circumspection" referred to in section 192 of the Penal Code must be construed as the equivalent of criminal negligence. To conclude otherwise would destroy the clear meaning of section 20 of the same code. See *People v. Kilvington*, 4 Cal.Unrep. 512, 36 P. 13.

The court said in *People v. Sidwell*, 29 Cal.App. 12, 154 P. 290, 292, after quoting section 192 of the Penal Code: "Thus it will be observed that, while involuntary manslaughter may be committed in two different ways, the Legislature has not recognized, as between those two ways, any distinction in the degree of turpitude characterizing that crime. In other words, the crime is that of involuntary manslaughter whether the killing be committed in the execution of an unlawful act, etc., or in the execution of a lawful act, etc., or where death, not willfully or intentionally produced, is, nevertheless, caused by the gross or culpable negligence of the defendant—negligence which, in degree, goes so far beyond that negligence merely which suffices to impose a civil liability for damages as to constitute it criminal negligence for which the party guilty of it may be held criminally liable."

In the case of *People v. Seiler*, 57 Cal. App. 195, 207 P. 396, 399, the District Court of Appeal, by dicta, in defining in-

voluntary manslaughter in the performance of a lawful act, used the words "in a wanton, reckless, or culpable manner," as the equivalent of "without due caution and circumspection." In criticizing this definition when denying a petition for hearing the Supreme Court said: "In order to constitute this kind of manslaughter the act may be lawful, but it must be one which might produce death, and which does produce death, and it must be committed without due caution and circumspection. The lack of due caution and circumspection need not go to the extent of being wanton or reckless, although it might possibly be such as would be defined as culpable. But the word 'culpable' is not an apt description of the idea intended to be conveyed by the words 'due caution and circumspection.' On this subject see note II to the case of *Johnson v. State* (1902) 61 L.R.A. 277."

[6] A reading of the available cases cited in the note referred to leads to the conclusion that it is the prevailing rule that the want of care that will support a conviction of involuntary manslaughter committed while performing a lawful act must be more than simple negligence and must at least equal gross negligence. Mr. Justice Field, in *United States v. Knowles*, Fed.Cas.No.15,540, 4 Sawy. 517, a much-cited case, expressed the opinion that the breach of duty must be one either imposed by law or contract, or that the duty omitted must be plain, and one that does not permit of discussion of its obligatory force or difference of opinion on the course of conduct pursued. In *Thomas v. People*, 2 Colo.App. 513, 31 P. 349, 351, the court stated the true rule to be that the defendant must be charged with an omission in the performance of a duty under which there appeared his "gross negligence essential to the commission of the crime." In other of the cited cases there was either violation of law or wanton disregard of the safety of another.

In a rather extensive study extending beyond anything cited in the briefs, we have found no case where a conviction was had and sustained under the facts presented by the record here, though there are statements in many cases, when divorced from their facts, which would tend to support the conclusion reached by the trial judge here. The great majority of the cases support the conclusion reached by us that where the defendant is charged

with involuntary manslaughter committed in the performance of a lawful act the evidence must show him guilty of criminal negligence or the conviction cannot be upheld.

In *People v. Driggs*, 111 Cal.App. 42, 295 P. 51, 53, "criminal negligence" is thus defined: "As the cause must go back for another hearing, it is incumbent for us to call attention to at least one other point urged by the respondent relative to one of the instructions given to the jury. The record shows that the trial court gave to the jury as one of its instructions section 20 of the Penal Code, reading as follows: 'In every crime or public offense there must exist a union, or joint operation of act or intent, of criminal negligence.' And then, as a definition of 'criminal negligence,' the following: 'The words "neglect," "negligence," "negligent," and "negligently" import a want of such attention to the nature or probable consequences of the act or omission, as a prudent man ordinarily bestows in acting in his own concerns.' * * * Though found in the Penal Code, this definition of 'negligence' is only of an act which fixes civil liability; it is the definition of the kind of act which fixes responsibility upon, for instance, drivers of automobiles, where no criminal element whatever is involved. In order to constitute criminal negligence, there must enter into the act some measure of wantonness or flagrant or reckless disregard of the safety of others, or willful indifference. If no one of these elements enters into the act, the person charged cannot be held guilty of criminal negligence." See, also, *Schultz v. State*, 89 Neb. 34, 130 N.W. 972, 33 L.R.A. (N.S.) 403, Ann.Cas.1912C, 495; *Omaha & R. V. R. Co. v. Chollette*, 33 Neb. 143, 49 N.W. 1114; *Carbo v. State*, 4 Ga.App. 583, 62 S.E. 140; *State v. Goetz*, 83 Conn. 437, 76 A. 1000, 30 L.R.A. (N.S.) 458; *Chicago, R. I. & P. R. Co. v. Zerneck*, 183 U.S. 582, 22 S.Ct. 229, 46 L.Ed. 339; *Jones v. Chicago, R. I. & P. R. Co.* (C.C.A.) 260 F. 929; *State v. Agnew*, 202 N.C. 755, 164 S.E. 578.

[7,8] The only failure of appellant to perform a required duty which is pointed out by the Attorney General, and the record sustains him, was the failure to so carefully observe the road in front of him that he could have seen Schwitz in time to avoid hitting him. Did this failure to observe constitute criminal negligence?

The driving of automobiles at night is now such a general and common practice that we can draw on our own knowledge in weighing the culpability of appellant under the circumstances before us. The night was dark but clear and the roadway was dry. There was little traffic. The Cord's lights were illuminated and in good order. Appellant was driving on his own right-hand side of the road and at a moderate speed. Deceased was walking on the wrong side of the road and several feet inside the right-hand edge of the improved oiled shoulder. When twenty-three or more feet from the point of impact appellant applied the brakes with sufficient force to cause skid marks on the pavement and swerved his car to the left to avoid the collision. Every driver, even the most careful and alert, has experienced the difficulty of seeing a pedestrian walking at night down the roadway in front of him. While contributory negligence of the deceased is no defense in a manslaughter prosecution, still it may have an important bearing on the degree of culpability of appellant. The law required Schwitz to walk close to his left-hand edge of the roadway. Section 564, Vehicle Code. Had he obeyed the law there would have been no collision as he would not have been in the path of the Cord. Appellant had the right to assume that pedestrians would obey the law and that no one would be walking down the road in the path of his automobile. While this would not excuse him from keeping a vigilant watch of the roadway in front of his car, it has an important bearing on the degree of his lack of care.

Under the facts of this case, and the decisions we have cited, we have reached the conclusion that the evidence shows appellant guilty of only the lack of the exercise of ordinary care, and not of gross indifference to or such a disregard of the safety of others as is necessary to constitute criminal negligence. It follows that the judgment pronounced upon him upon his conviction of involuntary manslaughter, and the order denying his motion for new trial made in that case, must be reversed.

It is ordered: (1) That the judgment pronounced upon appellant, and the order denying his motion for new trial under the charge of failure to stop and render aid after an accident, are affirmed; and (2) that the judgment pronounced upon

appellant, and the order denying his motion for new trial under the charge of manslaughter, are reversed.

We concur: BARNARD, P. J.; JENNINGS, J.



13 Cal.App.2d 245

PEOPLE v. PETRO.

Cr. 292.

District Court of Appeal, Fourth District,
California.

April 15, 1936.

1. Homicide ☞18(5)

Where accused's accomplice struck and killed person being robbed while accused and his accomplice were engaged in committing robbery, accused held guilty of first-degree murder (Pen.Code, § 189).

2. Homicide ☞126

Under evidence showing victim of robbery was killed by accused's accomplice while accused and accomplice were committing robbery, instruction that charge was murder, and that it was no defense that accused claimed he committed act or made omission charged under threats or menace held proper (Pen. Code, §§ 26, 189, 190).

3. Homicide ☞348

Conviction for murder would not be reversed, even though erroneous instruction was given, where accused's guilt was established beyond doubt, and there was no miscarriage of justice by his conviction (Const. art. 6, § 4½).

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Paul D. Petro was convicted of murder in the first degree, and he appeals.

Affirmed.

Edgar G. Langford, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

MARKS, Justice.

By an information filed by the district attorney of San Diego county, defendant was charged with the crime of murder in the first degree. He was tried before a jury which returned a verdict of guilty of murder in the first degree, and fixed his punishment at confinement in the penitentiary for life. Judgment was pronounced in accordance with this verdict. From this judgment defendant has appealed.

Defendant and one James White, a negro, were employed on a hog ranch near El Cajon, Cal., by Margaret Catherine Geer, the deceased. They planned to rob the deceased, and on September 17, 1935, in the perpetration of the robbery, John White struck Mrs. Geer over the head, knocking her unconscious. According to defendant's own testimony, White tied Mrs. Geer up, sent defendant out to the road as a lookout, searched the premises, and when the task was complete they took a garbage truck and drove to Los Angeles. Some personal property was taken from the premises. On September 18, 1935, defendant mailed a letter from Los Angeles to the El Cajon police department directing it to send officers to the Geer hog ranch. Upon arrival at the ranch, officers found Mrs. Geer had died from the blow delivered by White, and that the house had been ransacked. White has not been apprehended. Defendant claims that he participated in the crime through fear of his life induced through threats made to him by White. The evidence does not support this contention.

The sole ground relied upon for reversal of the judgment is that the trial court committed prejudicial error in giving the following instruction: "You are instructed that the charge in this case is murder, which may be punishable by death, and it is no defense to the charge of murder that the defendant, Paul D. Petro, claims that he committed any act or made any of the omissions charged, under threats or menaces."

This instruction is based upon section 26 of the Penal Code, which provides in part: "All persons are capable of committing crimes except those belonging to the following classes: * * * Eight. Persons (unless the crime be punishable with death) who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable

cause to and did believe their lives would be endangered if they refused."

Defendant admits this is a true statement of the law, but claims it is not applicable here because there was no showing that he committed any act which in any way contributed to Mrs. Geer's death. It is true that defendant did not strike the blow which caused the death, but the evidence clearly supports the implied finding of the jury that the defendant and White co-operated in the robbery of Mrs. Geer. The evidence established beyond question that the robbery was planned by defendant and James White and was carried out by them.

[1] "The law is well settled that a homicide committed in the perpetration of robbery or in an attempt to perpetrate robbery is murder in the first degree. Pen.Code, § 189. In such cases the law conclusively presumes premeditation, and the Legislature has declared that they shall be deemed and held to be murder in the first degree." *People v. Anderson*, 1 Cal.(2d) 687, 37 P.(2d) 67, 68. Therefore, even though defendant did not strike the blow which killed Mrs. Geer, it was struck by his accomplice while they were engaged in committing a robbery, and by virtue of the rule above set forth, defendant is guilty of murder in the first degree.

"Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the jury trying the same." Section 190, Pen.Code.

[2] Defendant being charged with a crime which may be punished by death, the instruction correctly states the law applicable to the facts of this case. Under subdivision 8 of section 26 of the Penal Code, where the crime charged may be punished with death, and the evidence clearly shows that the death penalty may be imposed, the defense that the perpetrator of the crime acted under threats or menace sufficient to show he had reasonable cause to believe, and did believe, that his life would be endangered if he refused, is not available. Under such circumstances, an instruction such as given here is proper.

The case of *State v. Moretti*, 66 Wash. 537, 120 P. 102, is factually similar to the instant case. In that case the defendant sought to invoke the defense of duress while he and his accomplices were committing the crime of robbery and death resulted to the victim. Although the defend-

ant in that case did not strike the death-dealing blow, he was participating in the robbery. The court, under a similar statute to subdivision 8 of section 26 of the Penal Code of California, held that the defense of duress was not available.

[3] Even though we should assume that the questioned instruction is erroneous, that fact would furnish no ground for a reversal of the judgment because of the provisions of section 4½ of article 6 of the Constitution. A study of the record leaves us with the fixed conclusion that the guilt of defendant has been established beyond any doubt, and that there has been no miscarriage of justice by his conviction.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.



13 Cal.App.2d 261
ADAMO v. NICHOLAS (two cases).
Civ. 10178.

District Court of Appeal, Second District,
Division 2, California.

April 16, 1936.

1. Appeal and error ⇨695(1)

Where sufficiency of evidence is in question, appellant must print evidence on both sides and not merely evidence favorable to him.

2. Appeal and error ⇨635(3)

Judgment may be affirmed for failure to place evidence adequately before District Court of Appeal.

3. Appeal and error ⇨1011(1)

District Court of Appeal will not interfere with finding of trial court on conflicting evidence.

4. Partnership ⇨344

Cross-complaint which charged fraud and asked for partnership accounting warranted entry of judgment for division of commissions disclosed by "secret" books, notwithstanding finding that there was no fraud.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by J. M. Adamo against S. J. Nicholas, wherein the defendant filed a cross-complaint. From the judgment, both parties appeal.

Affirmed.

Craig & Weller, of Los Angeles, for appellant Adamo.

Frank M. Bering, of Los Angeles, for respondent Nicholas.

GOULD, Justice pro tem.

Plaintiff and defendant were engaged in a merchandising copartnership. An attempt was made to settle certain differences by a formal arbitration, which was unsuccessful, but which resulted in an agreement between the partners for the termination of their partnership, the adoption of certain findings of the arbitrators, the equal division of cash and the allotment of merchandise in equal shares by a new committee of arbitration. It was also provided that, in satisfaction of the balance due him upon a promissory note, plaintiff might select merchandise to the value of \$2,500 from defendant's allotment; but defendant, it is charged, removed and secreted the more valuable items from his merchandise allotment before plaintiff could make such selection therefrom.

Plaintiff then instituted this suit for a breach of the agreement, for damages, and for an accounting. Defendant countered with a cross-complaint, alleging that plaintiff had without defendant's knowledge kept a separate bank account and secret books of account, and that the figures exhibited to the arbitrators and which formed the basis of the settlement agreement did not truly reflect the actual business and accounts of the partnership, and asking for an accounting and money judgment for any balance found due him. Upon trial judgment was entered for plaintiff in the sum of \$4,345 upon his complaint, and for defendant upon the cross-complaint to the extent that recovery was allowed to each party respectively for his share of commissions deposited in the separate bank account. The residue of partnership funds was divided equally between plaintiff and defendant. Two appeals are prosecuted, one by defendant from that part of the judgment based upon the complaint, and the other by plaintiff from that part of the judgment based upon the cross-complaint.

[1,2] The pleadings are long and involved, the testimony was in sharp conflict upon almost every point, and the matter is presented upon appeal, at least as to appellant Nicholas, in a highly unsatisfactory manner. As to him, not enough of the record is printed to enable this court to determine the various points presented for review; and where, as here, the sufficiency of the evidence is in question, it is incumbent upon appellant to print not only the evidence favorable to himself, but the evidence upon both sides relating to the findings in question. It is manifest in the case at bar that appellant Nicholas has completely ignored the major part of the testimony offered at the trial, and failure to place the evidence adequately before this court is of itself sufficient to warrant an affirmance of the judgment from which he appeals. *Marsh v. Marsh*, 80 Cal.App. 752, 252 P. 1071; *In re Estate of Berry*, 195 Cal. 354, 233 P. 330.

[3] We have, however, examined the transcript with care and are satisfied that ample and substantial evidence was before the trial court to sustain the findings and portion of the judgment of which appellant Nicholas complains. The case upon the complaint at most presents a conflict of evidence, resolved by the trial court in favor of respondent Adamo, and it is not our province to interfere with its decision.

[4] Appellant Adamo's objection to the judgment in so far as it relates to the cross-complaint is based upon the contention that the judgment is not supported by the findings. The cross-complaint is replete with charges of fraud; the court found in effect that there was no fraud and yet entered a judgment thereon for a division of the commissions disclosed by the "secret" books. Appellant Adamo takes too narrow and technical a view of the court's action. As we view the matter, a case was presented to the trial court where two warring partners, unsuccessful in settling their own disputes and unable to comply with the terms fixed by two successive arbitration committees, came into the judicial forum upon involved pleadings—complaint, cross-complaint and answers thereto—with charges and counter charges of bad faith and fraud. The court properly, we believe, seized the opportunity to settle all matters of dispute, and ignoring perhaps some of the technical distinctions for which the parties now con-

tend, proceeded to treat the case as a partnership accounting, with the added element of damages for certain breaches of contract on the part of the partner Nicholas. In both the complaint and cross-complaint the partners specifically asked for an accounting. The cross-complaint is designated as "cross-complaint for accounting," etc., and the prayer of the complaint demands "that defendant be required to render an accounting." Upon this reasonable theory of the litigation and the issues before it, we find no error in that portion of the judgment based upon the cross-complaint.

Judgment affirmed, each party to bear his costs of appeal.

We concur: CRAIL, P. J.; WOOD, J.



13 Cal.App.2d 312

WEIR v. LUKES.

Civ. 5479.

District Court of Appeal, Third District,
California.

April 20, 1936.

Rehearing Denied May 20, 1936.

Hearing Denied by Supreme Court
June 18, 1936.

1. Automobiles ⇨244(20)

In action for death of guest in automobile, evidence that defendant, in attempting to pass truck traveling in same direction, either did not see automobile approaching from opposite direction or thought there was plenty of time to pass, and in attempting to cut in front of truck was unable to change his course because of defect in steering mechanism, which caused him to leave highway and run into fence, held insufficient to support finding of willful misconduct (St.1931, p. 1693, § 141¾).

2. Automobiles ⇨181(1)

"Willful misconduct," within automobile guest statute, means more than negligence, however gross, but there must be actual knowledge, or that which law deems to be equivalent of actual knowledge of peril to be apprehended from failure to act, and con-

scious failure to act to avert injury (St.1931, p. 1693, § 141¾).

[Ed. Note.—For other definitions of "Willful Misconduct," see Words & Phrases.]

3. Automobiles ⇨181(1)

Mental state of driver of automobile is important in determining whether there was "willful misconduct" within automobile guest statute (St.1931, p. 1693, § 141¾).

4. Automobiles ⇨181(1)

To constitute "willful misconduct," there must exist intentional misconduct coinciding with knowledge of or indifference to probability of injury (St.1931, p. 1693, § 141¾).

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Action by Isabella Weir against John Lukes. Judgment for plaintiff, and defendant appeals.

Reversed.

Hadsell, Sweet, Ingalls & Lamb, of San Francisco, and Nathan F. Coombs, of Napa, for appellant.

Clarence N. Riggins, of Napa, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This appeal is taken from a judgment rendered in favor of respondent, who is the mother and heir at law of deceased William J. Weir, who was killed while riding as a guest with John Lukes, appellant herein. The action was based upon the theory that appellant was guilty of conduct which constituted willful misconduct within the provisions of section 141¾ of the California Vehicle Act (St.1923, p. 517, added by St.1929, p. 1580, as amended by St.1931, p. 1693).

[1] The question here for determination is whether the acts and conduct of appellant were such as to constitute such willful misconduct. The facts are briefly as follows:

Appellant, accompanied by decedent as his guest, was driving a light Ford truck northerly along the main highway between Vallejo and Napa. He was following a large dump truck which was approximate-

ly 18 or 20 feet in length and 8½ feet in width. A third car was proceeding southerly. The concrete portion of the highway was 18 feet in width with a white line dividing it into two lanes each 9 feet wide. The big truck was traveling about 18 miles an hour; the car approaching from the north was traveling about 45 miles an hour, and defendant was following the dump truck on the right side of the highway, at about 35 miles an hour. When about 20 feet behind the dump truck defendant swerved out toward the left and looked ahead, and testified at one point in his testimony, he then saw no car approaching from the north, and at another time testified he saw a car down the highway about 500 or 600 feet distant. Defendant then apparently swung again slightly toward the right and partly behind the big truck, accelerated the speed of his car, and veered to the left and around the truck. When he was about opposite the driver of the dump truck he then saw the oncoming car which was then less than 300 feet away. The approaching car drew off the paved portion of the highway on to the shoulder without apparently slacking speed, and the defendant continued forward and swung sharply to his right in front of the dump truck, but failing, or being unable to change his course, continued diagonally across the highway and struck a fence along the easterly side thereof, causing the death of Weir.

It was the contention of defendant, supported by testimony of certain mechanics who examined the Ford truck after the accident, that the steering gear was defective and it locked, thereby preventing defendant from controlling the car, causing it to plunge across the highway.

[2] Upon the foregoing facts it is apparent that defendant was negligent, but we do not believe it is sufficient to support a finding of willful misconduct. "Willful misconduct," as said in *Helme v. Great Western Milling Co.*, 43 Cal.App. 416, 185 P. 510, 512, "means something different from and more than negligence, however gross"; and adds further, "to constitute 'willful,' misconduct there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with the conscious failure to act to the end of averting injury."

In *Howard v. Howard*, 132 Cal.App. 124, 22 P.(2d) 279, 281, the defendant was driving at a high rate of speed on a wet pavement, approaching a slight curve. The court, considering gross negligence and willful misconduct, there said that "willful misconduct involves a more positive intent actually to harm another or to do an act with a positive, active, and absolute disregard of its consequences." It must amount to misconduct, as distinguished from negligence, and that misconduct must be willful, and not willful in the sense that the act was done intentionally, but the intentional doing of such act either with a knowledge that injury is a probable as distinguished from a possible result, or doing intentionally an act with a wanton and reckless disregard of its possible result. It clearly appears that although Howard was mistaken, he thought he could safely drive as he did even though the pavement was wet, and while he intended to drive rapidly he neither intended the result that happened nor was indifferent to the same and was not in such a frame of mind that he did not care whether or not he injured any one.

In the instant case, defendant, traveling with a friend of many years, wished to pass a slow-moving truck. He either did not see the oncoming car, or if he did he "thought there was plenty of time to pass." He discovered too late the car was coming very fast, "lots faster than I thought he was." In other words, he misjudged the speed of the approaching car. Even then he did not hit either the car or the truck, but cutting in toward the right, in front of the truck, failed by reason of a defect in the steering mechanism of his car, to change direction, and continued across the highway into the highway fence.

In *Lennon v. Woodbury*, 3 Cal.App.(2d) 595, 40 P.(2d) 292, 294, the driver was traveling about 55 miles an hour. The road was wet and the tires were smooth. In attempting to turn, the car skidded, injuring plaintiff. The court there said: "While the driver of this car knew or should have known that an accident with the consequent injury to one of his guests was possible under the circumstances, we see in the evidence nothing to indicate that he knew or should have known that such an injury was probable."

[3,4] It is apparent from the foregoing authorities that it is the mental state of the driver that is important. There must

exist intentional misconduct coinciding with knowledge of, or an indifference to, the probability of injury. The act constitutes the misconduct, while the intentional doing of which together with the knowledge of or indifference to the probability of injury constitutes the element of willfulness.

Analyzing the facts in the case before us in the light of the rule expressed in the foregoing cases, we must conclude the acts of the defendant failed to show willfulness, in the absence of which one cannot be held for willful misconduct.

Judgment must therefore be reversed, and it is so ordered.

I concur: THOMPSON, J.



13 Cal.App.2d 233

NEW YORK LIFE INS. CO. v. DOANE et al.

Civ. 10923.

District Court of Appeal, Second District,
Division 2, California.

April 15, 1936.

Hearing Denied by Supreme Court

June 11, 1936.

1. Mortgages ⇨334

Whether power to sell as provided in mortgage was revoked by mortgagor's death depends upon whether such power of sale was coupled with an interest within statute relating to termination of agency (Civ.Code, § 2356).

2. Mortgages ⇨333

Although power of sale as security for mortgage is strictly construed, such power is not looked upon with disfavor in California (Civ.Code, §§ 858, 2924, 2932).

3. Mortgages ⇨334

Power of sale in mortgage is "power, coupled with an interest," within statute providing that power of agent is terminated by principal's death, unless agent's power is coupled with an interest in subject of agency, and mortgagee could exercise power of sale after mortgagor's death (Civ.Code, § 2356).

[Ed. Note.—For other definitions of "Power Coupled With an Interest," see Words & Phrases.]

4. Mortgages ⇨333

Under mortgage providing for power of sale and release by mortgagors of all their right, title, and interest in property, mortgagee had interest essential to enforcement of mortgage by execution of such power, since mere fact that person does not own estate in or title to realty is not conclusive that he does not have an interest therein within statute (Civ.Code, §§ 858, 2924, 2932).

5. Mortgages ⇨334

Under mortgage providing for power of sale and release by mortgagors of all their right, title, and interest in property, assignee of mortgagee held entitled to exercise power of sale, notwithstanding mortgagor's death; power of sale being coupled with interest in property (Civ.Code, §§ 858, 2924, 2932).

Appeal from Superior Court, Los Angeles County; Pat R. Parker, Judge.

Suit by the New York Life Insurance Company against Lorena A. Doane, as executrix of the will of Belle W. Atwood, deceased, and others. From a judgment for plaintiff, named defendant appeals.

Affirmed.

Randall & Bartlett, of Los Angeles, for appellant.

Kibbey, Cooper & Dulin, by Walter B. Kibbey, all of Los Angeles, for respondent.

CRAIL, Presiding Justice.

The sole question presented on this appeal is this: Is a power of sale contained in a mortgage revoked by the death of the mortgagor? Defendant has placed in her brief the following statement: "So far as we are able to ascertain, this question, while suggested in several decisions to which we will refer, has never been directly passed on by the courts of this state. It has been passed on by the courts of other states, but those decisions are in conflict." Respondent on its part quotes this statement with apparent approval.

Belle W. Atwood, defendant's decedent, during her lifetime borrowed from the plaintiff's assignor \$9,000 and in return executed her promissory note for said sum secured by a mortgage on real property. The mortgage was recorded. Among other things, the mortgage contained the following clauses: "The mortgagors mort-

gage and warrant to the mortgagee, its successors and assigns with power of sale, the following described real estate * * * and the mortgagors do hereby release unto the mortgagee, and its successors and assigns forever, all their right, title and interest in said property * * * and that upon request of the mortgagee they will execute any further necessary assurance of the title to said property, and that they warrant the title to said property. * * * In the event of default in the payment of the indebtedness hereby secured or any part thereof or in any of the covenants or conditions of this mortgage, at the option of the mortgagee, without notice * * * the entire indebtedness secured by this instrument shall immediately become due * * * and the mortgagee shall have power to sell said premises according to law without any right of redemption by mortgagors, or assigns, or successors in interest, or any or either of them." The assignment of the mortgage to the plaintiff was duly acknowledged and recorded.

Thereafter, Belle W. Atwood died, and the defendant became the executrix of her will. The debt had not been paid, and plaintiff claimed that the power to sell survived her death. This claim was denied by the defendant. A controversy arose between the parties, and this action was brought for declaratory relief. The complaint asked that the court declare affirmatively that the plaintiff had the right to sell the property under the power of sale contained therein, and that said power did not terminate by reason of the death of said Belle W. Atwood. The court rendered judgment for the plaintiff as prayed, and it is from this judgment the appeal is taken.

[1] Whether or not the power to sell contained in the mortgage was revoked by the death of the mortgagor depends upon whether or not such power of sale was coupled with an interest. Civ. Code, § 2356. The appellate courts of California have had this question before them on several occasions. The early case of *Hall v. Boyd*, 60 Cal. 443, does not appear in the briefs of the parties, but this very question was argued in the respective briefs in that case as indicated in the summaries thereof which precede the opinion itself. In that case, Laskie executed to Matthews a mortgage upon real property containing a power of sale clause. There-

after, Matthews in his own name as grantor and not as attorney in fact for Laskie executed to James Hall a quitclaim deed of the premises. In this deed no reference was made to the mortgage or to the power therein contained or to Laskie. Ten years later one Boyd purchased from Matthews the promissory note and mortgage and brought an action for the foreclosure of the mortgage. Among other things, the court said: "It is true that Matthews had a power coupled, with an interest, but that power was to act as an attorney in fact," etc. In the case of *Goldwater v. Hibernia Savings & Loan Society*, 19 Cal.App. 511, 126 P. 861, 862, the question arose again, and among other things the court said: "Whether or not the power to sell contained in the mortgage is revoked by the death of the mortgagor depends upon whether or not such power of sale is a power coupled with an interest. * * * Upon this question there is much conflict in the decisions in those states where, as in California, a mortgage transfers no title or estate in the property mortgaged. In this case, however, we do not deem it necessary to determine this question, for [the reason that the mortgage had ceased to be a lien upon the land]." The Supreme Court (19 Cal.App. 517, 126 P. 863), however, in denying a petition for a hearing in that court, said: "We deem the opinion of the District Court of Appeal ([19 Cal.App. 511] 126 P. 861) herein correct, regardless of the question whether a power of sale included in a mortgage is, or is not, technically a lien on the land. At the time the defendant attempted to execute the power, the debt, note, and mortgage had become barred, and the mortgagor was deceased. The lien of the mortgage was therefore extinguished, and the mortgagee, as holder of the power, was without any interest whatever in the land, as lienholder or at all. Consequently, on well-settled principles, the interest once coupled with it had then ceased to exist, it had become a naked power, and the mortgagor who made it being dead, the power had terminated with the extinction of the interest." In *Faxon v. All Persons*, 166 Cal. 707, 137 P. 919, 923, L.R.A.1916B, 1209, the court quoted the above language with approval, and added the following: "This, of course, was tantamount to saying that the only possible interest coupled with the power of sale was such interest as was essential to the enforcement of the lien of the mortgage by the execution of the pow-

er, and that such interest, together with the remaining naked power, necessarily terminated with the extinguishment of the mortgage lien."

It was upon the authority of these decisions, and possibly others, that in 1924 the following text was inserted into volume 18, California Jurisprudence, page 262: "Whether or not a power to sell contained in a mortgage is revoked by the death of the mortgagor depends upon whether or not such power of sale is a power coupled with an interest. While there is much conflict in the decisions, in states where, as in California, a mortgage transfers no title or estate in the property mortgaged, the rule seems to be that the mortgagee has a power coupled with an interest, prior to the expiration of the period limited for bringing an action upon the principal obligation." California Jurisprudence, of course, is not law in itself, but it is read and followed by a large portion of the lawyers of California as a ready handbook by which to discover the law, and undoubtedly that text has been followed by members of the bar on numerous occasions. The text, as cited, is approved in the Ten Year Supplement of said work, volume 8, page 85, section 543, by citation to 56 A.L.R. 224.

Appellant relies greatly upon the case of *Hunt v. Rousmanier's Administrator*, 8 Wheat. 174, 204, 5 L.Ed. 589, 598, which holds: "That the interest which can protect a power after the death of a person who creates it, must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing." This case has been frequently cited by the Supreme Court of this state. And defendant relies upon the following cases in which the *Hunt* Case has been cited with approval: *Scott v. Superior Court*, 205 Cal. 525, 271 P. 906; *Cox v. Hughes*, 10 Cal.App. 553, 102 P. 956; *Boehm v. Spreckels*, 183 Cal. 239, 191 P. 5; *Frink v. Roe*, 70 Cal. 296, 11 P. 820; *Parke v. Frank*, 75 Cal. 364, 17 P. 427. The contention of the defendant is that the power to sell is merely a lien upon the property; that it conveys no estate or title to the land, and it is by section 858 of the Civil Code to be deemed a part of the security; and that as the security of which it is a part is not an estate or title to the land, the part can have no greater force or effect than the whole. Her final conclusion, however, is, "that

the exact question before us has not been decided in California."

In the case of *Norton v. Whitehead*, 84 Cal. 263, 24 P. 154, 156, 18 Am.St.Rep. 172, the Supreme Court distinguishes between the *Hunt* Case and a case in which the power of sale is included within a mortgage, as follows: "In the case of *Hunt v. Rousmanier*, supra [8 Wheat. 174, assignment of any interest in the subject-175, 5 L.Ed. 589], there was no sale nor matter (vessels at sea) of the power of attorney, by way of mortgage or otherwise. The bill shows that the complainant intentionally and expressly declined to take a mortgage of the vessels."

In a great majority of the cases in other jurisdictions, the courts have held that a power of sale in a mortgage is one coupled with an interest. It would serve no useful purpose to review the cases herein or even to cite them. They are collected and reviewed in 56 A.L.R. 224 et seq. In a discussion of the cases, the following quotation is taken from *Reilly v. Phillips*, 4 S.D. 604, 610, 57 N.W. 780, 781: "Appellants insist that the rule of these cases is not applicable in this jurisdiction, because, under our law, the mortgagor retains the title to the estate mortgaged, contrary to the law prevailing in most of the states whence these decisions come; but we apprehend that, upon principle, that fact ought not to make any difference in respect to the survival of the power. Even in the states where the mortgage is held to convey the legal title to the mortgagee, the transfer is only nominal. It is more of a fiction than a reality. If the mortgagee, who is said to hold the legal title, die, his interest does not pass to his heirs, as real estate, but to his executor or administrator, as personal property. It is a chose in action, precisely as in this state." For another collection of cases in support of the statement that the majority of cases sustains the rule, that a power of sale in a mortgage is one coupled with an interest, see 41 C.J. 927, §§ 1345 to 1348. The recent volume of the American Law Institute on Agency, p. 355, § 139, has this to say under the section entitled: "Termination of Powers Given as Security. (1) Unless otherwise agreed, a power given as security is not terminated by: * * * (d) the death of the holder of the power, or, if the power is given as security for a duty which does not terminate at the death of the creator of the power, by his death."

POHL v. ANDERSON et al.**Civ. 5516.**District Court of Appeal, Third District,
California.

April 15, 1936.

**Hearing Denied by Supreme Court
June 11, 1936.**

[2] Mortgages with a power of sale as a form of security, although such powers of sale are strictly construed (*Savings & Loan Society v. Burnett*, 106 Cal. 514, 39 P. 922), are not looked upon with disfavor in California (*Godfrey v. Monroe*, 101 Cal. 224, 35 P. 761). Indeed, such powers of sale are expressly permitted by section 2932 of the Civil Code, and since July 27, 1917, the exercise of such powers has been carefully regulated. Civ. Code, § 2924. In this connection we should also bear in mind section 858 of the Civil Code, which reads as follows: "Where a power to sell real property is given to a mortgagee, or other encumbrancer, in an instrument intended to secure the payment of money, the power is to be deemed a part of the security, and vests in any person who, by assignment, becomes entitled to the money so secured to be paid, and may be executed by him whenever the assignment is duly acknowledged and recorded." This indicates to some extent that California intended that such a power of sale survives until the debt is paid or barred by the statute of limitations.

[3,4] Such powers of sale have been treated in California as "a power, coupled with an interest" continuously since the early case of *Hall v. Boyd*, supra. Mortgages containing such power of sale have become a fixture in our economic life. At this late day to hold by judicial pronouncement that such powers cannot be effectively exercised would not only cause confusion, but place in jeopardy sales which have been made thereunder, rendering titles doubtful.

[5] The mere fact that a person does not own an estate in or title to land is not conclusive that he does not have "an interest" therein. On the contrary, the mortgagee under the circumstances of this case had "such interest as was essential to the enforcement of the lien of the mortgage by the execution of the power." *Faxon v. All Persons*, supra. Our conclusion is that the power of sale was vested in the plaintiff under section 858 by reason of the assignment, and that, being coupled with an interest in the land, it has not been revoked by the death of the mortgagor.

Judgment affirmed.

We concur: **WOOD, J.; McCOMB,**
Justice pro tem.

1. Trade-marks and trade-names and unfair competition ☞71

Deceptive use of similar name, or emblematic representation of such name, is evidence of unfair competition, even though name is not exclusive trade-mark or trade-name.

2. Trial ☞375

Knowledge acquired by trial judge on view is independent evidence upon which his findings can be predicated.

3. Trade-marks and trade-names and unfair competition ☞93(3)

Evidence that defendant operated drive-in drink-dispensing booth in form of lemon painted lemon color and known as the "Jumbo Lemon," and drink-dispensing booth in form of orange sitting in latticework basket, near plaintiff's drive-in drink-dispensing booth in form of orange painted orange color and known as the "Giant Orange," held insufficient to show unfair competition.

4. Appeal and error ☞1008(1)

Findings of trial court on issues of fact have binding effect on appellate court, particularly where trial judge had view of premises.

Appeal from Superior Court, San Joaquin County; **M. G. Woodward**, Judge.

Action by **Frank E. Pohl**, an individual doing business under the fictitious name and style of the Giant Orange, against **Harry Anderson** and others. From a judgment for the defendants, the plaintiff appeals.

Affirmed.

Percy S. Webster and **Roger B. Webster**, both of Stockton, for appellant.

Gumpert & Mazzera and **C. H. Hogan**, all of Stockton, for respondents.

TUTTLE, Justice pro tem., delivered the opinion of the court.

Appellant seeks to enjoin respondents from unfair competition and to recover damages alleged to arise therefrom. The

case was tried by the court, and findings on all issues were made adversely to appellant, who now appeals from a judgment denying him any relief.

The trial court found that plaintiff, on or about May 1, 1928, established in the city of Tracy, Cal., a "drive-in" dispensing booth for the sale of drinks; that said booth was shaped in the form of a giant orange, and was painted an orange color; that plaintiff advertised his fresh orange drinks through the medium of a great number of highway signs for ten miles in an easterly direction and sixteen miles in a westerly direction, said signs referring to the "Giant Orange"; that on June 1, 1929, defendants acquired and commenced the operation of a "drive-in" dispensing booth at a point about seventy-five yards immediately to the west of plaintiff's booth, and on the same side of the highway, said place of business being known as the "Jumbo Lemon," the booth being in the form of a lemon, and painted a lemon color; that in May, 1934, defendants erected a small sandwich and eating shop about two-tenths of a mile easterly from plaintiff, on the same side of the highway. Connected with this shop there was a drink dispensing booth in the form of a large orange sitting in a latticework basket.

The court found that "it was not true that said traveling public, and/or customers of the plaintiff are misled into stopping at the defendants' booth, and/or purchasing drinks there, believing that they are stopping at, and/or patronizing the dispensing booth of plaintiff as advertised by him * * *; that it is not true that all or any of the alleged acts of the defendants, or either of them, set forth in the complaint herein, diminished either the business or the profits of plaintiff."

Other findings were made to the effect that the acts of defendants in operating and advertising their business were not in imitation of plaintiff. In addition to hearing the evidence at the trial, the court visited the premises in question.

[1] The sole ground urged for reversal is the insufficiency of the evidence to sustain the findings. It is said that: "No inflexible rule can be laid down as to what conduct will constitute unfair competition. Each case is, in a measure, a law unto itself. Unfair competition is a question of fact. * * * The universal test question

is whether the public is likely to be deceived." 63 C.J. p. 414, § 112. At the outset it may be pointed out that plaintiff proved no *exclusive right* to the use of the trade-name "Giant Orange." In his closing brief appellant states that "the question of whether or not appellant is entitled to such exclusive use is not pertinent to the issues." He then quotes from 63 C.J. 391-393, as follows: "Relief will be afforded regardless of whether or not deceptive words or marks are valid trade-marks. The cases are very numerous where relief will be afforded upon the ground of unfair competition against a deceptive use of generic or descriptive names and marks, personal, geographical, corporate, and other names, none of which are capable of exclusive appropriation as technical trade-marks." We are in accord with this general statement of the rule. Under such circumstances, the use of a similar name or the emblematic representation of that name may be some evidence of unfair competition, although the cause of action may not be predicated upon the infringement of an exclusive trademark or trade-name. This was the precise situation in the case of *Dunston v. Los Angeles Van, etc., Co.*, 165 Cal. 89, 131 P. 115, 117, where it is said: "As the judgment cannot thus be supported upon the theory of an invasion of an exclusive right to property in a trade-mark, the only ground for the support of the judgment is that which has come to be known as 'unfair trade dealing.' This is but a succinct statement of the principle, that in the interest of fair commercial dealing courts of equity, where one has been first in the field doing business under a given name, will protect that person to the extent of making competitors use reasonable precautions to prevent deceit and fraud upon the public and upon the business first in the field. *Spieker v. Lash*, 102 Cal. 38, 36 P. 362; *American Waltham Watch Co. v. United States Watch Co.*, 173 Mass. 85, 53 N.E. 141, 43 L.R.A. 826, 73 Am.St.Rep. 263, 265; *Shaver v. Shaver*, 54 Iowa 208, 6 N.W. 188, 37 Am.Rep. 194; *Newman v. Alvord*, 51 N.Y. 189, 10 Am.Rep. 588. But, it has been intimated, relief in such cases really rests upon the deceit or fraud which the later comer into the business field is practicing upon the earlier comer and upon the public. Like all other kinds of fraud and deceit, this is not presumed but must be pleaded and shown. Since

plaintiff had no exclusive property right by way of trade-mark in the use of the name, it follows that the mere similarity of names does not establish the fraud. It must be such a misuse of the name by advertising and soliciting as amounts to fraud, and without this proof no relief may be granted, for, as is said by the Supreme Court of the United States in *Delaware & Hudson Canal Co. v. Clark*, 13 Wall. 311, 20 L.Ed. 581: "True it may be that the use by a second producer, in describing truthfully his product, of a name or a combination of words already in use by another, may have the effect of causing the public to mistake as to the origin or ownership of the product; but if it is just as true in its application to his goods as it is to those of another who first applied it and who, therefore, claims an exclusive right to use it, there is no legal or moral wrong done. Purchasers may be mistaken, but they are not deceived by false representations, and equity will not enjoin against telling the truth." The findings absolutely fail to show such fraud, imposition, or deceit. Since the use by the defendants of the similar name which they have selected is not forbidden by law, the use of it even for conspicuous advertising so long as the advertisements are true is not a violation of any of plaintiff's rights. The fact that confusion to the business of the plaintiff has resulted from acts not in themselves illegitimate of itself affords no ground for relief."

In the later case of *American Automobile Ass'n v. American Automobile Owners' Ass'n*, 216 Cal. 125, 13 P.(2d) 707, 715, 83 A.L.R. 699, the foregoing language is quoted with approval, and the California authorities bearing upon the question of unfair competition are reviewed.

[2-4] The alleged unfair practices upon the part of respondents may be said to

arise, not from *one* act, but from a combination of various features. As summarized by appellant, they consist in the prominent use of the equivalent of his trade-name; the imitation of the architecture and dress of his dispensing booth and his color scheme, and the placing of these imitations in the line of travel toward appellant's place of business. The trial judge viewed the premises, and what he saw was independent evidence upon which his findings might be predicated. 24 Cal.Jur. p. 921; *Preston v. Culbertson*, 58 Cal. 198; *Hatton v. Gregg*, 4 Cal.App. 537, 88 P. 592. We have carefully examined all the features which appellant asserts were mere imitations of *his* place of business and *his* business methods, and we cannot say that there is no substantial evidence to support the finding to the effect that the public was not misled by respondents' acts. Furthermore, to reverse this judgment we must conclude that the record shows, as a matter of law, that defendants were guilty of fraud, imposition or deceit. See *Dunston Case*, *supra*. Manifestly, we cannot reach this conclusion without doing violence to the well-known rule covering the binding effect of the findings of a trial court upon issues of fact. The latter rule is more potent here than usual, due to the fact that the trial court actually saw the structures which it is claimed deceived the public and thus constituted unfair competition. The observation of our Supreme Court in the *American Automobile Association Case*, *supra*, would seem pertinent here: "Every one who enters the field of competition desires and plans to draw custom from his competitors. Unless his acts are unlawful, his avarice is not actionable."

The judgment is affirmed.

We concur: PULLEN, P. J.;
THOMPSON, J.

6 Cal.2d 90

**NORTH AMERICAN BUILDING-LOAN
ASS'N v. RICHARDSON, Building and
Loan Com'r et al.**
L. A. 14173.

Supreme Court of California.
April 14, 1936.

1. Building and loan associations ⇨42(3)

Certified public accountants' report showing capital impairment of over \$246,000, standing alone, *held* to justify building and loan commissioner in taking over property, business, and assets of association (St. 1931, p. 539, § 13.11).

2. Building and loan associations ⇨42(3)

Uncollected interest not three months delinquent on building and loan association's loans *held* properly not included as asset of association in determining whether association's assets had been impaired so as to justify building and loan commissioner in taking over association's property, where there was little or no chance of collecting such interest (St. 1931, p. 539, § 13.11).

3. Building and loan associations ⇨42(3)

Entrance fees paid by investors in building and loan association which were to be returned when last payment had been made on their investment contracts and which could only be retained by association if investor prematurely terminated contract *held* properly included among liabilities of association in determining impairment of assets (St. 1931, p. 539, § 13.11).

4. Building and loan associations ⇨42(3)

Action of certified public accountants in writing off from assets of building and loan association 60 per cent. of value of furniture of branch offices which had been closed, without inspection of furniture, *held* proper in determining whether there had been impairment of association's assets (St. 1931, p. 539, § 13.11).

5. Building and loan associations ⇨42(3)

Taxes due and delinquent on realty held by subsidiaries *held* properly included as liabilities of building and loan association by auditor in determining whether there was impairment of its assets (St. 1931, p. 539, § 13.11).

6. Building and loan associations ⇨42(3)

Statute *held* to give building and loan commissioner discretion, if any impairment of association's assets existed, to take over

business, property, and assets of association (St. 1931, p. 539, § 13.11).

7. Building and loan associations ⇨42(3)

Upon proof of existence of any impairment of assets of building and loan association on date of taking over such assets by building and loan commissioner, it is duty of court to uphold commissioner's action (St. 1931, p. 539, § 13.11).

8. Building and loan associations ⇨42(3)

Statute authorizing building and loan commissioner to notify building and loan association that impairment of its assets must be made good within specified period and statute authorizing commissioner to take over assets of association where its assets are impaired are mutually independent, and noncompliance with order commanding restoration of impaired capital is not condition precedent to commissioner's taking possession of assets under other section (St. 1931, pp. 511, 539, §§ 7.06, 13.11).

9. Building and loan associations ⇨42(3)

Building and loan commissioner having once rightfully taken possession of assets of association, it is within his sound discretion whether to retain possession thereof or return assets upon approval of some plan of reorganization (St. 1931, p. 539, § 13.11).

10. Building and loan associations ⇨43

Question of feasibility of plan for reorganization of building and loan association rests in building and loan commissioner's sound discretion (St. 1931, p. 539, § 13.11).

11. Building and loan associations ⇨2

Constitutional law ⇨306

Statute authorizing building and loan commissioner to summarily seize assets of building and loan association when he deems assets are impaired to extent specified *held* not unconstitutional as deprivation of property without due process of law, in view of statute subjecting commissioner's action to immediate judicial inquiry (St. 1931, pp. 539, 540, §§ 13.11, 13.12).

12. Appeal and error ⇨2

In statute authorizing building and loan commissioner to take over assets of building and loan association in case of impairment thereof to extent specified therein, provision permitting commissioner to prosecute appeal without an appeal bond, whereas bond is required on appeal by association, *held* not to render statute unconstitutional,

since commissioner acts in his capacity as state officer (St.1931, p. 539, § 13.11).

13. Appeal and error ⇨1078(1)

Appellant failing to advance arguments in favor of its appeal from adverse orders was deemed to have waived any rights under such appeal.

14. Costs ⇨243

Where, on appeal, appellate court deferred ruling on motion to allow costs on appeal to await determination of cause on merits without prejudice to consideration of question on disposition on merits, adjudication on merits adverse to movant required denial of motion (St.1931, p. 539, § 13.11).

In Bank.

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Action by North American Building-Loan Association against Friend W. Richardson, Building and Loan Commissioner of the state of California, and another. From adverse judgment and orders, plaintiff appealed and moved for allowance of costs of appeal.

Affirmed, and motion denied. Appeal from order denying motion for new trial dismissed.

See, also, 219 Cal. 685, 28 P.(2d) 1044.

David R. Faries and Joseph Scott, both of Los Angeles (Don F. Tyler, of Los Angeles, of counsel), for appellant.

Roscoe C. Andrews, of Los Angeles, and Roland Tognazzini and Thomas M. Gannon, both of San Francisco, for respondents.

PER CURIAM.

On July 8, 1932, Friend W. Richardson, as building and loan commissioner of the state of California, took over the assets of the North American Building-Loan Association, pursuant to the provisions of section 13.11 of the Building and Loan Act, enacted in 1931. (St.1931, pp. 483, 539.) Section 13.11 reads as follows; "*Power to take possession of association.* If the commissioner as the result of any examination or from any report made to him or to any association doing business in this state or its investors or any thereof, shall find that such association is violating the provisions of its articles of incorporation or charter or by-laws or any law of this state, or is conduct-

ing its business in an unsafe or injurious manner, he may by an order addressed to such association direct a discontinuance of such violations or unsafe or injurious practices and a conformity with all the requirements of law; and if such association shall not comply with such order within the time specified therein, or if it shall appear to the commissioner that any association is in an unsafe condition or is conducting its business in an unsafe or injurious manner such as to render its further proceeding hazardous to the public or to any or all of its investors, or if he shall find that its assets are impaired to such an extent that, after deducting all liabilities other than to its investors they do not equal or exceed the sum of the value of its outstanding shares and investment certificates and the par value of its outstanding stock, or if any association shall refuse to submit its books, papers and accounts to the inspection of the commissioner or any of his examiners, deputies, or assistants, or if any officer thereof shall refuse to be examined upon oath concerning the affairs of such association, then the commissioner may forthwith demand and take possession of the property, business and assets of such association and retain such possession until such association shall with the consent of the commissioner resume business, or until its affairs be liquidated. Such association may, with the consent of the commissioner, resume business upon such conditions as may be approved by him."

Thereafter within thirty days the North American Building-Loan Association commenced this statutory action in the superior court pursuant to section 13.12 of the aforesaid Building and Loan Act to enjoin the building and loan commissioner from further proceedings and to secure an order directing him to surrender to said association the business, property, and assets taken over by him. Section 13.12 reads as follows: "Court application by association aggrieved. Whenever any association of whose property, business and assets the commissioner has taken possession, as aforesaid, deems itself aggrieved thereby, it may at any time within thirty days after such taking possession apply to the superior court of the county in which the principal office of such association is located, to enjoin further proceedings; and said court after citing the commissioner to show cause why further proceedings should not be enjoined, and hearing the allegations and

proofs of the parties and determining the facts, may upon the merits dismiss such application or enjoin the commissioner from further proceedings and direct him to surrender such business, property and assets to such association."

The complaint of plaintiff association alleged that the plaintiff "deems itself aggrieved by the action of the defendants in taking and retaining possession of its property, business and assets as aforesaid." Plaintiff by such allegation attempts to present two main issues: (1) That under the facts of the instant case the commissioner was not justified in taking over the business, property, and assets of such association; and (2) even if the commissioner was justified in taking over the business, he was not justified in retaining said assets and proceeding to liquidate the affairs of the association. At the trial of the case, the commissioner, in justification of his taking over the business, property, and assets of the association, elected to rely upon the impairment of the assets of the association. In substantiation of such issue, the commissioner offered in evidence the report of the firm of Fuller, Eadie & Co., a firm of certified public accountants, who had audited the books and accounts of the association for the express purpose of determining whether or not such impairment existed. Mr. Eadie, the member of the firm in charge of the audit, reported that in April, 1932, there existed an impairment of \$246,352.30. This impairment did not include the depreciation in real estate values owned by the association, which depreciation was not taken into account in said report. There was further evidence consisting of the testimony of Milton C. Shaw, chief examiner of the building and loan commission, who had been in office under the preceding commissioner, that an analysis of the reports of the association ending September 30, 1931, and December 31, 1931, prepared by the association itself and verified by its officers, showed a capital impairment as far back as these respective dates. At the trial there was also introduced evidence on behalf of the association that a plan for the reorganization of the association had been prepared and presented to the commissioner but that he had refused to give his approval to such plan, and had insisted on retaining possession of the business, property, and assets of the association and liquidating the affairs of the association. Upon the hearing of such allegation and proof, the trial court refused to

make an order enjoining the commissioner from further proceedings, or directing him to surrender such business, property, and assets to the association, and dismissed the application of the plaintiff association. Thereafter the plaintiff association perfected its appeal to this court. The notice of appeal specified that said appeal was taken from (1) the judgment; (2) the order denying plaintiff's motion for a new trial; (3) from the orders of the superior court refusing to fix a bond on appeal and refusing to deliver the assets of the North American Building-Loan Association to its duly constituted officers and directors pending final decision on appeal; and (4) from the order refusing to determine the amount of attorney's fees due Joseph Scott and refusing to make the same a charge against the funds of the plaintiff in the hands of the defendant commissioner.

[1-5] In view of the clear and unambiguous language of section 13.11 of the Building and Loan Act, there can be no doubt that the building and loan commissioner was justified in taking over the property, business, and assets of the appellant association on July 8, 1932. The record before us not only justifies such conclusion, it practically compels it. The report of the firm of certified public accountants that their report showed an impairment of \$246,352.30 furnished ample warrant for such action on the part of the commissioner. Appellant association, while complaining that it was not permitted to have the audit made by the firm of accountants which had previously done its auditing, nevertheless selected the independent firm of Fuller, Eadie & Co., which made the audit after receiving bids on the job, and without any suggestion from the commissioner as to what firm should be employed. This report showing on its face a capital impairment of \$246,352.30, standing alone, was ample justification for the action of the commissioner. Appellant endeavors to destroy the effect of this report by an analysis of the various items of the report in an attempt to prove that if certain items had been considered as assets and certain other items had not been classified as liabilities, the capital impairment would not have been so large. For instance, appellant association insists that uncollected interest not three months delinquent on loans made by the association should have been included as an asset of the association. As the auditing firm pointed out that as a matter of fact there was little or no chance of collecting this interest, it cannot be said, we

think, that good accounting practice required that such interest be listed as an asset. Appellant also complains that "entrance fee liabilities" were included as liabilities. These entrance fee liabilities were entrance fees paid by investors which were to be returned to them when the last payment had been made on their investment contracts. This fee could be retained by the association only in the event the investor prematurely terminated his contract. The report included as a liability the amount of these fees which would be returnable to those investors in good standing at the date of the report. We find no cause of complaint in this procedure. Appellant also complains that there was written off from the assets of the company 60 per cent. of the value of the furniture of the branch offices which had been closed, although no inspection had been made of the furniture. As we understand it, this is the regular practice in making such an audit, inasmuch as such depreciation is deemed to result from the fact that the furniture is no longer in use by a going concern and regardless of the physical condition of the furniture. Finally appellant complains that the report included as liabilities the taxes due and delinquent on real property held by subsidiary companies. In the report the auditor explained that it was necessary to pierce the corporate entity and treat the real property held by the subsidiary companies as property actually owned by the association in order to arrive at a true picture of the financial condition of the association. The trial court was undoubtedly of the opinion that the report of the auditing firm was a fair and just report, and we agree with its conclusion. It follows, therefore, that the finding of the trial court to the effect that an impairment existed at the time of the taking over of the business, property, and assets of the association by the commissioner is supported by substantial evidence.

[6, 7] The attack upon the correctness of the auditing report to reflect the true financial condition of the association is, however, more or less a minor contention. Appellant's main contention is that even though the report correctly disclosed an impairment, the impairment so disclosed was at most a "mere technical impairment" and the commissioner's action was not justified. Appellant claims that inasmuch as the statute gives to the superior court the power upon the hearing of the allegations and proofs of the parties and determining the facts "upon its merits" to enjoin the com-

missioner from further proceedings and direct him to surrender such business, property and assets to such association, the court has the authority and power as a court of equity to determine whether or not the financial condition of the association was sufficiently sound to warrant a disaffirmance of the action of the commissioner. In this regard, appellant association insists that as the assets of the association were sufficient to meet its outstanding obligations, take care of the full face value of all investment certificates, and still have a substantial surplus for the stockholders, there was only a "technical impairment," and the seizure of its assets by the commissioner was not justified. In other words, it is the appellant association's contention that the stockholders of any corporation expect to share in the losses and profits, and that if the impairment does not endanger the rights of the depositors of the association, but only amounts to a deficit in the assets available for the stockholders, these stockholders should, if they desire, be permitted to continue the business of the association and not be forced to suffer a liquidation by the commissioner. The answer to this contention is the plain requirement of the Building and Loan Act hereinbefore quoted which declares that if an impairment exists to such an extent, after deducting all liabilities other than to investors they do not equal or exceed the sum of the value of its outstanding shares and investment certificates and the par value of its outstanding stock, the commissioner may forthwith take over the business, property and assets of the association. This language is so plain and clear that any attempt to interpret it would be almost an absurdity. It is apparent that the Legislature intended by this provision that if any impairment whatever existed, the commissioner might in his discretion take over the business, property, and assets of the association showing such impairment. We can see no escape, therefore, from the conclusion that if an actual impairment existed as defined by the statute, the commissioner was entitled to take over the business, property, and assets of the association. This being so, it was the duty of the court, upon proof of the existence of the impairment at the date of the taking over by the commissioner, to uphold the action of the commissioner. The statute plainly sets out the conditions upon which the commissioner was entitled to take over the assets, and we do not believe that the power and authority of the superior court was so enlarged by the use

of the words in the statute, "upon its merits" that it could determine that the action of the commissioner was not justified when the evidence before it showed the existence of said conditions. It follows that the finding of the trial court that the action of the commissioner was justified was amply supported by the evidence, and the judgment based thereon must be sustained.

[8] Another objection to the action of the commissioner is predicated upon a previous order of the commissioner of January 22, 1932. The record shows that in January, 1932, when the said commissioner took over the office of building and loan commissioner, his chief examiner made a report to him, based upon an analysis of the verified quarterly reports furnished by the appellant association to the building and loan commissioner, that there existed a total impairment of \$318,057, and the examiner discussed with the commissioner the advisability of requesting the directors of the association to levy an assessment of at least \$150,000 to bring about a repairment of its capital structure. Thereafter on January 22, 1932, the commissioner wrote an official letter to the president of the association notifying him that the deficiency of \$150,000 must be made good within sixty days. This action of the commissioner was authorized by section 7.06 of the Building and Loan Act. (St.1931, p. 511.) Thereafter the directors of the association levied an assessment upon the stock, all of which was owned by a holding company, The North American Associated Companies, Limited. This company refused to pay such assessment. Appellant association now contends that the action of the commissioner in taking over the business, property, and assets of the association was based originally upon an illegal order, referring to the letter of January 22, 1932, requiring the appellant association to make good a capital impairment of \$150,000 within sixty days. Appellant association claims that this order was illegal for the reason that no proper examination of the books of the association was made by the commissioner previous to the issuance of the order. But there is nothing in the statute to indicate that action by the commissioner pursuant to section 7.06 is necessarily a prerequisite to any action by him under section 13.11. So far as the statute reads, these sections are mutually independent and a noncompliance with an order commanding the restoration of the impaired capital is not a condition precedent to the commissioner's taking possession of the as-

sets under section 13.11. It is, therefore, unnecessary for us to determine whether this prior order of the commissioner was or was not void.

Appellant further suggests that the official report of the auditing firm was not placed before the commissioner until after July 8, 1932. There is, however, not the slightest doubt that the substance of the report had been communicated to him, as he had been in close touch with the financial condition of the association and had discussed it with officials of the company. Moreover, Mr. Eadie of the auditing firm had been expressly authorized by letter to discuss with the commissioner the financial condition of the association as his investigation of its condition and its report progressed. This being so, this argument merits little consideration.

[9, 10] We find no merit in appellant association's further contention that the retention of the business, property, and assets of the association by the commissioner was not justified. The statute (section 13.11) provides that the commissioner shall retain possession "until such association shall with the consent of the commissioner resume business, or until its affairs be liquidated. Such association may, with the consent of the commissioner, resume business upon such conditions as may be approved by him." It appears from this language that the commissioner having once rightfully taken possession of the assets of an association, it lies in his sound discretion whether he will retain possession of them or return them upon an approval of some plan of reorganization. The figures of a reorganization plan were presented to the commissioner prior to the taking over of the business, property, and assets of the association by him, the fundamental basis of which plan was to organize two separate companies and segregate the "good assets" in one company and the "slow moving assets" in the other company. As long as there was a possibility of the association securing a loan from the Reconstruction Finance Corporation, the commissioner withheld from taking possession of the assets. As soon as it became apparent, however, that the loan which was being negotiated for by the association could not be secured, he took over the association for the purpose of liquidating it. It was his conviction that the association could not be rehabilitated unless some new cash could be secured. Mr. Eadie, the auditor, testified that "a reconstruction loan is essential to a reorganiza-

tion plan, I think." Under the statute the question of the feasibility of any plan for the reorganization of a building and loan association rests in the sound discretion of the commissioner. Obviously no plan could guarantee success. At the most, the possibility of the success of such a plan is problematical. The evidence in the instant case is not convincing of the success of the plan proposed. It failed to convince the trial court, and it has failed to convince us. The finding of the trial court, therefore, that the action of the commissioner in retaining possession of said property, business, and assets of the association was for the best interest of the association and of its creditors must be upheld.

[11, 12] Finally the appellant association attacks the constitutionality of the provision of the Building and Loan Act authorizing the summary seizure of the assets by the building and loan commissioner as being a deprivation of property without due process of law. Despite the fact that the statute is quite drastic in operation, we are of the opinion, that considering the nature of the business and the need for close supervision of such institutions as shown by the history of building and loan associations especially during the past few years, such provision is not unreasonable, and, therefore, not unconstitutional. In *Richardson v. Superior Court*, 138 Cal.App. 389, 392, 32 P.(2d) 405, 406, it is said: "The business of a building and loan corporation, like the business of banking, has inherent qualities and characteristics which affect its relation to the public, and bring it within the scope of the police power of the state." It is apparent from an examination of the statutes that the power of the superintendent of banks and the commissioner of building and loan associations are strikingly similar. Evidently the Legislature was of the opinion that a fundamental similarity in the two types of institutions justified similar supervision by the state. An identical seizure clause in the Bank Act was held constitutional in *State Savings & Commercial Bank v. Anderson*, 165 Cal. 437, 132 P. 755, L.R. A.1915E, 675, and affirmed by the Supreme Court, 238 U.S. 611, 35 S.Ct. 792, 59 L.Ed. 1488. The building and loan associations are institutions peculiarly patronized by persons of small means whose margin of security and safety from want often consists only of their investments in these associations. It is imperative, therefore, that no speculation or bad business practices should be permitted to jeopardize this security.

Experience shows that almost invariably in the liquidation of any association the assets shrink, and it is necessary for the protection of the owners of shares and investment certificates that the association have some margin of assets over and above the amount necessary to meet its obligations to its creditors and to the holders of shares and investment certificates. The question then arises of how much of a margin is reasonable. The Legislature has set it at an amount equivalent to the par value of the stock. We are not prepared to say that such provision is not a proper measure of safety. It must be borne in mind that section 13.11 conferring upon the commissioner this power is to be read in conjunction with section 13.12 which provides that the commissioner's action is subject to immediate judicial inquiry. By said section 13.12 an association is fully protected from any arbitrary and unjust seizure. Appellant also makes the contention that the provisions of section 13.12 of the Building and Loan Act which permits the commissioner to prosecute an appeal without an appeal bond, whereas such bond is required on the part of the appellant association is unconstitutional. In the case of *Mercantile Trust Co. v. Miller*, 166 Cal. 563, 137 P. 913, this court held that the superintendent of banks, engaged in liquidation, need not give an appeal bond for the reason that he was acting as a state officer in his official capacity. The same reasoning, undoubtedly, applies to the situation of a building and loan commissioner.

[13] Although, as previously noted, the appellant association appealed from certain orders of the superior court subsequent to judgment, that is to say, from the order refusing to fix a bond on appeal and refusing to deliver the assets to the directors of the association pending the appeal, and from the order refusing to determine the amount of attorney's fees due Joseph Scott, it has advanced no arguments in favor of its appeal from these orders and it must be deemed, therefore, to have waived any rights thereunder. It will not be necessary for us, therefore, to discuss the question of whether or not the trial court erred in making these orders, and the orders thus appealed from are hereby affirmed.

[14] Previous to the submission of this cause upon its merits a motion was made by the appellant association before this court that the costs of appeal, amounting to \$486.80, incurred by said association be allowed said association and made a charge

against the funds of the association now in the hands of the respondent commissioner. In passing upon that motion, this court said: "We are of the opinion that this cause should follow the usual and customary course by which the allowance of costs on appeal is made dependent upon the determination of the cause on its merits.

* * * The Building and Loan Association Act, supra, makes no provision for the advancement or prepayment of costs in a case of this kind. Such costs should abide the determination of the appeal." North American B.-L. Ass'n v. Richardson, 219 Cal. 685, 28 P.(2d) 1044. While we stated in our opinion that the denial was without prejudice to the consideration of the matter of costs on the disposition of the cause on its merits, the conclusion at which we have arrived requires a denial of said motion at this time. Having determined that the judgment of the trial court should be affirmed, the question of costs in the cause, according to the language of the decision just quoted, must follow the final determination of the appeal. The motion is denied.

After the appellant had perfected its appeal herein, the respondent moved this court to dismiss said appeal or affirm the judgment herein. Our determination of this appeal upon its merits renders it unnecessary for us to pass upon the respondent's said motion.

The judgment is affirmed and the appeal from the order denying the motion for a new trial is dismissed.



6 Cal.2d 123

TOGNAZZI v. WILHELM.

S. F. 15516.

Supreme Court of California,

April 16, 1936.

1. Fraudulent conveyances ☞174(3)

In grantor's suit to set aside conveyance made solely to render grantor judgment-proof in anticipated action against her, sustaining demurrer to complaint without leave to amend *held* proper notwithstanding action was never brought against grantor, since equity will not

establish a trust or enforce a contract tainted with fraud.

2. Fraudulent conveyances ☞174(3)

Party conveying property to hinder, delay, or defraud his creditors cannot by an action in equity obtain reconveyance from his grantee, nor can any one claiming under him, except innocent purchaser, bring such action.

3. Fraudulent conveyances ☞174(3)

Where realty was transferred solely to defeat existing creditor whose claim might become deficiency judgment against grantor, fraudulent scheme was consummated upon conveyance of realty, precluding grantor from setting aside conveyance, as against contention that intent to defraud had not been consummated at time of conveyance because creditor had not obtained deficiency judgment.

4. Pleading ☞225(2)

Where trial court sustained demurrer to complaint filed by grantor to set aside conveyance made to defeat judgment which might be rendered against grantor, refusal to permit amendment which alleged that grantees fraudulently induced grantor to make conveyance and that grantor had no intention of defrauding her creditors *held* not abuse of discretion.

5. Pleading ☞36(7)

Generally, party will not be allowed to file an amendment contradicting an admission made in original pleadings, in absence of deception or mistake.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George J. Steiger, Judge.

Suit by Anna M. Tognazzi against Hazel M. Wilhelm. From an adverse judgment on the pleadings, plaintiff appeals.

Affirmed.

Joseph A. Brown, of San Francisco, for appellant.

Glensor, Clewe, Schofield & Van Dine, of San Francisco, for respondent.

WASTE, Chief Justice.

This is an appeal from a judgment entered after a demurrer to the complaint had been sustained without leave to amend and plaintiff's motion for leave to file an amended complaint had been denied.

In substance, the complaint alleges that pursuant to an agreement appellant had conveyed certain real property to her two daughters, one of whom is the respondent herein, and that said daughters thereupon agreed to make application of the income therefrom in a manner designated. The complaint goes on to allege that "said agreement was made and entered into * * * merely as a sham and pretense and with the thought and idea in mind that this plaintiff would be thereby protected against the possibility of a deficiency judgment which by some possibility might be had against plaintiff in an action, never filed nor sought, by reason of a deed of trust given to a concern known as the San Jose Pacific Building and Loan Association, and with the understanding had between plaintiff and the defendant herein [and the other grantee-daughter] that at any time upon demand of the plaintiff, the real property described in said agreement would be reconveyed to plaintiff and the said agreement cancelled and annulled and set aside." The complaint then contains the usual allegations of a denial by the grantee-respondent of any right, title, or interest of appellant in or to the property or its income, and prays, among other things, for a declaration of appellant's rights under the contract and to the property, for an accounting, and for an adjudication that she is owner of said property.

[1,2] It is immediately apparent from the face of the complaint that the sole and admitted purpose underlying the transfer of the property by appellant to respondent and another and of the contract incidental thereto was to place the same beyond the reach of a creditor to whom appellant might thereafter become liable on a deficiency judgment. Under the circumstances, it was not error for the trial court to sustain the demurrer without leave to amend. It is well settled that equity will not lend its aid to establish a trust or enforce a contract which is tainted with fraud. As stated in *Saint v. Saint*, 120 Cal.App. 15, 22, 7 P. (2d) 374, 376, "he who executes a conveyance of property for the purpose of hindering, delaying, or defrauding his creditors cannot by an action in equity obtain a reconveyance from his grantee, nor can any one claiming under him, except an innocent purchaser." We pause to cite but a few of the innumerable authorities containing declarations to this effect: *Bennett v. Brown*, 206 Cal. 424, 428, 274 P. 532; *Faria v. Faria*, 100 Cal.App. 177, 181, 280 P. 187;

Allstead v. Laumeister, 16 Cal.App. 59, 116 P. 296.

[3] The mere fact that the creditor at the time of the conveyance had not procured the deficiency judgment which the conveyance was intended to defeat, is immaterial. *Kihlken v. Kihlken*, 59 Ohio St. 106, 51 N.E. 969, 972; *Carson v. Beliles*, 121 Ky. 294, 89 S.W. 208, 209, 210, 1 L.R.A. (N.S.) 1007; *Anderson v. Nelson*, 83 Cal. App. 1, 6, 256 P. 294. The admitted purpose of the transfer was to defeat an existing creditor whose claim, in part, might thereafter assume the form of a deficiency judgment. The fraudulent scheme was therefore fully consummated upon the conveyance of the property. It no longer remained, as appellant urges, an unconsummated intent to defraud. The cases of *Green v. Frahm*, 176 Cal. 259, 168 P. 114; *De Leonis v. Walsh*, 140 Cal. 175, 73 P. 813; and *Wassermann v. Sloss*, 117 Cal. 425, 49 P. 566, 38 L.R.A. 176, 59 Am.St.Rep. 209, relied on by appellant, are distinguishable on the ground, among others, that in each instance the conveyance itself did not, as here, constitute the fraud or wrong, but rather was executed to permit the grantor or the grantee, as the case might be, to thereafter perpetrate an independent wrong unconnected with the conveyance, which contemplated wrong being later abandoned left but a mere unexecuted intent to perpetrate the same. Here, as intimated, the conveyance itself was contrary to public morals and constituted the wrongful act which precludes the interposition of equity on behalf of the fraudulent grantor. The fraudulent agreement was fully executed when the conveyance was made.

To the above-stated general rule that equity will not lend its aid to either party to a fraudulent conveyance but will leave them where it finds them, there is, of course, the equally well-settled exception which permits relief to the grantor where the deed was procured by the fraud or undue influence of the grantee. *Faria v. Faria*, supra, 100 Cal. 177, 182, 280 P. 187; *Anderson v. Nelson*, supra, 83 Cal.App. 1, 6, 256 P. 294; *Saint v. Saint*, supra, 120 Cal. App. 15, 22, 7 P. (2d) 374. This exception is well stated in 12 California Jurisprudence, 1028, § 68, wherein the following appears: "If the grantor is not in pari delicto with the grantee the rule denying relief to the grantor against his own fraud does not apply, for this rule is never made the means of sustaining an injustice. If the

grantor acts under circumstances of oppression, imposition or undue influence, so that it appears that his guilt is subordinate to that of the grantee, equity will grant relief—not on the ground of any right in the grantor, but for the purpose of preventing a greater fraud by the grantee. The parties although in delicto are not in *pari delicto*, and relief is afforded the grantor because of the bad faith of the grantee and to prevent an imposition, for the greater offense of the grantee overcomes the lesser one of the grantor.”

After respondent’s demurrer to the complaint had been sustained without leave to amend, appellant moved to vacate the order and for leave to file an amended complaint. This dual request, which was denied, had for its only purpose the filing of an amended complaint whose allegations would take appellant’s cause without the application of the general rule and bring it within the exception thereto. In contradistinction to the allegations of the original complaint, the proposed amended complaint averred that the respondent by means of false and fraudulent representations had importuned and induced the appellant to enter into the agreement and to execute the conveyance and that appellant in so doing “had no intention of hindering, delaying, or defrauding any of her creditors * * *.”

[4] It is immediately apparent that the quoted portion of the proposed amended complaint flies squarely in the face of the allegation in the original complaint that the agreement and conveyance were “a sham and pretense” entered into “with the thought and idea in mind” that the appellant would thereby evade the effect of a possible deficiency judgment of a designated creditor. Under the circumstances, we are not prepared to hold that the trial court abused its discretion in refusing leave to the appellant to file her proposed amended complaint. In *Brown v. Aguilar*, 202 Cal. 143, 149, 259 P. 735, 738, it is declared that “an application for leave to amend is addressed to the sound discretion of the court and such application may be denied where no showing is made to justify the exercise of the court’s discretionary power.”

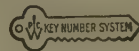
[5] The rule which warranted the court below in refusing leave to file the proposed amended complaint, and which finds expression in the decisions of this state, is well expressed in 31 Cyc. 422, wherein it is declared: “As a general rule a party will not

be allowed to file an amendment contradicting an admission made in his original pleadings. If it be proper in any case, it must be upon very satisfactory evidence that the party has been deceived or misled, or that his pleading was put in under a clear mistake as to the facts.” To the same effect, see *Bank of Woodland v. Heron*, 122 Cal. 107, 109, 110, 54 P. 537; *Harney v. Corcoran*, 60 Cal. 314; *Spanagel v. Reay*, 47 Cal. 608; *Cox v. Rosenberg*, 58 Cal.App. 181, 188, 208 P. 377; 49 C.J. 486, § 634.

In the *Bank of Woodland Case*, just above cited, the defendant had admitted the due execution, acknowledgment and certification of a mortgage. Upon the trial it was sought to file an amendment denying the due acknowledgment of the instrument. The application was denied. While recognizing that liberality should be exercised in allowing amendments to pleadings, this court in affirming the ruling pointed out that it is a settled proposition that “a party will not be permitted upon the trial to amend by denying a fact admitted in the answer.”

The judgment is affirmed.

We concur: SHENK, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.



6 Cal.2d 166

STEVER v. STEVER.

L. A. 15485.

Supreme Court of California.

April 27, 1936.

1. Divorce ☞298(1)

Custody of minor child of divorced parents may not be given to a stranger unless father and mother are found unfit or improper custodians (Civ.Code, §§ 138, 197, 246; Code Civ.Proc. § 1751).

2. Divorce ☞298(1)

Where husband obtained divorce, award of minor child to husband’s parents held error in absence of finding that wife was not fit person to have custody of child (Civ.Code, §§ 138, 197, 246; Code Civ.Proc. § 1751).

In Bank.

Appeal from Superior Court, Los Angeles County; Oscar J. Seiler, Judge.

Suit for divorce by Eugene R. Stever against Mae I. Stever. From an adverse order, the defendant appeals.

Order reversed, with directions.

Stuart McHaffie, of Los Angeles, and Archie L. Tower, of Long Beach, for appellant.

Cameron & Perkins, of Long Beach, for respondent.

CURTIS, Justice.

Respondent was granted a divorce from appellant by default. There was one child, Betty Jean Stever, a girl then five years of age. No disposition was made as to her custody nor provision for her support in either the interlocutory or final decree of divorce. The child continued to live and reside with appellant, her mother, who still has her physical custody. On March 15, 1935, four years after the interlocutory decree was entered, appellant caused an order to show cause to be issued out of the trial court requiring the respondent to show cause on a day therein named, why legal custody should not be awarded to appellant and respondent required to pay towards the support and maintenance of said minor. On the day appointed, the respondent appeared, and a hearing was had on appellant's motion at which hearing affidavits and oral testimony were offered by the parties to said action. No stenographic reporter was present and no record was made of the evidence admitted at said hearing. Respondent presented no counter petition for the custody of said minor. At the conclusion of the hearing, the court awarded the custody of said minor to Wesley R. Stever and Mary L. Stever, the parents of the respondent father, and directed the father to pay the sum of \$15 per month towards the support of his said minor child. Ample provision was made in the decree for each parent to visit and take said minor child to their respective homes at proper intervals of time. No findings were made by the court, and consequently the court made no findings as to the fitness of the parents, or either of them. The mother has appealed from said order, and for ground of appeal asserts that the court erred in awarding said minor to strangers without a finding as to the fitness of the par-

ents, and particularly as to her fitness to have the care and custody of her minor child. It is apparent from the record that the order awarding the custody of the minor to his parents was made with the consent of the respondent, if not at his instance and request. Therefore, the only question before us is whether the trial court erred in awarding said minor to the parents of the respondent without finding the appellant to be an unfit person to have the care and custody of her own child.

In a number of cases it has been held that in a proceeding between the parents of minor children to modify the interlocutory or final decree respecting the custody of the children, it is not necessary that the court make findings as to the unfitness of one or either of the parents. *Crater v. Crater*, 135 Cal. 633, 635, 67 P. 1049; *Simmons v. Simmons*, 22 Cal.App. 448, 456, 134 P. 791; *Gavel v. Gavel*, 123 Cal. App. 589, 591, 11 P.(2d) 654; *Beal v. Beal*, 218 Cal. 755, 758, 24 P.(2d) 768.

In guardianship proceedings, which are governed by sections 1747 to 1751 of the Code of Civil Procedure (prior to the adoption of the Probate Act), it is held that before the court can appoint a stranger as guardian of a minor under fourteen years of age, it must find that the parents are incompetent to act as guardian. In *re Campbell's Estate*, 130 Cal. 380, 383, 62 P. 613. In the case of *In re Mathews' Estate*, 169 Cal. 26, 145 P. 503, which was a contest between the mother of a minor and a stranger, for the guardianship of the child, it was held that a finding of the court that the mother was competent compels her appointment, notwithstanding her straitened financial condition, and the further fact that apparently the child's material welfare would best be served by giving it to another. However, where the mother of a minor child less than a year old was dead, and the court found the father to be an unfit person to have the care of the child, an order appointing a stranger as guardian was held to be proper. In *re Bensfield*, 102 Cal.App. 445, 283 P. 112.

[1,2] The only California case directly in point, so far as we are informed, with the present action, is the case of *Newby v. Newby*, 55 Cal.App. 114, 202 P. 891, 892. In that case the controversy was over the custody of a minor child, six years of age. Each parent asked for its custody upon the ground of alleged unfit-

ness of the other, and as to which issue the court made no finding. But as a conclusion of law, found that it was for the best interests of the child that its custody be awarded to a third person, and thereupon made an order awarding its custody to a stranger. On an appeal from said order by the father, the order was reversed. That case was not brought up to this court, and accordingly it has not had the approval of this court. However, we are impressed with the reasoning of the court in its opinion, and agree with conclusion reached therein. We quote therefore the following portion of said opinion which expresses our views upon the question now before us: "As father of the child, appellant attacks this order, claiming that in the absence of a finding of unfitness, the custody of the child should have been awarded to one of the parents. In this we agree with appellant. Section 138, Civil Code, provides that in such actions the court may make an order for the custody, care, and support of minor children of the marriage; and section 246 of said Code provides that the court, in the determination of such matters, shall be guided, first, 'by what appears to be for the best interest of the child,' and, second, 'as between parents adversely claiming the custody or guardianship, neither parent is entitled to it as of right; but other things being equal, if the child is of tender years, it should be given to the mother.' It is apparent that in making the order the court was controlled by subdivision 1 of said section. The law, however, presumes that the interest of a child will be best subserved by awarding its care to a parent, unless he or she is unfit to have its care. Section 197, Civil Code, provides, 'The father and mother of a legitimate unmarried minor child are equally entitled to its custody, services and earnings,' unless, as further provided, they are unable or refuse to take the custody, or have abandoned his or her family, in which cases, as well as for other causes, they should be deemed unfit as such custodians. This section should be construed with subdivision 1 of section 246, and, so read, they contemplate that the natural right of the parent to the care of a minor child, if a fit and proper person, shall prevail as against an entire stranger. In the absence of either evidence or finding showing the contrary, the law presumes that either parent is a proper person to whom its care should be awarded. And where, as here, since in

the absence of a finding upon the issue of fitness either is presumably a proper person, the court, guided by subdivision 2 of section 246, should have awarded the custody of the minor child to one of its parents. By reason of the right which the law presumes to be vested in the parent, the rule declared in section 1751, Code of Civil Procedure, as to guardians, read with and modified by the provisions of section 246, Civil Code, is applicable, viz. that under section 1751 'the father or the mother of a minor child under the age of fourteen years, if found by the court competent to discharge the duties of guardianship, is entitled to be appointed a guardian of such minor child, in preference to any other person.' In *re Mathews' Estate*, 169 Cal. 26, 145 P. 503; In *re Mathews' Estate*, 174 Cal. 679, 164 P. 8; In *re Campbell's Estate*, 130 Cal. 380, 62 P. 613. And under section 246, by reason of the presumptive right thereto, unless found by the court to be an unfit and improper person, the father or the mother is entitled to the care and custody of the minor child." The order awarding the custody of the minor was reversed, with directions to the trial court upon a further hearing of the matter to make a finding as to the alleged unfitness of the parents to have the care of said minor. This case seems to be upon "all fours" with the instant action, and in our opinion should control our decision of the question as to the necessity of a finding as to the unfitness of the parents to have the custody of said minor before it can award the custody of said minor to a stranger. As the respondent has apparently consented to the order giving the custody of his child to his parents, the question of his fitness to have her custody is not involved. But before the court can deprive the mother of her right to the minor's custody and give her into the charge of strangers, there must be a finding that the mother is an unfit person to have the custody of her child.

The evidence before the trial court upon the hearing of appellant's motion to modify the decree is not before us. There are in the clerk's transcript two questionnaires with the answers of each party to the questions contained in the questionnaire submitted to him or her. Assuming that these documents are legally included in the clerk's transcript and are therefore properly before us, they constitute only a part of the evidence before

the trial court at said hearing. This appears from the order itself which recites: "Witnesses were sworn and examined and documentary evidence was introduced and the matter was submitted to the court for decision." Were all the evidence properly before us, we might make the required finding but with the condition in which we find the record, we are, of course, not authorized to make any change in the findings. The motion to dismiss is denied.

For the failure of the court to find that the appellant was an unfit person to have the custody of said minor child, the order awarding the custody of said minor to the paternal grandparents of said minor is reversed, with directions to the trial court upon a further hearing of said matters to make a finding as to the fitness of appellant to have the custody of said minor.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; CONREY, J.; SEAWELL, J.



6 Cal.2d 128

DWELLY v. McREYNOLDS et al.

S. F. 15522.

Supreme Court of California.

April 18, 1936.

Rehearing Denied May 18, 1936.

1. Witnesses Ⓒ222

Party seeking to suppress evidence as confidential communication has burden to show that such evidence is within terms of statute (St.1931, p. 2130, § 142).

2. Witnesses Ⓒ216

Statements made to officers in reporting automobile accident, to be privileged and inadmissible in evidence, must come within express terms of statute (St.1931, p. 2130, § 142).

3. Appeal and error Ⓒ970(2)

Witnesses Ⓒ223

Whether statements made to officers in reporting automobile accident were privileged was for trial court's determination, and trial court's decision on conflicting evidence was conclusive (St.1931, p. 2130, § 142).

4. Witnesses Ⓒ216

Where statements made to officers in reporting automobile accident were not on requisite forms or filed or used as provided by statute, statements were not privileged so as to be inadmissible in evidence (St.1931, p. 2130, § 142).

5. Automobiles Ⓒ290

No duty rested on road watchman to warn motorcyclist of danger equally known to motorcyclist.

6. Automobiles Ⓒ245(82)

Where motorcyclist after being signaled by night watchman to proceed along highway under construction collided with truck, lights of which motorcyclist saw when he passed watchman, whether motorcyclist's general knowledge of truck's movements over highway should have caused him to anticipate danger when he saw lights of truck held for jury.

7. Automobiles Ⓒ201(1)

Night watchman's negligence in permitting motorcyclist to proceed along highway under construction, although watchman saw lights of truck and knew driver would turn truck across motorcyclist's path, held a proximate cause of collision between motorcyclist and truck, so as to entitle motorcyclist to recover for injuries sustained in collision.

8. Negligence Ⓒ136(9)

Contributory negligence is question of law only when court is impelled to say that from facts reasonable men can draw but one inference, and that an inference pointing unerringly to negligence of plaintiff contributory to his injury.

9. Automobiles Ⓒ245(82)

Where motorcyclist was familiar with highway and knew highway was being reconstructed and saw in advance headlights of truck with which he collided after he had been signaled by night watchman to proceed along highway, whether motorcyclist was guilty of contributory negligence in failing to anticipate that truck would cross his path without warning held for jury.

10. Automobiles Ⓒ213

Motorcyclist was not negligent in failing to anticipate that truck driver would violate vehicle act by failing to signal before turning so as to bar recovery for injuries sustained when motorcycle collided with truck (St.1925, p. 413, § 130).

11. Automobiles ⇨245(82)

Where motorcyclist after being signaled by night watchman advanced along highway under construction and collided with truck, whether motorcyclist made reasonable effort to avoid collision *held* for jury.

12. Damages ⇨132(1)

\$17,500 *held* not excessive for injuries sustained by motorcyclist colliding with truck, where motorcyclist suffered concussion of brain which rendered him unconscious for two weeks, fractures of pelvis, wrist, and elbow, and injuries were of permanent nature.

In Bank.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Suit by Vernon Edward Dwelly against O. McReynolds and others. From a judgment for the plaintiff, the defendants appeal.

Affirmed.

For prior opinion see 47 P.(2d) 552.

Bronson, Bronson & Slaven, of San Francisco (John H. Painter, of San Francisco, of counsel), for appellants Peninsula Paving Co. and Lloyd E. Arrowsmith.

Paul Dana and Charles V. Barfield, both of San Francisco, for appellants O. McReynolds and G. R. Burgin.

Martinelli & Gardiner, Jordan L. Martinelli, and Samuel W. Gardiner, all of San Rafael, for respondent.

PER CURIAM.

Further consideration of the merits of the appeals herein has led us to arrive at the same conclusions reached by the District Court of Appeal, First Appellate District, Division 1, and we adopt as the opinion of this court the opinion of that court prepared by Mr. Justice Gray, pro tem. It is as follows:

"On the night of the accident, respondent Vernon E. Dwelly, as a state traffic officer, was patrolling, on his motorcycle, the state highway between San Rafael and Sausalito, in Marin county. The portion of this highway between Sausalito and Waldo was being reconstructed by appellant Peninsula Paving Company under a state contract. In such work, dirt was hauled southerly from a steam shovel, westerly of the highway, to a fill, easterly

of the highway, by trucks, which were rented, with drivers, by appellant O. McReynolds, to the company. To control traffic, the company stationed a flagman at each end of the portion of the highway over which the trucks moved. Immediately before the accident respondent had stopped on signal of the northerly flagman, appellant Lloyd E. Arrowsmith, and, after proceeding southerly about 125 feet, collided with one of such trucks, operated by appellant G. R. Burgin, when it, in going to the steam shovel, made a sharp left turn from the easterly side of that highway across respondent's course. For the resultant injuries respondent sued all four appellants and was awarded by a jury damages against all in the sum of \$17,500. The paving company and its flagman, jointly, and the truck owner and its driver, jointly, have separately appealed from the judgment, entered in accordance with the verdict.

"Over such appellants' separate objections that they were privileged and confidential communications under section 142 of the California Vehicle Act (St.1923, p. 563, as amended by St.1931, p. 2130), respondent was permitted to read into evidence, statements as to the accident, made by appellants Arrowsmith and Burgin, and to cross-examine each as to his statement. The pertinent part of this section reads as follows: 'The driver of any vehicle involved in any accident resulting in injuries * * * to any person, shall within twenty-four hours forward or file or cause to be filed a report of such accident to the division, or any of its branch offices or local headquarters of the California highway patrol. * * * All accident reports shall be made on forms approved by the division. * * *'

"'The division may require drivers * * * involved in accidents to file supplemental reports and may require witnesses of accidents to render reports to it upon forms furnished by it whenever the original report is insufficient in the opinion of the division.

"'All accident reports together with all supplemental reports above mentioned shall be without prejudice and shall be for the confidential use of the division of motor vehicles and shall not be used in any manner whatsoever as evidence, or, for any other purpose in any trial, civil or criminal arising out of such accident.'

[1-4] "The burden is upon the party seeking to suppress the evidence to show that it is within the terms of the statute." *Sharon v. Sharon*, 79 Cal. 633, 677, 22 P. 26, 39, 131; *Collette v. Sarrasin*, 184 Cal. 283, 193 P. 571. The statements to be privileged and hence inadmissible must come within the express terms of the section. *Edison Electric L. Co. v. United States Electric L. Co. (C.C.)* 44 F. 294; *Peden v. Peden's Adm'r*, 121 Va. 147, 92 S.E. 984, 2 A.L.R. 1414; *Hawthorne v. Delano*, 183 Iowa, 444, 167 N.W. 196; *Thaden v. Baggan*, 139 Minn. 46, 165 N.W. 864. The question of privilege was a matter for the trial court's determination and its decision, upon conflicting evidence, is conclusive. *Stewart v. Douglass*, 9 Cal.App. 712, 100 P. 711. The testimony discloses that both appellants, at the request of a traffic officer, reported, the day after the accident, to the highway patrol office in San Rafael; that Arrowsmith then signed a statement in the presence of such officer and the latter's superior; that Burgin, after being sworn by a notary public, was questioned by the two officers and signed a transcription of such interrogation; that neither statement was on the specified division form nor filed as provided in the section and that the officers obtained the statements for the benefit of their injured fellow officer and not for official use, nor had they been so used. Since, as the trial court correctly stated, the statements were neither made by appellants on the requisite forms, nor filed nor used as provided by the section, they were not privileged but were admissible.

[5-7] "In addition to the general verdict, the jury returned two special verdicts, in which they found that Lloyd Arrowsmith was guilty of negligence as charged in the complaint and that O. McReynolds was an independent contractor. Respondent cannot question the sufficiency of the evidence to support the second finding and the judgment as to the Peninsula Paving Company and Lloyd Arrowsmith can only be sustained if the evidence supports the first finding. *Hudgins v. Standard Oil Co.*, 136 Cal.App. 44, 28 P. (2d) 433. The complaint charged that Arrowsmith was stationed by his employer, Peninsula Paving Company, as a flagman to protect the public, including respondent, from injury arising from the movement of the trucks upon the highway, that Arrowsmith, although aware of the direction in which Burgin was operating his truck,

failed to halt respondent or to protect him from the danger arising from such operation but negligently permitted and invited him to proceed. Appellants Peninsula Paving Company and Arrowsmith argue: (1) That, since respondent had knowledge as to manner of operating all trucks used in the work, equal to that of Arrowsmith, the latter owed no duty to warn him of the particular movement of Burgin's truck; (2) that, since Arrowsmith had stopped respondent, he had discharged all duty he owed; and (3) that Arrowsmith's negligence, if any, was not a proximate cause of the accident. No duty rested on Arrowsmith to warn respondent of a danger equally known to him. *Molles v. Dollar S. S. Lines, Inc.*, 136 Cal.App. 369, 29 P. (2d) 308. Respondent had patrolled the highway nightly for two months before the accident, during which time its reconstruction was progressing and was therefore aware that trucks crossed the highway to and from the steam shovel. He also saw the steam shovel in operation and the headlights of Burgin's truck as it proceeded from the fill northerly but did not know whether they belonged to a truck or automobile. He stopped at Arrowsmith's signal and conversed with him. He told the latter that he was going south, the latter said 'Okay' and he moved on. Arrowsmith knew that Burgin's truck was approaching and that it was dangerous for respondent to proceed. Respondent would not have proceeded if Arrowsmith had told him the headlights were those of Burgin's truck. This testimony shows that respondent did not have actual knowledge of the danger created by this particular truck and whether his general knowledge of truck movements should have caused him to anticipate danger when he saw headlights presented a question for the jury. Since Arrowsmith had superior knowledge that the headlights belonged to Burgin's truck, he should have warned respondent of the danger, of which, it is apparent, he knew the latter was oblivious. Arrowsmith's negligence was a proximate cause, although Burgin's negligence intervened, because, it is clear from the above testimony, that Arrowsmith not only should have but actually did anticipate that Burgin would turn his truck across respondent's path. *Sawyer v. Southern California Gas Co.*, 206 Cal. 366, 274 P. 544.

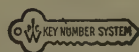
[8-11] "O. McReynolds and G. R. Burgin make no claim that the evidence does

not show that the operation of the truck was negligent, but they, like the other appellants, contend that the evidence establishes that respondent was contributorily negligent, as a matter of law. All appellants argue that since respondent was familiar with the highway, knew that its reconstruction was in progress and that trucks crossed the highway in the vicinity of the collision and actually saw the headlights of the approaching truck, he was guilty of contributory negligence, as a matter of law, in failing to realize that the headlights belonged to Burgin's truck and in failing to anticipate that the truck would cross his path without warning or signal. "Contributory negligence is a question of law only when the court is impelled to say that from the facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his injury." *Reaugh v. Cudahy Packing Co.*, 189 Cal. 335, 336, 208 P. 125, 128; *Smith v. Southern Pacific Co.*, 201 Cal. 57, 255 P. 500. In all other cases the question of contributory negligence is a question of fact for the jury. *Wahlgren v. Market St. Ry. Co.*, 132 Cal. 656, 663, 62 P. 308, 64 P. 993; *Jansson v. National S. S. Co.*, 189 Cal. 187, 192, 208 P. 90; *Smith v. Southern Pacific Co.*, *supra*. (*Flores v. Fitzgerald*, 204 Cal. 374, 376, 268 P. 369, 370. Whether or not respondent acted with ordinary care under the circumstances and with his knowledge presented a question of fact for the jury's decision. He was not negligent in failing to anticipate that the truck driver would violate section 130 of the California Vehicle Act (St.1923, p. 558, as amended by St.1925, p. 413). *De Arman v. Connelly*, 134 Cal. App. 173, 25 P.(2d) 24. The reasonableness of respondent's conduct in seeking to avoid the collision also was a matter for the jury's determination. *Kearney v. Castellotti*, 55 Cal.App. 541, 203 P. 1029; *Mast v. Claxton*, 107 Cal.App. 59, 290 P. 48.

[12] "Their soft and mild recital of respondent's injuries and expenditures sufficiently refute the argument of appellants McReynolds and Burgin that the verdict is excessive merely because he was not so incapacitated as to be unable to resume his occupation after four months. The special damages for medical and hospital services and loss of earnings amounted to \$3,790. He suffered a concussion of the

brain, which rendered him unconscious for two weeks, and fractures of the pelvis, wrist and elbow. He was confined in the hospital for ten weeks. At the time of trial, six months after the accident, he still limped but was gradually improving. Then, there was a permanent loss of one-third of the normal motion in the left wrist. The flexion of the left elbow had improved under treatment and was pretty good at time of trial, but its extension would not improve. Appellants concede that the injuries were severe and painful."

The judgment is affirmed.



6 Cal.2d 103

OLDFIELD v. BANK OF AMERICA NAT.
TRUST & SAVINGS ASS'N.

L. A. 15155.

Supreme Court of California.

April 14, 1936.

1. Appeal and error ⇨1208(1)

Generally, party obtaining through judgment, before reversal, any advantage or benefit must make restitution to adversary after reversal.

2. Appeal and error ⇨1208(4)

Where judgment in interpleader action adjudged, adversely to execution creditor, that fund deposited with clerk belonged to neither debtor nor certain judgment creditor, but belonged to third persons, who stipulated for specified payment therefrom to judgment creditor, who furnished ample consideration therefor by waiving his claim to fund and right of appeal and satisfied judgment pro tanto, and third persons thereafter withdrew balance of fund prior to notice of appeal by execution creditor, who obtained reversal of judgment and first lien on deposit, obligation to make restitution rested on third persons and not on judgment creditor nor his assignor for collection, who had no knowledge that fund was withdrawn without hearing required by court rule (Code Civ.Proc. §§ 572-574; Rules of Superior Court for Los Angeles County, rule 41).

In Bank.

Appeal from Superior Court, Los Angeles County; Carl J. Stutsman, Judge.

Action by Barney Oldfield against the Bank of America National Trust and Savings Association. Judgment for defendant, and plaintiff appeals.

Affirmed.

Prior opinion, 47 P.(2d) 493.

Carroll Allen and A. E. McManus, both of Los Angeles, for appellant.

Louis Ferrari, of San Francisco, and Edmund Nelson and G. L. Berrey, both of Los Angeles, for respondent.

WASTE, Chief Justice.

With such additional comments as will hereinafter appear, we adopt as part of the decision of this court the following portions of the opinion heretofore prepared in this cause by Mr. Justice Willis, sitting pro tempore, in the District Court of Appeal of the Second Appellate District, Division Two (47 P.(2d) 493).

"This is an appeal by plaintiff from a judgment, and is based on the judgment roll alone. The facts of the case are therefore those reflected by the findings of fact, hereinafter stated, and the main question herein is whether or not those findings support the conclusion of the court and its judgment based thereon.

"On August 1, 1926, appellant obtained a judgment against one J. M. Danziger for \$10,000, on which two writs of execution were issued and levies made thereunder by the sheriff of Los Angeles county on California Bank, a banking corporation, on April 27, 1927, and January 28, 1929, respectively, garnishing certain property and money then in the possession of said bank and claimed by appellant to belong to said Danziger, but which money and property the trial court found in this case did not belong to him. Other persons made claim to part or all of said money and property, among them being Ivan R. Bean, whom the court found was an assignee of the respondent bank for the purpose of collecting the claim he represented. On February 19, 1929, the California Bank filed an interpleader action against the sheriff, this appellant, said Ivan R. Bean, Edith Wake Danziger and Lina Danziger, and others, in which action an order was entered permitting the California Bank to deposit the money and property, subject to the adverse claims of the

parties, with the clerk of the superior court, said property including the sum of \$15,081.12 in cash. Upon deposit of the money and property the California Bank was dismissed from the case.

"In the interpleader action said Ivan R. Bean appeared and answered, with other defendants. On April 25, 1930, judgment therein was entered against this appellant adjudging that said money and property belonged to Edith Wake Danziger, subject to a lien thereon or interest therein in favor of Lina Danziger in the amount of \$4,400, and that said Ivan R. Bean had no interest therein or right thereto. The court further found that it was not true that said money and property of the value of \$40,000 were ordered by the court to be deposited with the clerk of said court pending the final determination of said cause. At that time there was a rule of the superior court in and for Los Angeles county, number 41, providing the procedure for securing an order of court for withdrawal of moneys or property deposited under sections 572, 573 and 574 of the Code of Civil Procedure, by which it was in substance provided that upon filing by the claimant of his verified petition setting forth the basis of his claim and giving the names of all parties interested therein, the presiding judge should order the custodian of said funds and all other persons interested therein and named in said order to show cause in the law and motion department at a time specified why an order should not be made directing the delivery or payment thereof to the petitioner, and that after such hearing the court should make such order as might be necessary or proper. On May 2, 1930, a stipulation was made and filed in said interpleader cause whereby Edith Wake Danziger and Lina Danziger on their part and Ivan R. Bean on his part stipulated that out of the funds deposited with the clerk of said court there should be paid to said Ivan R. Bean the sum of \$3,000 in consideration of his waiving all his claim, right, title and interest in and to said fund, which by inference was based on an execution lien on a judgment against J. M. Danziger, and of waiving his right of appeal in said action and satisfying his judgment against J. M. Danziger to the extent of \$3,000; and thereupon the presiding judge of said court entered an order for the payment of said sum of money to said Ivan R. Bean, the said sum was paid to him on May 2, 1930, and he

thereupon satisfied his judgment against J. M. Danziger to the amount of \$3,000. Later on the same day all the remaining portion of the funds on deposit was withdrawn by Edith Wake Danziger and Lina Danziger and Charles Montgomery.

"The court further found that no hearing was held upon any petition for delivery of the moneys in said deposit as provided in said rule of court. Also the court found that it was not true that Ivan R. Bean and respondent bank knew or should have known that said funds were so procured fraudulently and in violation of the rights of the appellant, and that it was not true that the whole transaction of procuring said funds was done for the purpose of cheating and defrauding appellant out of his interest in said funds in the event that said judgment should be reversed on appeal.

"On April 30, 1930, notice of entry of the judgment in the interpleader cause was served on appellant, and on May 8, 1930, appellant filed a notice of appeal from said judgment, but he neglected to procure any stay of execution thereon.

"The court also found that during the time between judgment entry, on April 26, 1930, and the order of withdrawal of May 2, 1930, appellant had full notice and knowledge that said Ivan R. Bean and Edith Wake Danziger and Lina Danziger were negotiating respecting a settlement of the demands of said Ivan R. Bean against said J. M. Danziger and against the funds on deposit, and that said Ivan R. Bean intended to make a settlement with said J. M. Danziger and to procure the payment to him from said deposit and to release his claim to said funds and waive his right of appeal and give partial satisfaction of judgment to said J. M. Danziger. On May 2, 1930, on the stipulation and order above mentioned, the sum of \$3,000 was paid from said funds to Ivan R. Bean, who waived right of appeal and entered partial satisfaction of his judgment against J. M. Danziger, and said Ivan R. Bean, as trustee for respondent bank, received said sum and paid the same over to respondent bank. When said sum was so paid over to Ivan R. Bean there was in said deposit a sum in excess of \$28,000 in cash and other property of the value of upwards of \$12,000. The court further found that by reason of delay of appellant in procuring a stay of execution on the judgment in the interplead-

er cause and in permitting Edith Wake Danziger and Lina Danziger to withdraw a portion of said remaining funds, appellant was guilty of such laches as to prejudice respondent bank.

"On March 31, 1932, the Supreme Court [this court] reversed the judgment in the interpleader cause upon the grounds that as to appellant herein there had been a prior adjudication that the said funds belonged to said J. M. Danziger (*California Bank v. Traeger*, 215 Cal. 346, 10 P.(2d) 51). Thereafter said cause was retried and a judgment was entered therein on June 9, 1933, adjudging this appellant to be entitled to and that he has a first lien in the sum of \$10,000 with certain interest 'on the money and securities heretofore deposited with the clerk of this court,' describing the same, and that J. M. Danziger is entitled, after the lien of appellant shall have been satisfied, to the balance of said money and securities, and that Edith Wake Danziger and Lina Danziger and other defendants, other than J. M. Danziger and appellant, take nothing by said action. An appeal from this judgment taken by Edith Wake Danziger and Lina Danziger was dismissed.

"On these facts the court herein concluded that appellant was not entitled to recover anything from respondent, and judgment was accordingly entered from which this appeal is taken.

[1] "Appellant claims that he is entitled to recover from respondent bank the amount received by it through its trustee Ivan R. Bean out of the deposit in the hands of the clerk of the court, on the theory that respondent obtained the same under an erroneous judgment, afterwards reversed. There is a general rule that a party obtaining through a judgment, before reversal, any advantage or benefit, must restore what he got to the other party, after the reversal. *Reynolds v. Harris*, 14 Cal. 667, 681, 76 Am.Dec. 459; *Cowdery v. London*, etc., Bank, 139 Cal. 298, 73 P. 196, 96 Am.St.Rep. 115; *Ward v. Sherman*, 155 Cal. 287, 100 P. 864. Herein appellant claimed an execution lien on the money and property taken into custody by the court in the interpleader cause, to the extent of the amount of his judgment against J. M. Danziger. The court in that cause was called upon to ascertain and determine the nature and order of priority of the claims of defendants therein. It adjudged that neither ap-

pellant nor Bean had any lien or valid claim upon the money and property, but that Edith Wake Danziger and Lina Danziger were the owners thereof and entitled thereto. By the judgment appellant's execution lien was voided. In the absence of any stay of execution the successful parties last above named stipulated that Bean should have \$3,000 of the funds on deposit, in consideration of his waiving his claim on the funds and his right to appeal and of his satisfying a judgment against J. M. Danziger to the extent of \$3,000. On this stipulation the presiding judge ordered the payment of that sum to Bean, who received and delivered it over to respondent bank as he was bound to do, and he thereupon gave up his right to appeal and satisfied the judgment against J. M. Danziger pro tanto.

"It is clear that in this action the court cannot restore the \$3,000 above mentioned to appellant without placing respondent bank in the position of having waived its claim through its trustee, Bean, to the funds and of having satisfied a judgment against J. M. Danziger to the extent of \$3,000, and then also being deprived of the \$3,000. In *Ward v. Sherman*, supra, it is said: 'Where a judgment or decree of an inferior court is reversed by a final judgment on appeal, a party is in general entitled to restitution of all things lost by reason of the judgment in the lower court, and, accordingly, the courts will, where justice requires it, place him as nearly as may be in the condition in which he stood previously.' * * * The money in question was withdrawn by Edith Wake Danziger and Lina Danziger, to whom it was adjudged by the judgment, not by Bean as the beneficiary under such judgment."

[2] The sentence last quoted points to the propriety of the judgment here questioned. It was Lina and Edith Wake Danziger, the beneficiaries under the judgment, who withdrew the fund prior to the noticing of appellant's appeal therefrom and paid a portion thereof over to respondent's assignee. The appellant's complaint so alleges. At the time of such withdrawal, and in the absence of a stay of execution, the Danzigers were entitled to the fund under the authorities above cited. In the absence of a stay, it was only upon a reversal of the judgment on appeal that appellant was in a position to again make claim to the fund. However,

upon such reversal of the judgment, the obligation to make restitution of the fund, whether or not withdrawn in compliance with the rule of court covering such withdrawals, was peculiar to and rested solely upon the beneficiaries of the judgment who had withdrawn the same. In the absence of fraud, and the trial court found against appellant on this issue, the respondent as recipient of a portion of the fund from the Danzigers, withdrawn by the latter at a time when it was adjudged to be their property, is not required to restore the same or its equivalent to the appellant. The mere fact that at one time respondent, through its assignee Bean, was a claimant to a part of the fund, places it in no different legal position, in our opinion, than any other third person to whom the Danzigers may have paid over a portion of the withdrawn fund. As stated above, Bean by waiving all claim to the fund and surrendering his right of appeal from the judgment awarding it to the Danzigers, furnished ample consideration for the payment to him.

The case of *Garrett v. Jensen*, 44 Cal. App. 99, 186 P. 156, 158, involved litigation between a widow and minor heir over the proceeds of an insurance policy which had been deposited in court by the insurance company and the rival claimants thereto interpleaded. The fund was adjudged to belong to the minor who, through his guardian, came into the possession of the greater part thereof after a stay of execution had expired and prior to the widow's appeal from the judgment. A portion of the fund was then paid by the guardian to an attorney named Lady who had formerly appeared for the insurance company but who thereafter assisted the guardian in obtaining the fund. Upon appeal, the judgment was reversed and the widow was adjudged to be entitled to the fund. She thereupon brought an action naming as defendants, among others, the guardian of the minor, who had received the money, and Lady, to whom the guardian had paid over a portion thereof. The latter defendant alone resided in Los Angeles county wherein the action was commenced. If said defendant was a necessary party or if the complaint stated a cause of action against him, the action was properly commenced in the county of his residence; otherwise a change of venue was proper. In affirming the order granting such change of venue, it was held that the complaint failed to state a cause

of action against Lady and that he was not a necessary party defendant. The opinion declares:

"If, on December 23, 1915—the day on which all the transactions were had that eventuated in the payment of the money by the county treasurer to the guardian of the minor—the latter was entitled to the possession of the money, then Lady's participation in those transactions was not wrongful or illegal. A judgment adjudging the minor to be entitled to the money had been entered; the stay of execution upon that judgment had expired; * * * and no appeal from the judgment had as yet been taken. There is no room, therefore, for the claim that, at the time when the money was received by the guardian, proceedings on the judgment had been suspended by any appeal therefrom, or that, at that time, supersedeas might issue to prevent an enforcement of the judgment in favor of the minor. The order of the court directing the county treasurer to pay the money to the guardian was, under the circumstances a proper proceeding for the enforcement of the judgment that had been given and made in the minor's favor. At the time when, on order of the court, the money was paid by the county treasurer to the guardian, there was a legal right in the minor to demand and receive it, or to enforce payment of it by some suitable method for enforcing the judgment that had been given and made in his favor. Doubtless the reversal of the judgment by the District Court of Appeal gave plaintiff a right or cause of action against the minor or his guardian. But that was a newly created right. It was a right created by the reversal of the judgment of the trial court and the entry of a new judgment—a judgment in favor of plaintiff, the widow of the insured, as directed by the District Court of Appeal. The reversal created a legal obligation on the part of the minor or his guardian to restore what the plaintiff here had lost by reason of the erroneous judgment of the trial court in that action. But the payment of the money to defendant Jensen, as the guardian of the minor, before plaintiff had taken any appeal from the judgment, was legal, and the reversal of that judgment did not have a retrospective operation so as to make void that which was lawful when done. * * *

"If, at the time when the money was paid over to his guardian, the minor was entitled to an enforcement of the judg-

ment that had been made in his favor, and he unquestionably was, then the fact that Lady had been the attorney for the insurance company and was not the attorney of record for the minor cannot lay him under any liability. If, as we hold, the guardian, at the time when the money was paid to her by the county treasurer, had the right to enforce the judgment that had been made in her ward's favor and compelled payment to herself as guardian, the means and instrumentalities whereby she accomplished that result do not concern plaintiff.

"The complaint alleges that, after the money was received by the guardian, the defendants—and that, of course, includes the defendant Lady—'appropriated' to their own use a large part of the money. Manifestly this can mean no more than that, after the money came into the possession or under the control of the guardian in the manner heretofore detailed, she paid or gave a part of it to Lady and the latter then used it as he saw fit. But that fact would not give plaintiff a cause of action against Lady for the part of the money that thus may have been paid to him by the guardian and then 'applied' by him to his own use, unless, at the time when he received it from the guardian, it was then held by the latter as a trust fund. While it is true that, as claimed by appellant, equity will enforce a trust against all persons who, with notice of the trust, may come into the possession of the trust property, nevertheless, to entitle appellant to follow the money into the hands of Lady and recover it from him as part of a trust fund held in trust for her, she must first show that when Lady received it from the guardian, the latter then held it as a trust fund in trust for appellant. This the complaint fails to do. * * * As we have seen, on December 23, 1915, when the money was paid by the county treasurer to the guardian, or to some agent of the guardian, she, as the guardian of the minor in whose favor the judgment of the trial court had been entered, was entitled to an enforcement of the judgment—entitled to have the money paid to her for her ward. And not until the judgment of the District Court of Appeal reversing the judgment of the trial court became final did any obligation rest upon the guardian to return any part of the \$4,074.

"On the reversal of an erroneous judgment, but not before, the law raises an

obligation on the part of any party to the action who may have received the benefit of the judgment to make restitution to the other party for what the latter has lost. Until the reversal, the party who may have received satisfaction under the erroneous judgment may justify under it and under any execution issued thereon, for the erroneous judgment is the act of the court. *Bank of United States v. Bank of Washington*, supra [6 Pet. 8, 8 L.Ed. 299]. * * * Until the reversal of the judgment by the District Court of Appeal the money that had been received by the guardian from the county treasurer was not held by her as a trust fund; until then it was not stamped with the character of a trust."

This case was cited with approval in *Levy v. Drew*, 50 P.(2d) 435, 101 A.L.R. 1144.

The decision in *Bank of U. S. v. Bank of Washington*, 6 Pet.(31 U.S.) 8, 11, 8 L.Ed. 299, referred to in the above quotation, contains the following language:

"In neither case does the party against whom the erroneous judgment has been enforced, lose his remedy against the party to the judgment. On the reversal of the judgment, the law raises an obligation in the party to the record, who has received the benefit of the erroneous judgment, to make restitution to the other party for what he has lost. And the mode of proceeding to effect this object must be regulated according to circumstances. * * * But as it respects third persons, whatever has been done under the judgment whilst it remained in full force is valid and binding. A contrary doctrine would be extremely inconvenient, and in a great measure tie up proceedings under a judgment, during the whole time within which a writ of error may be brought. * * *

"The reversal of the judgment cannot have a retrospective operation, and make void that which was lawful when done. The reversal of the judgment gives a new right or cause of action against the parties to the judgment, and creates a legal obligation on their part to restore what the other party has lost by reason of the erroneous judgment; and as between the parties to the judgment, there is all the privity necessary to sustain and enforce such right; but as to strangers there is no such privity, and if no legal right ex-

isted when the money was paid, to recover it back, no such right could be created by notice of an intention so to do."

As stated above, a portion of the deposited fund was withdrawn by Lina and Edith Wake Danziger, beneficiaries under the original judgment, and paid over to Bean, respondent's assignee for collection, upon the furnishing of substantial consideration therefor. Bean did not take as assignee of the judgment or of a part thereof and is not therefore subject to the same responsibility as the original beneficiaries.

Our conclusion makes it unnecessary to pass upon the issue of laches, which the trial court resolved against appellant. In view of our disposition of the cause, we may treat the findings on that issue as surplusage.

The judgment is affirmed.

We concur: CURTIS, J.; SEAWELL, J.; THOMPSON, J.; CONREY, J.



13 Cal.App.2d 335
HOLLEY v. HUNT et al.
Civ. 10926.

District Court of Appeal, Second District,
Division 2, California.

April 21, 1936.

1. Courts ⇨489(3)

Action to prevent defendants, who had been manufacturing article for plaintiff, from using information acquired through their confidential business arrangement with plaintiff, held properly brought in state Superior Court rather than in federal court, notwithstanding plaintiff had applied for patent on such article and that federal courts had exclusive jurisdiction of suits arising under patent laws.

2. Injunction ⇨56

As law recognizes a property right in trade secrets, inventor was entitled to ask for injunctive relief to protect himself from injury as result of defendants' use of trade secrets gained while manufacturing article for him.

3. Appeal and error ☞1035

That plaintiff, who had sued for both declaratory relief and an injunction, may not have had right to seek declaratory relief held not to render granting to him of relief error, where all relief granted him was properly granted under the injunction.

4. Action ☞6

If a dispute had arisen between inventor and parties manufacturing article for him under an agreement, it was proper that declaratory relief be sought as well as injunctive relief.

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Action by Ulysses G. Holley against E. H. Hunt and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Bryan Woodson, of Los Angeles, for appellants.

Halverson & Halverson, of Los Angeles, for respondent.

GOULD, Justice pro tem.

Plaintiff, inventor of a "metal toe protector" for which application for letters patent had been made, brought this action for declaratory relief to determine the rights of plaintiff and defendants under an agreement by which the latter had been manufacturing the article for plaintiff. Injunctive relief also was asked to prevent defendants from further making or selling the device. Judgment went for plaintiff, and defendants appeal on questions of law alone. Although appellants cite eleven different respects in which they claim the trial court erred in its decision, the questions involved may be discussed under a very few headings.

[1] It is not necessary, as contended by appellants, that this action, affecting as it does an article for which patent application was pending, should be brought in the federal courts. Exclusive jurisdiction of suits arising under patent laws is committed to the federal courts, but the action before us does not in any sense involve any question arising under the patent laws or any infringement of a patent. It is simply a controversy to prevent appellants from wrongfully using to their own advantage and to respondent's detriment in-

formation and ideas which they had received from the latter while manufacturing the metal toe protectors for him. Such an action, to prevent appellants from using information acquired through their confidential business arrangement with respondent, was properly brought in the Superior Court, which is clothed with jurisdiction in such a case. *Harlow v. Feder*, 89 Cal.App. 435, 264 P. 782.

Not only did the state court have jurisdiction to hear and determine this controversy for the protection of respondent's trade secrets, but the complaint stated facts sufficient to constitute a cause of action, setting forth the parties, their relationship, the nature of the rights involved, a statement of the wrong threatened, and other appropriate allegations to bring the controversy fully before the court. There is therefore no merit in appellants' points as to the insufficiency of the complaint and improper statement of causes of action.

[2-4] As stated in *Morrison v. Woodbury*, 105 Kan. 617, 185 P. 735: "The law recognizes a property right in trade secrets and confidences, and a court of equity may, when its jurisdiction is properly invoked, enjoin one in whom the confidence has been reposed from divulging it to third persons or from taking advantage of it himself to the injury of the owner." This states succinctly the legal proposition upon which the complaint herein was predicated, the case tried, and the judgment rendered. Basically, respondent asked protection from injury by fraudulent means, to wit, the use by appellants of trade secrets gained in a confidential relationship, and injunction is a proper remedy. *Vulcan, etc., Co. v. American Can Co.*, 72 N.J.Eq. 387, 67 A. 339, 12 L.R.A.(N.S.) 102. Inasmuch as respondent properly asked injunctive relief, which was granted, we think it immaterial whether or not he had the right also to seek declaratory relief. All the relief accorded respondent was properly granted to him under the injunction. But assuming, as found by the court, that a dispute had arisen between the parties under the terms of their agreement, it was proper also that declaratory relief be sought. *Herrlein v. Tocchini*, 128 Cal. App. 612, 18 P.(2d) 73.

Judgment affirmed.

We concur: WOOD, J.; CRAIL, P. J.

13 Cal.App.2d 302

SEITZ v. ENGERT.

Civ. 10351.

District Court of Appeal, Second District,
Division 1, California.

April 20, 1936.

1. Executors and administrators $\Leftrightarrow$ 109(2)

Monument may be erected and charged as a part of funeral expenses of testator, even though there is no express direction or request to that effect in will (Gen.Laws 1931, Act 1288, §§ 21, 22).

2. Executors and administrators $\Leftrightarrow$ 215

Probate court has power to authorize erection of monument commensurate with estate of deceased and fitting to deceased's situation in life and to order payment therefor from the estate (Gen.Laws 1931, Act 1288, §§ 21, 22).

3. Executors and administrators $\Leftrightarrow$ 96

Coexecutrix' contract, reciting it was between plaintiff and estate of deceased and signed by coexecutrix, for erection of monument over testator's grave, which was not approved by probate court or presented as claim against estate as required by statute, *held* not enforceable against estate upon death of coexecutrix against whom suit on such contract was pending (Probate Code, §§ 707, 716).

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Emil G. Seitz, doing business under the fictitious name of Seitz Memorial Company, against Mima G. Engert, wherein upon the death of Mima G. Engert, Carl Engert, as administrator with the will annexed of the estate of Joseph Engert, deceased, was substituted as defendant. From an adverse judgment, the defendant appeals.

Reversed.

J. Marion Wright, of Los Angeles, for appellant.

Will H. Light, of Los Angeles, for respondent.

ROTH, Justice pro tem.

Mima G. Engert was the surviving wife of Joseph Engert, deceased. By the will of said deceased, Mima was appointed co-executor of his estate; Security-First National Bank of Los Angeles being the other executor. During the time that Mima acted as the qualified executrix of said estate,

she signed a contract to have a monument erected over the grave of her deceased husband. The will did not require or request that a monument be erected. The probate court did not approve said contract and it was not signed nor agreed to by the other executor, to wit, Security-First National Bank. The contract itself dated April 25, 1930, was made between plaintiff and "Estate of Joseph Engert," and it is signed by Mima G. Engert with no words indicating that she was acting for the estate, or descriptive of her as executrix thereof. During her lifetime, work on the monument having been completed and thereafter approved and accepted by Mima, as per the contract, she as an individual was sued by plaintiff herein for the purchase price. During the pendency of the suit Mima died. Thereafter, an amended complaint was filed in which Carl Engert, as administrator with the will annexed of the estate of Joseph Engert, deceased, was substituted as a defendant; the Security-First National Bank, theretofore and during the lifetime of Mima, having resigned as coexecutor of said estate. No claim was filed by plaintiff at any time against the estate. Judgment was rendered against Carl Engert, as administrator with the will annexed of the estate of Joseph Engert, deceased, and the question herein presented is whether the facts recited will sustain the judgment.

[1,2] It may be conceded that a monument may be erected and charged as a part of the funeral expenses, even though there is no express direction or request to that effect in the will. Sections 21 and 22, Act 1288, St.1931, p. 2434; vol. 1, Deering's Gen.Laws (1931 Ed.) pp. 602, 603; Estate of Koppikus, 1 Cal.App. 84, 87, 81 P. 732; Estate of Bruggemeyer, 115 Cal.App. 525, 2 P.(2d) 534; Van Emon v. Superior Court, 76 Cal. 589, 18 P. 877, 9 Am.St.Rep. 258. Neither is there any doubt that the probate court has power to authorize the erection of a monument commensurate with the estate of deceased and fitting to the situation in life of deceased, and to order payment therefor from the estate. Estate of Bruggemeyer, 115 Cal.App. 525, 2 P.(2d) 534; Estate of Weringer, 100 Cal. 345, 34 P. 825.

[3] In this case no permission was requested of the court and none was granted. If the monument be considered a proper part of the funeral expenses, it should have been included in a claim presented against

the estate. No such claim was presented, as required by section 707 of the Probate Code, and no action could be commenced thereon in the absence of presentation and filing of such a claim. 11a Cal.Jur. p. 690 et seq., p. 728 et seq.; section 716 of the Probate Code; Estate of Cates, 195 Cal. 319, 232 P. 972; Dugand v. Magnus, 107 Cal.App. 243, 290 P. 309.

The judgment is reversed.

We concur: HOUSER, P. J.; DORAN, J.



8 Cal.App.2d 447

HAMPTON v. ROSE et al.
Civ. 1549.

District Court of Appeal, Fourth District,
California.
July 22, 1935.

1. Evidence ⚡75

Partnership ⚡328(1)

Suspicion arising from failure of defendant, in action to dissolve partnership and for accounting, to produce, after demand, evidence which should be in his possession, will not operate to relieve plaintiff of burden of proof nor supply requisite facts to support findings and judgment.

2. Partnership ⚡328(3)

In action to dissolve partnership and for accounting, evidence held insufficient to support judgment charging defendant with designated amount of net receipts for which he had not accounted, based on computation of costs and income in operation of business before and after period of operation as partnership.

Action by Wade E. Hampton against J. B. Rose, and another to dissolve a partnership and for an accounting. Judgment for plaintiff, and the named defendant appeals.

Affirmed in part; and reversed and remanded, with directions, in part.

David Schwartz and Saul S. Klein, both of Los Angeles, for appellant.

Mott, Vallee & Grant, Paul Vallee, and A. L. Abrahams, all of Los Angeles, for respondent.

HARDEN, Justice pro tem.

This is an action to dissolve a partnership and for an accounting. See Hampton v. Rose, 3 Cal.App.(2d) 167, 39 P.(2d) 447, wherein an appeal from an order appointing a receiver was dissolved, and Hampton v. Rose, 3 Cal.App.(2d) 170, 39 P.(2d) 449, wherein a motion to dismiss an appeal from the judgment was denied, for a statement of some of the facts. The business was that of manufacturing and selling candy in Los Angeles.

Upon ample evidence the court found the existence of a partnership between plaintiff and defendant J. B. Rose. It is admitted that plaintiff was excluded from participation in the business and that Rose refused to render an accounting. By the judgment the partnership was dissolved and a sale of partnership assets was ordered; and it was adjudged that, after payment of fees, costs, and debts, the remainder of the proceeds of sale be devoted to the payment to plaintiff of \$7,232.43; that thereafter, any surplus remaining be divided equally between plaintiff and Rose; that if the proceeds of sale proved insufficient to pay said sum to plaintiff after payment of fees, costs, and debts, plaintiff recover from Rose one-half the amount of the deficiency with interest. Defendant J. B. Rose has appealed from the judgment.

From February 26, 1932, to June 30, 1932, the business had been run by Rose. This is called the first period. The second period was from June 30, 1932, to March 13, 1933, during which time the business was run by Rose for the partnership. The third period is from March 13, 1933, to May 31, 1933, being a portion of the time during which it was run by a receiver.

The principal question on the appeal is as to the correct amount of the income during the second period. Rose reported gross sales during that time of \$32,309.89. The cost of merchandise during said period was 51.59 per cent of said amount. In support of the claim that said sum was the total amount collected from sales, Rose produced the books kept in the regular course of the business and the testimony of several witnesses employed in the store. Some of the supporting records, such as cash register readings, paid invoices or vouchers, and a production book, were missing. Plaintiff claimed Rose withheld them from evidence and that their production would have disclosed a greater gross income than that reported. Under such circumstances resort

was had to the testimony of an accountant. He was supplied with figures showing costs and income which are not disputed from which he concluded that during the first period (under Rose's individual operations) the cost of merchandise was 35.91 per cent. of the gross sales; that during the third period (the portion of the administration of the receiver) cost of merchandise was 36.69 per cent. of the gross sales; that the average cost of merchandise for the two periods was 36.21 per cent. of the gross sales. (A misprint may account for the difference, but our figure would be 36.3 per cent.) Upon the assumption that there had been established thereby a constant relationship between cost of merchandise and gross sales, and being supplied with the cost of merchandise during the second period it was an easy matter for the accountant to calculate the assumed gross receipts of the business for the second period. Simple arithmetic brought the answer of \$46,028.58. There is no claim that there was any error in calculation, provided the formula was right. The conclusion was that the sum of \$32,309.89, reported by Rose as the gross receipts lacked \$13,718.69 of being the correct amount. Beginning with this figure as the basis for subsequent calculations, debits and credits not necessary to detail resulted finally in a charge against Rose of \$7,232.43 as net receipts for which he had not accounted.

It will be seen that the first period had a duration of 4 months and 4 days and the third period a duration of 2 months and 18 days; that the duration of both periods was 6 months and 22 days. The duration of the second period was 8 months and 13 days.

[1] Complaint is made as to the competency of the testimony of the accountant. To support his method of calculation to establish gross receipts for the second period, he testified that it was the method followed by insurance companies, and the internal revenue department of the United States when records were missing.

The competency of the accountant's testimony is not the important question. If his method was right, the court could have applied it without his aid; if wrong, his testimony could not validate it. It is not a question of the competency of opinion evidence. No inquiry as to art, skill, science or

other similar subject was involved. The witness did not pretend to have any knowledge of the candy business nor as to the relationship of costs to income in such business. The actual question is as to the sufficiency of the evidence, direct and circumstantial, to support the findings and judgment. The testimony of the accountant did not add to nor detract from the weight of the evidence.

[2] Assuredly, there is no presumption of law that there is a constant relationship between cost of merchandise and income. While courts look with suspicion on the failure after demand to produce evidence which ought to be in the possession of a defendant, such suspicion will not operate to relieve the plaintiff of the burden of proof nor supply requisite facts to support findings and judgment. We are referred by counsel to no authority pro or con. We think the justifiable inferences derivable from the showing of the average of costs and income during the first and third periods and all the evidence in the case will not suffice to establish the finding that the gross income during the second period was \$46,028.58.

We understand from the other proceedings before the court (proceedings cited, *supra*) that there has been a sale of the partnership assets in the winding up of the business pursuant to the judgment and that the proceeds thereof are now in the hands of the commissioner. Therefore it is necessary to preserve, as far as possible, all that has been done pursuant to the judgment.

The only error we have noted is the one already considered.

The portion of the judgment to the effect that there be paid to plaintiff from the proceeds of sale the sum of \$7,232.43 is reversed, and the case is remanded for a new trial upon the issue of the amount of the income from the business during the period from June 30, 1932, to March 13, 1933; that after the ascertainment thereof, and after the making of proper debits and credits, the court render a money judgment for such sum, if any, as is found to be due. In other respects the judgment is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

PEOPLE v. CATO et al.

Cr. 1872.

District Court of Appeal, First District,
Division 1, California.

April 23, 1936.

Hearing Denied by Supreme Court
May 21, 1936.

1. Criminal law ☞369(2)

Although a defendant can be tried for no other offense than that charged and ordinarily prosecution may not prove commission of an independent crime, evidence of which has no tendency to prove some material fact in connection with particular crime charged, where evidence is otherwise competent, it cannot be excluded merely because, in producing such evidence, there is shown a commission of other offenses, or wrongful acts.

2. Criminal law ☞369(1)

Where defendants, accused jointly of committing a robbery, had denied knowing each other or having in their possession or ever having seen a sawed-off shotgun, prosecution might show that on previous occasion one of the defendants was seen with a shotgun in his hand, even though such evidence tended to reveal commission of another wrongful act.

3. Criminal law ☞775(6)

Giving of instruction relative to an alibi as a defense in prosecution for robbery, in which jury was told that they should scrutinize testimony offered in support thereof in order to satisfy themselves that a fabricated defense was not being imposed on them, held not prejudicial error.

4. Criminal law ☞1038(3)

Where evidence showed a robbery perpetrated with use of a deadly weapon, defense was that of an alibi, and defendant had not requested any instruction relative to any offense other than first-degree robbery, he could not on appeal urge that he had been prejudicially injured by statement of judge, in submitting form of verdict, that only question was whether defendant was guilty of robbery in first degree.

5. Criminal law ☞995(4)

Judgment directing that sentence should commence at expiration of sentence imposed in federal court, or if federal court sentence was suspended, that it should commence at once held, in view of amended statute, not void as depending on a contingency of which court

could not take cognizance (Pen.Code § 669, as amended by St.1935, p. 1670).

Appeal from Superior Court, City and County of San Francisco; George J. Steiger, Judge.

Joseph Cato and another were convicted of robbery, and the named defendant appeals.

Affirmed.

Nathan C. Coghlan, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

TYLER, Presiding Justice.

In an information filed by the district attorney of the city and county of San Francisco, appellant, Joseph Cato, and one Hugh Ritchie were jointly accused of the crime of robbery, which act was alleged to have been committed on April 26, 1935. Appellant, Cato, was also charged with the prior conviction of a felony, to wit, a burglary alleged to have been committed on August 20, 1932. To the charge each defendant pleaded not guilty. Appellant, Cato, also denied that he had suffered the prior conviction of felony as charged. After trial, both defendants were found guilty on the robbery charge. No evidence was offered in support of the alleged prior conviction suffered by Cato. From the judgment rendered, and from an order denying a new trial, defendant Cato has appealed. No appeal has been taken by defendant Ritchie.

The pertinent facts show that about 10:30 in the morning of April 26, 1935, one Peter Murney, the manager of a restaurant and beer parlor located at 300 Howard street, served defendant Ritchie with a glass of beer, which took Ritchie about twenty minutes to consume. During this period Murney delivered about \$400 in checks to his wife for the purpose of having her cash the same at a bank. Upon his wife's return Murney met her and received the money. There was evidence to show that defendant Ritchie saw the money and began to act in a strange manner. Murney went behind the bar and placed his money in a cash drawer under the register. Ritchie at this time finished his beer and walked around in a circle up

to the end of the bar when defendant Cato appeared on the premises with a sawed-off shotgun in his hands. Cato commanded Murney and the customers to turn around and face the wall. Defendant Ritchie thereupon jumped over the bar and took the money from the cash register and put the same into his pocket. A third man appeared in the doorway with a pistol, which he pointed at Murney and commanded him to turn the other way. Defendant Cato then went through Murney's pockets, after which the men left the place. Murney called the police and upon checking his accounts found that about \$700 had been taken. Several days thereafter Murney identified Cato at the city prison as one of the robbers, and about a week later he also identified Ritchie. Two days after the robbery, Cato was arrested and \$20 was found on his person. In an automobile registered in his wife's name were found nineteen shotgun shells, and some rifle shells were found in his apartment. It was also shown that Ritchie had on the afternoon of the day of the robbery opened a bank account, depositing \$165 in currency, and it further appeared that Cato and Ritchie a day after the robbery purchased an automobile, paying the sum of \$155 as a down payment. After his arrest, the police authorities asked Ritchie whether he knew defendant Cato, and he replied that he did not. Upon being further questioned he admitted knowing him and also the third man, who was later arrested at a house designated by Ritchie. Ritchie and Cato were both questioned concerning the shotgun, but each denied owning a sawed-off shotgun or having participated in the robbery, and both relied upon evidence tending to substantiate an alibi. In rebuttal the prosecution showed that on a previous occasion defendant Cato, at a time when Ritchie was also present, had a sawed-off shotgun in his hands when a crime was being committed. These are all the facts necessary to be stated for a discussion of the questions presented.

[1,2] Appellant, Cato, claims that the trial court committed error in the admission of evidence disclosing the commission of another offense, and in the giving of instructions relative to the defense of alibi, and also the degree of the offense and the imposition of the particular sentence in the case. It is true the rule is well established that a defendant in a criminal cause can be tried for no other offense than that charged and it is not competent

for the prosecution to prove the commission of independent crimes by the defendant, the evidence of which has no tendency to prove some material fact in connection with the particular crime charged. However, the rule has many exceptions. Where the evidence is otherwise competent, it cannot be excluded merely because, in producing such evidence, there is shown the commission of other offenses or wrongful acts. 8 Cal.Jur. 60-73. Thus where a person denies knowing another it is competent to show that the person knew the other, even though such a showing tends to bring out the commission of an independent offense. *People v. Morales*, 143 Cal. 550, 77 P. 470. So, also, where a defendant denies that he had a particular instrument used in the commission of an offense it is competent to show by other evidence that such instrument was possessed by the defendant at a previous time, even though the testimony tends to show independent wrongful acts. *People v. Madison*, 3 Cal.2d 668, 46 P.(2d) 159. This is the precise situation here presented. Defendants had denied knowing each other and had likewise denied having in their possession, or ever having seen, a sawed-off shotgun. It was competent, therefore, for the prosecution to show that on a previous occasion appellant was seen with a shotgun in his hands, even though such evidence tended to reveal the commission of another wrongful act.

[3] Appellant complains of an instruction given by the court, relative to an alibi as a defense, in which the jury was told that they should scrutinize the testimony offered in support thereof in order to satisfy themselves that a fabricated defense was not being imposed upon them. This cautionary instruction has received full consideration and approval in *People v. Arnold*, 199 Cal. 471, 250 P. 168, where the cases on the subject are extensively reviewed. Appellant was not prejudiced thereby.

[4] Appellant next urges as ground for reversal that the court invaded the province of the jury by instructing them that only first-degree robbery was involved in the case. The jury was instructed as to what constituted both first and second-degree robbery. The jury was further instructed that it was its exclusive province to determine the facts of the case. Thereafter the court submitted forms of verdict, and in the form of verdict of guilty the por-

tion as to the degree of robbery was left blank. At the time of submitting this form of verdict the court made these statements: "If the defendants are found guilty of robbery, it would be robbery in the first degree. * * * As I say, the question here is whether or not the defendants are guilty of robbery in the first degree. This is for you to decide from the facts." There was no request on the part of defendants for an instruction or the submission of a form of verdict relative to second-degree robbery. Here the evidence showed a robbery perpetrated with the use of a deadly weapon. The evidence on behalf of the defense was that of alibis which went to prove that they were not present at the time and place the crime was committed. Under the evidence the only verdict which the jury could render was one of guilty as charged or of acquittal. However, since appellant did not request any instruction relative to any other included offense than that of first degree robbery, he cannot now urge that he has been prejudicially injured. *People v. Derwin*, 78 Cal.App. 781, 248 P. 1029; 8 Cal.Jur. 377.

[5] And, finally, it is claimed that the judgment is uncertain and made to depend upon a contingency. The sentence reads as follows: "It is therefore ordered, adjudged and decreed that the said defendants, Joseph Cato and Hugh Ritchie, be punished by imprisonment in the State Prison of the State of California. Said sentence to commence at the expiration of the sentence imposed in the Federal Court; or if said Federal Court sentence is suspended, to commence at once. U. S. District Court No. 25401 S., sentenced to 1 year in the San Francisco County Jail, August 17, 1935. The defendants, Joseph Cato and Hugh Ritchie, were then remanded to the custody of the sheriff of the City and County of San Francisco, to be by him taken to the warden of the State Prison, at San Quentin, California. 5 day stay of execution of sentence granted to the defendant Joseph Cato."

Appellant claims that the judgment is void for the reason that it is made to depend upon a contingency of which the trial court cannot take cognizance; and, further, that the judgment and sentence involve an alternative over which the trial court has no jurisdiction to take notice. There is no merit in the contention. Un-

der the amendment in 1935 (St.1935, p. 1670) to section 669 of the Penal Code it is now provided that no matter whether the several convictions are had in the same court or different courts, or in the same proceeding or different proceedings, the judge has the alternative of directing whether the sentences shall run concurrently or shall follow after a previous conviction.

The order and judgment are affirmed.

We concur: CASHIN, J.; KNIGHT, J.



13 Cal.App.2d 265

AMERICAN SECURITIES CO. et al. v.
VAN LOBEN SELS et al.

Civ. 5398.

District Court of Appeal, Third District,
California.

April 16, 1936.

Hearing Denied by Supreme Court
June 15, 1936.

1. Judgment ⇐117

Default judgment cannot exceed specific prayer of complaint, even though allegations of complaint would support judgment for additional relief and general relief is asked for.

2. Mortgages ⇐346

Appointment of receiver in trustee's action for specific performance of provision of trust deed giving trustee right on default to take physical possession of and manage property and collect and apply income to debts, was ancillary remedy which did not determine rights of parties, and merely transferred possession of property to court to enable court to give trustee benefit of such possession in event trustee should prove it was entitled to it at time of filing of complaint.

3. Mortgages ⇐346

Complaint for specific performance of provision of trust deed giving trustee right on default to take physical possession of and manage property and collect and apply income to debts gave court jurisdiction to appoint receiver.

4. Action ⇐65

Decree operated on parties and subject-matter as they stood at commencement of ac-

tion where status of parties had not changed and no rights had intervened.

5. Mortgages ⚡346

Complaint which prayed for specific performance by defendants of provision in deed of trust concerning delivery of possession of premises to trustee and for order restraining defendants from interfering with trustee's exercise of any rights conferred on it by deed held to support judgment applying net profits from receiver's operation of premises to debts, where provision concerning delivery of possession of premises gave trustee right on default to take physical possession of and manage premises and collect and apply income to debts.

Appeal from Superior Court, Sacramento County; J. R. Hughes, Judge.

Action by the American Securities Company and the American Trust Company against Maurits Carel Constantyn Van Loben Sels and another. From the final judgment settling accounts of the receiver appointed therein, the defendants appeal.

Affirmed.

Hubert C. Wyckoff, Jr., and George M. Naus, both of San Francisco, for appellants.

Brobeck, Phleger & Harrison, of San Francisco, and Downey, Brand & Seymour, of Sacramento, for respondents.

DEIRUP, Justice pro tem., delivered the opinion of the court.

In 1923, P. J. Van Loben Sels delivered to the plaintiff, American Trust Company (then named Mercantile Trust Company), a promissory note for \$600,000, and to secure the payment of the note and further advances, he executed to the Mercantile Securities Company, as trustee, and the plaintiff trust company, as beneficiary, a deed of trust covering several thousand acres of land. Thereafter, the plaintiff, American Securities Company, was substituted as trustee. The trustor died and the land was distributed to his son, defendant herein, subject to the deed of trust. In 1928, when the indebtedness had increased to \$1,194,108.92, the defendants executed a new note and deed of trust. The latter trust deed contained the usual provisions, with additional stipulations to the effect that the original deed of trust remained in force; that the defendants should not be personally liable for a deficiency;

and that in the event of default, the plaintiff-trustee, upon the demand of the plaintiff-beneficiary, should be entitled to take possession of the property, and manage and operate it and apply the income to the indebtedness in the same manner in which the proceeds of the property should be applied. The first trust deed also gave the right to take possession and collect and apply the income in the event of default.

In January, 1931, the defendants being in default, the plaintiff-trustee recorded notice of breach and election to sell, and demanded possession. Upon the refusal of the defendants to surrender possession, the plaintiffs brought this action to enforce the provisions of the trust deed in so far as they related to the possession of the property, and asked for the appointment of a receiver. The court, by an ex parte order, appointed a receiver on February 10, 1931. He farmed the land until July 3, 1931, then surrendered possession to the purchaser at a trustee's sale, the plaintiffs having proceeded with the extra judicial foreclosure of the deeds of trust.

The defendants did not answer the complaint. They appeared specially, however, and made a motion to vacate the order appointing the receiver. That motion was denied. Judgment was entered by default on July 28, 1931. The court decreed that the plaintiffs were entitled to the possession of the land, and reserved jurisdiction to settle the accounts of the receiver. From that judgment the defendants appealed, but the judgment was affirmed (*American Securities Co. v. Van Loben Sels*, 218 Cal. 662, 24 P.(2d) 499, 500), for the following reason, as stated in the opinion: "The appellants' attack upon the judgment really amounts to an assertion that the court was without jurisdiction to appoint a receiver, because the action is one at law, in ejectment, rather than one in equity. We might yield greater space to a discussion of the contention, but for the fact that recently we decided the case of *Mines v. Superior Court*, 216 Cal. 776, 16 P.(2d) 732, in which case we concluded that an action the same as the one now before us was equitable in character and that the appointment of a receiver was within the power of the court. The opinion therein concludes appellants' argument here."

The accounts of the receiver showed that he had on hand, as net profits from the operation of the properties, approximately

\$14,000. The defendants filed objections, but were not permitted by the trial court to introduce evidence in support of them upon the ground that they were not parties in interest. From the order settling the accounts, the defendants have appealed upon the theory that the original judgment did not become final until the accounts were settled, jurisdiction having been reserved for that purpose.

The defendants claim title to the funds in the hands of the receiver. If they have title thereto, they are affected by the correctness of the accounts; but if the funds belong to the plaintiffs, the defendants have not, under the facts of this case, any concern with the specific amount in the receiver's hands. After the sale under the deeds of trust, there remained an unpaid balance, or deficiency, of about \$450,000, a sum far in excess of any sum for which the receiver could be held accountable. There cannot be any balance payable to the defendants after the application of the fund to the debt, and the extent of the credit is of no moment to the defendants, for the reason that they are not personally liable for any part of the deficiency.

It is conceded that the proceeds of all crops which had been severed by the defendants before the receiver took possession belonged to them notwithstanding the provision in the trust deeds to the effect that the trustee was entitled to the rents, issues, and profits in the event of default. *Bank of America Nat. Trust & Sav. Ass'n v. Bank of Amador County*, 135 Cal.App. 714, 28 P.(2d) 86. Their right to the proceeds of such crops was recognized by the receiver; he paid to them all moneys received by him from the sale of such crops. It is conceded also that in view of the provisions contained in the trust deeds, the plaintiffs had the right to have a receiver appointed and to have the income applied to the debt. In short, the allegations of the complaint, admitted as they were by the default of the defendants, fully support the decree that the funds in the hands of the receiver be paid to the plaintiffs. But the defendants contend that the plaintiffs are not entitled to those funds for the sole reason that (they assert) the application of those proceeds to the debt was not specifically prayed for in the complaint.

[1] Defendants rely upon a legal principle which is beyond dispute. Where, as here, judgment is taken by default, no relief can be granted in excess of that prayed for.

Even though the allegations of the complaint would support a judgment for additional relief, and general relief is asked for, the judgment cannot exceed the specific prayer of the complaint. *Code Civ. Proc.*, § 580; *Staaacke v. Bell*, 125 Cal. 309, 57 P. 1012; *Metropolitan Life Ins. Co. v. Welch*, 202 Cal. 312, 260 P. 545; *Von Der Kuhlen v. Hegel*, 51 Cal.App. 416, 196 P. 913.

To determine whether the foregoing principle is controlling here, it is necessary to examine the complaint somewhat in detail.

Both of the trust deeds are set out in the complaint, and each of them gives to the trustee the right of possession in the event of default. That provision in the second trust deed reads as follows: "If default be made in the performance of any of the terms hereof, or in the payment of any indebtedness secured hereby, the trustee, upon request of the bank, may, at its option, forthwith enter upon the premises without the necessity of bringing any action or instituting any legal proceeding, and exclude the grantors therefrom, and use, operate, manager and control said property, and conduct the business thereon, and perform such acts of repair or cultivation as may be necessary or proper to conserve the value thereof, and collect and receive the income therefrom, and apply the same as hereinbefore specified with respect to proceeds of sale of said premises."

The prayer of the complaint is:

"1. That a receiver be appointed of all said real property, with power to take possession thereof, and to do and perform all acts of repair and cultivation as may be necessary or proper to conserve the value thereof, and to collect and receive the rents, issues and profits thereof, to execute leases of any part of said property, to receive and collect the earnings, revenue, rents, issues, profits and income from said property, to pay all taxes, assessments, insurance and other proper charges against said property, or any part thereof, to purchase and pay for all needed materials and supplies, to employ, compensate and discharge, from time to time, all necessary employees, to issue receiver's certificates for necessities, and with such other powers as may be appropriate in the premises.

"2. That a decree be entered for the specific performance by the defendants of the provisions in said deed of trust with respect to the delivery of the possession of said premises to the plaintiff, American Securities Company.

"3. That the defendants be restrained from interfering with the exercise by the plaintiffs of any of the rights conferred upon them by said deed of trust; and

"4. For such other relief as may be meet and proper in the premises, and for their costs herein incurred."

The order appointing the receiver provided that: "said receiver shall take possession of all of the real property of which he is hereby appointed receiver, and that said receiver shall have power to receive and collect the earnings, revenues, rents, issues, profits and income of said property; * * * to apply the rents, issues and profits of said real property in the manner specified in said deeds of trust in regard to the proceeds of a sale of said property thereunder."

In its judgment the court decreed that the plaintiff, American Securities Company, was entitled to the possession of the real property, and that the defendants deliver possession to the said plaintiff and be "perpetually enjoined and restrained from interfering in any manner with the exercise by the plaintiffs, or either of them, of any of the rights conferred upon plaintiffs, or either of them, by the deeds of trust described in the complaint"; and that the receiver hold all moneys and property subject to the further order of the court, "which hereby reserves power and jurisdiction to settle his accounts as such receiver, and otherwise to direct him in the performance of his duties and the closing of his trust." Pursuant to said reservation of power the court entered a decree on January 8, 1934, in which it settled the accounts of the receiver, allowed compensation to him and his attorney, and ordered him "to pay and deliver all property in his possession to the plaintiff, American Securities Company, to be applied in the manner specified in said deeds of trust in regard to the proceeds of a sale thereunder of the real property therein described."

It will be noted that the prayer of the complaint does not, in so many words, ask that the net income of the property be applied upon the debt. Counsel for the defendants have proceeded upon the theory that the plaintiffs asked merely for the possession of the property, and that the judgment was in excess of the prayer of the complaint in that it gave to them the net income, also. But it is as true that the complaint does not ask for the possession

as it is that it does not pray for the net income. What is sought in the complaint is "the specific performance by the defendants of the provisions in said deed of trust with respect to the delivery of the possession of said premises to the plaintiff," and an order restraining the defendants from interfering with the exercise by the plaintiffs of any rights conferred by the trust deed. Thus, the plaintiffs incorporated into the prayer itself, as clearly as if they had set them forth therein, all of the provisions of the trust deed that had to do with the possession of the property. The provisions so incorporated by reference included the taking of physical possession, the management of the property, the collection of the income, and the application of the income to the debt. Thus, the defendants were as fully advised of the specific relief sought by the complaint as they were of the description of the property involved. Although they were referred to the copy of the trust deed which was attached to the complaint for the provisions relating to possession as well as for the description of the property, the prayer fully gave them notice of the specific relief sought.

[2-5] True, the prayer does not ask that the receiver apply the income to the debt. The application of the proceeds could not be made until the further order of the court after it had determined the issue whether the plaintiff-trustee was in fact entitled to possession and that the income should be applied to the debt. The appointment of the receiver was an ancillary remedy. It did not determine the rights of the parties; it merely transferred to the court the possession of the property in order to enable the court to give to the plaintiffs the benefit of that possession in the event that they should prove that they were entitled to it at the time of the filing of the complaint, as they alleged. Only through a receiver could the immediate right to the income be enforced; without one, the defendants, remaining in possession, would have had title to the crops and the income therefrom. Counsel for defendants rely upon decisions to the effect that in an action for the specific enforcement of a contract, the plaintiff cannot be given judgment for damages for the withholding of possession if such damages are not prayed for. *Abbott v. 76 Land & Water Co.*, 161 Cal. 42, 118 P. 425; *Chase v. Blair*, 105 Cal.App. 744, 288 P. 681. The distinction between those cases and this one is obvious. In them, the plaintiff sought specific performance of a contract. He was

entitled to a judgment for the rental value of the property (not the income thereof), if he prevailed, and if he failed to ask for it, the court could not grant him that relief. Plaintiffs could, perhaps, in this case, have asked for possession and for the rental value, but instead of asking for a judgment for the rental value, they sought the appointment of a receiver to collect the income—a type of remedy to which they were entitled under the allegations of the complaint. *Mines v. Superior Court*, 216 Cal. 776, 16 P.(2d) 732. His appointment was sought to make effective that remedy. *French Bank Case*, 53 Cal. 495; 22 Cal. Jur. 432, 433. The decree of the trial court operated upon the parties and the subject-matter as they stood at the commencement of the action, there being no change in the status of the parties, and no rights having intervened. *Cullinan v. Mercantile Trust Co.*, 80 Cal.App. 377, 252 P. 647; 21 C.J. 663.

Counsel for defendants rely upon the case of *Garretson Investment Co. v. Arndt*, 144 Cal. 64, 77 P. 770. In that case the plaintiff had prayed for the foreclosure of a mortgage and for the appointment of a receiver. A receiver was appointed. He had in his hands a very small sum of money, which the court ordered paid to the plaintiff. On appeal, the decree was modified to the extent that the money in the hands of the receiver was directed to be paid to the defendant, for the reason that judgment was entered by default, and the payment of the net income to the plaintiff was not prayed for. Counsel for plaintiffs point out distinctions between that case and this, but it is not necessary to discuss them here for the reason that, as we have pointed out, the plaintiffs in this case did ask that the net income be applied to the debt.

Plaintiffs contend that the issues now before the court were concluded by the former appeal. That appeal raised the question whether in an action of this nature the trial court had jurisdiction to appoint a receiver. The Supreme Court held that it had such jurisdiction. Plaintiffs contend that the title to the rents, issues, and profits in the hands of the receiver could have been, and, therefore, should have been, determined on that appeal.

Defendants answer that the question of the title to the income was reserved by the court in its first judgment, and could not have been raised on appeal until it was

determined in the final judgment, from which this appeal is taken. While we are inclined to think that the contention of the defendants is correct, it is not necessary to decide the question, in view of the conclusion we have reached with respect to the merits of the appeal.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.



13 Cal.App.2d 239

HAWK v. DE GOEDE et ux.

Civ. 10925.

District Court of Appeal, Second District,
Division 2, California.

April 15, 1936.

Rehearing Denied May 1, 1936.

Hearing Denied by Supreme Court
June 11, 1936.

Appeal and error ⇐766

Alternative appeal would be dismissed where appellant failed to comply with statute requiring printing in brief of such portions of record which were desired to be called to attention of court and rule requiring portion of pleading claimed to be defective or as constituting admission affecting decision to be printed in brief where necessary to understanding of matter (*Rules for Supreme Court and District Courts of Appeal*, rule 8, § 3; *Code Civ.Proc.* § 953c).

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by Charlotte G. Hawk against Martin De Goede and wife. Judgment for defendants, and plaintiff appeals.

Appeal dismissed.

William Ellis Lady, of Los Angeles, for appellant.

J. Wiseman MacDonald, of Los Angeles, for respondents.

CRAIL, Presiding Justice.

In this appeal, which is under the alternative method, appellant has failed to comply with section 953c of the Code of Civil Procedure, which reads in part as follows:

"In filing briefs in said appeal the parties must, however, print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court." Appellant has also failed to comply with section 3, rule VIII, of the Rules for the Supreme Court and District Courts of Appeal, which reads in part as follows: "If it is claimed that pleadings are defective, or that admissions are thereby made affecting the decision on appeal, such portion of the pleadings shall be printed in the brief as may be necessary to an understanding of the matter." For this reason we have decided to dismiss the appeal. *Barrow v. Simon* (Cal.App.) 56 P.(2d) 539; and see numerous cases collected in 2 Cal.Jur. 643, § 359 et seq., and the Ten Year Supp. thereto.

The appeal is dismissed.

We concur: WOOD, J.; McCOMB, Justice pro tem.



13 Cal.App.2d 204

HARRIS v. HIRSCHFELD et al.

Civ. 10791.

District Court of Appeal, Second District,
Division 2, California.

April 10, 1936.

1. Partnership ⇨20

Agreement, under which two parties conducted certain business, providing for equal division of profits and losses, that it was their intention to engage in business as copartners and designating their relationship as a partnership, *held* to create partnership (Civ.Code, § 2400).

2. Partnership ⇨61

Partnership created by agreement which failed to fix definite term for its duration constituted partnership at will.

3. Torts ⇨12

No action will lie against third person for inducing another to terminate partnership at will.

4. Conspiracy ⇨6

Conspiracy is not actionable unless combination results in perpetration of an unlaw-

ful act or some injurious act by unlawful means.

5. Conspiracy ⇨18

Complaint alleging that defendants maliciously and fraudulently entered into conspiracy to prevent plaintiff from operating business by causing plaintiff's associate to sever his association with plaintiff *held* not to state cause of action for conspiracy, since there was no allegation of unlawful act or injurious act by unlawful means.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Suit by G. E. Harris against Edward Hirschfeld, B. W. Downs, and others. Judgment in favor of defendant Downs, and plaintiff appeals.

Affirmed.

James E. Neville, of Los Angeles, for appellant.

Bicksler, Parke & Catlin and Walter G. Danielson, all of Los Angeles, for respondent.

McCOMB, Justice pro tem.

Plaintiff appeals from a judgment in favor of defendant B. W. Downs after the trial court sustained a demurrer to plaintiff's complaint without leave to amend.

The complaint alleged that:

A. Subsequent to June 20, 1934, plaintiff and defendant Hirschfeld conducted a business and manufactured cosmetics and other toilet articles pursuant to an agreement which, after providing for the advancement and repayment of a sum of money to plaintiff, read in part as follows: "Both parties hereto agree to use and devote their best efforts and endeavors towards making a success of the business of manufacturing the products made by chemical process. It is understood that the parties hereto shall share equally in all profits and losses of said business and/or the manufacture of said products, it being the intention of the parties hereto to engage in business as co-partners under the name and style of "H and H" Chemical Company. Such partnership shall continue in full force and effect until dissolved by operation of law or mutual consent of the parties hereto." (Italics ours.)

B. Defendants "entered into a conspiracy for the purpose of forcing the plaintiff

to shut down and prevent the plaintiff from operating" the business which plaintiff and defendant Hirschfeld had theretofore conducted by causing defendant Hirschfeld to sever his association with plaintiff and to enter into business with defendant Downs. It is further alleged that "said acts were done by said defendants willfully, maliciously and fraudulently and with intent to damage the plaintiff," and that he was damaged thereby.

The questions necessary for us to determine are these:

First. Was a partnership created by the plaintiff and defendant Hirschfeld through their agreement?

Second. If a partnership existed between plaintiff and defendant Hirschfeld, was it a partnership at will?

Third. Does an action lie against a third party who induces a partner to terminate a partnership at will?

Fourth. Does the complaint state a cause of action predicated upon the theory of a conspiracy between defendants to injure plaintiff?

[1] The first question is answered in the affirmative by the allegation of the complaint that the "*parties conducted a business*" and by the wording of their agreement which expressly designated it as a partnership and provided for an equal division of the profits and losses. Section 2400, Civ.Code. The partners were not employees of the partnership. Services which they agreed to perform were merely a part of their contribution to the partnership.

[2] As to the second question, if no time is fixed for the duration of a partnership, it is a partnership at will. *McCauley v. Eyraud*, 87 Cal.App. 121, 123, 261 P. 760. Therefore, since the partnership agreement in the instant case failed to fix a definite term for its duration, it was a partnership at will.

[3] The third query must be answered in the negative, as no action will lie against a third person for inducing another to terminate a partnership at will. *McGuire v. Gerstley*, 204 U.S. 489, 503, 27 S.Ct. 332, 51 L.Ed. 581.

[4] Turning to the final query, a conspiracy is not actionable unless the combination results in the perpetration of (1) an unlawful act or (2) some injurious act by unlawful means. *Moropoulos v. C. H. &*

O. B. Fuller Co., 186 Cal. 679, 683, 200 P. 601.

[5] In the complaint before us there is a total absence of any allegation of either an unlawful act or injurious act by unlawful means; hence the complaint failed to state a cause of action predicated upon the theory of a conspiracy between defendants to injure plaintiff.

From the foregoing it is clear the trial court's ruling in sustaining the general demurrer to plaintiff's complaint without leave to amend was correct.

The judgment is affirmed.

We concur: CRAWL, P. J.; WOOD, J.



13 Cal.App.2d 423

WILLIAMS v. WILLIAMS.

Civ. 10937.

District Court of Appeal, Second District,
Division 2, California.

April 24, 1936.

1. Divorce ⇄296

Award of custody of children of divorced parents is within discretion of trial judge who hears testimony, sees witnesses, examines parties, and is in position to determine what is best for welfare of child.

2. Divorce ⇄296

Order awarding custody of child to wife after award of divorce to husband would be affirmed in absence of showing of abuse of discretion.

3. Divorce ⇄228

Allowance of attorney's fees can be made only to party to divorce action and not to attorney for party, and order for payment directly to attorney is unauthorized and in excess of court's jurisdiction.

4. Judgment ⇄524

Interpretation upholding validity of court's judgment is to be favored.

5. Divorce ⇄228

Order requiring husband to pay wife's attorney's fees of \$50 held not invalid as in

excess of court's jurisdiction as direction for payment of fees directly to counsel.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Suit by Sarah I. Williams against Charles Daverson Williams. From an adverse order, the defendant appeals.

Affirmed.

Daily & Gallaudet, of Los Angeles, for appellant.

Milton D. Klein, of Los Angeles, for respondent.

GOULD, Justice pro tem.

Divorce proceedings between the parties hereto resulted in the court granting a decree of divorce to the husband, but the custody of an eight year old son was awarded to the wife. After the final decree of divorce and the subsequent remarriage of the husband, he instituted a proceeding for modification of the custodial order, asking that the son be placed in his custody and control. This the court refused to do, leaving the child in nominal custody of the wife, but requiring that said child be kept at a private school, with right of visitation accorded each parent. Defendant was also "ordered to pay plaintiff's attorney fees of \$50.00." From the custodial order and from the order for payment of attorney fees, defendant appeals.

[1,2] Appellant suggests that the custodial order is "an abuse of discretion" on the part of the trial judge. No such abuse is apparent. The whole matter is committed to the wise discretion of the judge who hears the testimony, sees the witnesses, examines the parties themselves, and who is, in the very nature of things, in a position to determine what is for the best welfare of the child. Testimony in this case was extensive, both as to the fitness of the parents and the propriety of allowing the child to remain in the private school. No abuse of discretion being shown, the custodial order will not be disturbed.

[3-5] The allowance of attorney's fees is attacked by appellant upon the ground that the order is for the payment of fees directly to the attorney and not to respondent. It is settled, of course, that allowance of attorney's fees can be made only to the party to the action and not to the attorney for such party; and an order for payment

directly to the attorney is unauthorized and in excess of the court's jurisdiction. *Stevens v. Stevens*, 215 Cal. 702, 12 P.(2d) 432. In the case before us, however, we do not interpret the order as necessarily a direction for the payment of fees directly to counsel. It may with equal force be construed as a direction for the payment to respondent of her attorney's fees. The interpretation upholding the validity of the court's judgment is to be favored, and as said in the similar case of *Robinson v. Robinson*, 79 Cal. 511, 21 P. 1095, 1096, "while the judgment is in some respects not very happily worded, still we think it should be treated as a judgment in favor of the plaintiff."

The orders appealed from are affirmed.

We concur: CRAIL, P. J.; WOOD, J.



13 Cal.App.2d 321

WORMINGTON v. ASSOCIATED INDEMNITY CORPORATION.

Civ. 10277.

District Court of Appeal, Second District,
Division 1, California.

April 21, 1936.

Rehearing Denied May 18, 1936.

Hearing Denied by Supreme Court
June 19, 1936.

1. Insurance ⇐280

Where automobile liability insurer transferred coverage of policy to new automobile purchased by insured and pre-dated indorsement to have coverage attach to new automobile as of September 13th, notwithstanding insured had informed insurer of accident which occurred on September 14th, insurer could not avoid liability on ground that insured stated that he purchased new automobile on September 13th, whereas he actually purchased it on September 4th, in view of immateriality of alleged misrepresentation (Civ. Code, §§ 2565, 2581, 2611).

2. Insurance ⇐514½

Insured's violation of automobile liability policy requirements for co-operation constitutes defense to action against insurer to collect judgment against insured only where insurer was substantially prejudiced by violation.

3. Insurance ☞665(3)

In action against automobile liability insurer to collect judgment against insured, evidence sustained findings that insured fully co-operated with insurer, and that lack of co-operation, if any, was not prejudicial to insurer, although insured did not appear at trial of action against him.

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Judge.

Action by Ellis F. Wormington against the Associated Indemnity Corporation. Judgment for plaintiff, and defendant appeals.

Affirmed.
pellant.

Syrl S. Tipton, of Los Angeles, for ap-
Kenneth C. Wiseman and Lech T. Niemo,
both of Los Angeles, for respondent.

WHITE, Justice pro tem.

This is an action against an insurance carrier to recover the amount of a judgment previously obtained against an insured. Plaintiff was injured in an automobile accident as a result of the negligence of George W. Locke, Jr., and the latter was insured against liability with the defendant corporation. The plaintiff sued Locke and recovered judgment for \$3,886.65 and costs, which sum he was unable to collect from Locke. Plaintiff then brought this action against the defendant insurance company. In its answer the company set up the defense that, while it issued a policy of insurance to Locke upon a Ford automobile, the automobile upon which the policy was issued was not the automobile which figured in the accident as the result of which plaintiff secured judgment against the assured, Locke; and the further defense that the assured failed to co-operate with the company in assisting them in the preparation of the case for trial by failing and neglecting to report to the company's attorneys when so requested, and, in addition, had failed to attend the trial and testify. Judgment was subsequently rendered in favor of plaintiff, from which defendant insurance company prosecutes this appeal.

Two questions are presented to us: (1) Was a contract of insurance in existence, force, and effect upon the automobile involved in the accident? (2) Assuming that

the answer to the foregoing is in the affirmative, did the alleged failure of the assured to co-operate with the company relieve appellant of liability?

[1] As affecting the first question, it appears without contradiction that on March 22, 1930, the appellant issued a policy of insurance upon a Ford coupé automobile, engine No. A-290523-M, in favor of George W. Locke, Jr. On the early morning of Sunday, September 14, 1930, the assured, Locke, while driving a Ford automobile, but not the one originally insured, became involved in an accident with an automobile operated by the respondent herein. It appears from the evidence that some time between September 4 and September 13 the assured "traded in" the first-named Ford automobile and purchased another Ford automobile bearing engine No. 2354139, and this was the automobile involved in the accident with respondent. The accident occurred early Sunday morning, September 14, and the evidence without dispute shows that on the following morning, Monday, September 15, the assured, Locke, contacted appellant, advising M. C. Hewett, special agent for appellant, that he had bought this new car, and that he had driven from Ventura to Los Angeles on the previous Saturday, and had attempted to notify appellant of the change of automobiles and to secure a transfer of insurance from the old Ford to the new one, but was unable to do so because appellant's office was closed Saturday afternoon. The evidence discloses that in this same conversation the assured informed appellant's agent that his automobile had been involved in an accident the day before. With full knowledge of the fact that assured had theretofore purchased a new automobile, and that such automobile had been involved in an accident, appellant company placed an indorsement upon the assured's policy, transferring the coverage to the new automobile, predating it so that coverage attached to the new automobile as of noon, September 13, 1930, some 36 hours prior to the happening of the accident.

It is appellant's contention that the assured, Locke, was guilty of misrepresentation when he declared to appellant's agents that he had purchased the car on Saturday, September 13, when, appellant contends, it was in fact purchased on September 4. Although there is a conflict in the testimony as to the exact date of purchase, and also as to when the assured took delivery of the

car, still, conceding that the assured represented to appellant that he had purchased the car on the 13th, when in truth and in fact he had purchased it on the 4th, we fail to see that the misrepresentation, if such there was, is a material misrepresentation, remembering that at the time the assured reported the purchase of the new car he informed appellant that he had been involved in the accident as a result of which the judgment was thereafter obtained against him by respondent herein. The appellant insurance company, with full knowledge of the fact that the assured had had an accident, and desired coverage as of a date preceding the accident, amended and revised its policy to cover the new car which was involved in the accident.

Civil Code, § 2581, in effect at all times in question here, provided that the materiality of a representation is determined by the same rule as the materiality of a concealment. And a representation, even though untrue, does not affect the validity of a policy of insurance unless it is material, at least where there is no declaration in the policy that the violation of such provision will avoid it. Civ.Code, § 2611; Employers' Liability Assur. Corp. v. Ind. Acc. Comm., 177 Cal. 771, 171 P. 935.

The test of materiality is defined in section 2565 of the Civil Code, then in effect, as follows: "Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries."

The only false statement claimed and relied upon by appellant is that the automobile involved in the accident was purchased by the assured September 4 and not September 13. In *Kleiber Motor Truck Co. v. International Indemnity Co.*, 106 Cal.App. 709, 723, 289 P. 865, it was decisively held that a misstatement as to the date of purchase of an automobile in connection with an application for insurance thereon is not material, in that the date of purchase could have no possible effect on the insurance applied for. In the instant case, having in mind the facts and circumstances thereof, we are of the opinion that the alleged difference in the date of purchase could not possibly have affected the transfer of the coverage from the original automobile to the new one. See 14 Cal.Jur. p. 491, § 55; *Hawley v. Liverpool, London & Globe Ins. Co.*, 102 Cal. 651, 36 P. 926; *Wilkinson v.*

Standard Acc. Ins. Co., 180 Cal. 252, 180 P. 607; *Sly v. American Indemnity Co.*, 127 Cal.App. 202, 15 P.(2d) 522. We conclude, therefore, that the finding of the trial court that the assured did not procure the policy or the amendment thereto through false or fraudulent representations was justified by substantial evidence, as was also the finding of the trial court that the representation as to the date of purchase, if made, was not material.

[2] The second ground urged by appellant for a reversal of the judgment presents a more serious question. The policy of insurance under which appellant undertook to indemnify Locke against claims for injuries or death contained the usual stipulations requiring the assured to co-operate fully with the company, and aid, if the company deemed necessary, without expense to the insured, in securing information and evidence and the attendance of witnesses, and in the settlement or defense of any suit or prosecution of any appeal; to present himself in due time for the preparation of his defense; and to attend the trial of such suit. These conditions are clearly stated, and, if the assured failed to comply with them, the company could not be held liable under the policy; but the violation of these conditions by the assured cannot be a valid defense against the injured third party unless, in the particular case, it appears that the insurance company was substantially prejudiced thereby. *Hynding v. Home Acc. Ins. Co.*, 214 Cal. 743, 752, 7 P.(2d) 999, 85 A.L.R. 13. See *George v. Employers' Liability Assur. Corp.*, 219 Ala. 307, 122 So. 175, 72 A.L.R. 1438; *Indemnity Insurance Co. v. Davis' Adm'r*, 150 Va. 778, 143 S.E. 328.

[3] The question of such prejudice was given consideration by the trial court, and, while the assured did not appear at the trial, he did report the accident within 48 hours after it occurred, and gave his deposition. At the time the assured's deposition was taken, appellant's counsel was present, with full opportunity to examine the assured. In our opinion, the finding of the trial court that the assured fully co-operated with the defendant insurance company in the preparation of the defense of said action, and that, if there was any lack of co-operation on the part of said assured, the same was not prejudicial, must, in view of the conflict in the evidence with regard to assured's conduct, be upheld, because of the substantiality of evidence to sustain the deci-

sion arrived at by the trial court upon this issue.

The judgment is affirmed.

We concur: HOUSER, P. J.; YORK, J.



13 Cal.App.2d 461

HAMILTON v. HAMMOND LUMBER CO.
et al.

Civ. 10795.

District Court of Appeal, Second District,
Division 2, California.

April 27, 1936.

Hearing Denied by Supreme Court
June 25, 1936.

1. Appeal and error ⇨930(2)

Jurors are presumed to be persons of common intelligence and capable of comprehending ordinary use of language, and reviewing court will not presume that jury may not have understood charge as reviewing court understands it.

2. Trial ⇨295(1)

Instructions must be read as a whole, and a questionable instruction is not ground for reversal when respective rights and duties of parties are clearly ascertainable from charge as a whole.

3. Trial ⇨295(1)

Instructions which, considered in their entirety, state law of case fairly and clearly, are unobjectionable, though containing objectionable passages.

4. Damages ⇨132(3)

\$17,000 held not excessive for concussion of brain, mental deterioration, dizziness, tremor, numerous injuries to nerves, leg, skin, bones, and flesh, and broken hip joint, suffered by plaintiff who was hospitalized for forty-eight days and confined to bed at home for two months thereafter.

5. Appeal and error ⇨1004(3)

Responsibility as to question of excessive damages is primarily with trial court, and appellate tribunal may not interfere unless award is so disproportionate to injury as to indicate that it was not result of dispassionate consideration.

Appeal from Superior Court, Los Angeles County; Francis J. Heney, Judge.

Action by Charles Hamilton against the Hammond Lumber Company and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

W. I. Gilbert, of Los Angeles, for appellants.

J. Lamar Butler and George P. Kinkle, both of Los Angeles, for respondent.

GOULD, Justice pro tem.

Defendants appeal from a judgment by which jurors awarded plaintiff damages of \$17,000 for personal injuries suffered in a collision between his automobile and a motortruck owned by defendant corporation and operated by defendant Goff. Conceding the sufficiency of the evidence to sustain the implied findings of the jury as to negligence, appellants attack the court's instructions as erroneously stating the law applicable to the case. Such errors may not be deemed harmless in a case such as this, appellants urge, because with the sharp conflict disclosed by the evidence the jury might well have rendered a verdict in their favor except for the instructions which are designated as erroneous and prejudicial.

[1] Fifty-three separate instructions were given by the court. To nineteen of these appellants address their arguments, asserting either that they improperly state the law, that they are not warranted by the facts in the case, that they inject new facts or that they are contradictory or argumentative. No useful purpose would be served by a detailed review of all the instructions and the numerous arguments by appellants and respondent relative thereto. It may be true that the charge to the jury was lengthy, involved, and weighty; that the instructions in some particulars lacked the cardinal virtues of clarity, preciseness, and simplicity. In complicated fact situations, such as that presented in this case, instructions are often unavoidably cumbersome, and it is quite possible that jurors may be in a quandary as to what may actually be the law designed to guide them in their deliberations. But as stated by Mr. Chief Justice Waste in *Douglas v. Southern Pacific Co.*, 203 Cal. 390, 264 P. 237, 239, "jurors are presumed to be persons of common intelligence and capable

of comprehending the ordinary use of language," and "we will not presume that they may not have understood the charge as we understand it."

The chief objection to the instructions is the claim that they placed upon appellants an unjust quantum of the burden of proof; that they in effect relieved respondent of his primary burden of establishing his position by the preponderance of the evidence. While such argument may appear plausible from certain language used by the court, we cannot reach the conclusion that the jurors attached to any vagrant word or phrase the importance for which appellants contend. Nor could the jurors have ignored the court's oft-repeated admonition that "plaintiff is not entitled to recover unless you shall be satisfied by a fair preponderance of the evidence that the negligence of defendants was the sole proximate cause of the accident"; that "if you should * * * determine that plaintiff was negligent in any degree * * * however slight, your verdict should be for defendants, notwithstanding you may believe that the defendants were guilty"—and similar instructions many times reiterated in the court's charge.

[2,3] "Instructions must be read as a whole, and a questionable instruction is not ground for reversal when the respective rights and duties of the parties are clearly ascertainable from the charge as a whole." *Krohn v. Patrick* (Cal.App.) 55 P.(2d) 301, 302. And in *Douglas v. Southern Pacific Co.*, supra, this apt language appears: "The instructions must be considered in their entirety, and if, as so considered, they state the law of the case fairly and clearly, then they are, as a whole, unobjectionable, even though by selecting isolated passages from single instructions they may in some respects be amenable to just criticism." We are satisfied that in the instant case the instructions, considered as a whole, fairly and fully stated the law applicable to the facts without injury to either party. There was no miscarriage of justice, and there appears to be no reason to disturb the verdict on account of errors claimed in the court's charge.

[4,5] The only other point presented by appellants is that the damages awarded were excessive. Respondent suffered concussion of the brain, mental deterioration, dizziness, tremor, numerous injuries to nerves, leg, skin, bones, and flesh; his left

hip joint was broken, he was unconscious overnight, was hospitalized for forty-eight days and confined to bed at his home for two months thereafter. The injuries were severe and permanent; and it cannot be said that the award, although ample, suggests passion, prejudice, or corruption on the part of the jury. The responsibility as to the question of excessive damages is primarily with the trial court, and an appellate tribunal may not interfere unless the award is so disproportionate to the injury as to indicate that it was not the result of the cool and dispassionate consideration of the jury. *Holden v. Patten-Blinn Lumber Co.*, 7 Cal.App.(2d) 220, 45 P.(2d) 1037. No hint is offered in the present case that the jury's award was reached by improper or unlawful means; nor can it be said that it is so disproportionate to the injuries suffered by respondent as to warrant any interference by this court.

Judgment affirmed.

We concur: CRAIL, P. J.; WOOD, J.



MacDONNELL v. SOUTHERN PAC. CO. *

Civ. 9722.

District Court of Appeal, First District,
Division 2, California.

April 21, 1936.

Rehearing Granted May 21, 1936.

1. Master and servant @250¼

In death action based on Federal Employers' Liability Act, plaintiff must recover, if at all, under terms of that act as interpreted by the federal cases (Federal Employers' Liability Act, 45 U.S.C.A. §§ 51-59).

2. Master and servant @265(2), 278(1)

In death action based on Federal Employers' Liability Act, plaintiff must show that defendant was guilty of some breach of duty owed to deceased in respect to matter charged as negligence, and it is not sufficient merely to show that death was incurred while employee was engaged in course of his employment (Federal Employers' Liability Act, 45 U.S.C.A. §§ 51-59).

@For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 62 P.2d 201.

3. Master and servant ☞137(6)

Only duty under Federal Employers' Liability Act which railroad owed member of its freight yard switching crew was to refrain, if possible, from injuring him in case his precarious position had been discovered (Federal Employers' Liability Act, 45 U.S.C.A. §§ 51-59).

4. Master and servant ☞204(1)

Death of member of railroad freight yard switching crew as result of being struck, while crossing track, by cars being moved in switching movement held result of risk which member assumed as part of necessary operation of cars within yard, and hence under Federal Employers' Liability Act, no recovery for his death could be had (Federal Employers' Liability Act, 45 U.S.C.A. §§ 51-59).

ties are more matters of interpretation and construction of the evidence than a conflict upon the facts. The deceased and another employee were walking through the freight yard of the Southern Pacific Company maintained at Bayshore just south of San Francisco, and attempted to cross a track upon which seven empty cars were standing. As they were in the middle of the track, these cars were struck by a moving train of thirty-three cars for the purpose of making a coupling. The coupling failed and the standing cars moved so suddenly that the deceased was unable to get clear of the track. His companion was struck by the edge of the first freight car but immediately got to his feet, climbed to the top of that car, and gave a signal to stop the train. The cars were practically at a stop when the signal was given, the movement from the point of contact with the deceased being variously estimated as between 48 and 71 feet. There is some dispute between the witnesses as to the speed of the cars at the time of the impact, as to the time when signals were given to stop the main train, and as to the clearance which deceased and his companion gave in endeavoring to pass in front of the freight car, and these will all be referred to hereafter. The material facts are, however, that the defendant was engaged in a common and routine railroad operation which was well known to all its employees and the nature of which was in itself a warning of danger to them and of such a character that no other notice or warning could be required from the defendant. The defense of assumption of risk is based upon these facts and also on the rule of the company which specially required the employees to expect trains or cars to be moved at any time on any track, and the warning to such employees to take care to avoid injury to themselves or others which might arise from these conditions.

[1-4] The case differs from the ordinary action of negligence, where the question of the sufficiency of the evidence is so frequently left to the responsibility of the jury, because the action is based on the Federal Employers' Liability Act, and the plaintiff must recover, if at all, under the terms of that act as interpreted by the federal cases. For this reason, it is not sufficient for plaintiff to show that injury or death was incurred while the employee was

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Frances MacDonnell, administratrix of the estate of Alexander MacDonnell, deceased, against the Southern Pacific Company. Judgment for plaintiff, and defendant appeals.

Reversed.

Arthur Bergin Dunne and Dunne & Dunne, all of San Francisco, for appellant.

M. Mitchell Bourquin, of San Francisco (Clinton L. Markley, of San Francisco, of counsel), for respondent.

NOURSE, Presiding Justice.

Plaintiff had a verdict for \$30,000 for damages for the death of her husband who was killed while employed as a member of a switching crew in the freight yard of the defendant company. The action was brought under the Federal Employers' Liability Act, 45 U.S.C.A. §§ 51-59, and charged negligence in the attempt to couple a group of standing freight cars. The defendant based its defense and rested its appeal on the main grounds that there is a failure of proof of negligence and that the risk was assumed by the employee. As the decision upon these grounds must control, it is unnecessary to consider the other grounds raised in the attack upon the judgment.

The facts are without material dispute. The only conflicts relied upon by the par-

engaged in the course of his employment. It is essential to show that the defendant was guilty of some breach of duty owed to the deceased in respect to the matter charged as negligence. *Chesapeake & O. R. Co. v. Mihas*, 280 U.S. 102, 50 S.Ct. 42, 43, 74 L.Ed. 207; *Baltimore & O. S. W. R. Co. v. Carroll*, 280 U.S. 491, 50 S.Ct. 182, 74 L.Ed. 566. It was said in *Means v. Southern California Railway Co.*, 144 Cal. 473, 478, 77 P. 1001, 1 Ann.Cas. 206, that in order to constitute actionable negligence it must appear that the injury complained of resulted from a failure on the part of the defendant to discharge a duty or obligation which the defendant was under to protect the plaintiff from injury. But the leading and controlling case is the *Mihas* Case, *supra*, where the facts are closely similar. *Mihas* was injured while crossing over standing cars which were suddenly struck in a switching movement. As to this point the Supreme Court said, "If there was a violation of duty, therefore, on the part of the railway company, it was not of a duty owing to *Mihas*; and the rule is well established that it is not sufficient for a complainant to show that he has been injured by the failure of another to perform a duty or obligation unless that duty or obligation was one owing to the complainant." Here there is no evidence of any rule or custom to give warnings to men working around the yard when cars are being moved or couplings are being attempted. There is no evidence of a duty to set brakes on standing cars when couplings are being made, and no evidence of any duty on the part of the engineer to give warning by whistle or bell from the locomotive, and no evidence that any sign or notice should be attached to the standing cars before a coupling is attempted. To the contrary, the evidence is that when a coupling will not be attempted a warning that standing cars are not to be moved is given by placing a blue flag on the end of the car. There is no evidence of any duty to place a man at the end of the standing cars to give warning of the attempted coupling to employees or others. The only evidence of a duty in this respect related to the maintenance of a man at the point of attempted coupling, and whether this man was in position at the time or not is immaterial because he could not have been seen or heard by the deceased if any warning had been attempted.

On the issue of defendant's negligence there is no evidence of any breach of duty

in respect to the deceased. The complaint charged that the defendant negligently and without notice or warning attempted to make the coupling with such force and violence and without using any precaution to control the movement of the cars that it resulted in the injury to *MacDonnell*. But the mere allegation that these acts were done without warning if no warning were required, and without precautions to control the movement of the cars if such precautions were not required, does not plead any act of negligence upon which the plaintiff could recover in this case. The cars were being moved in defendant's yard, and the defendant had the right to move them as it saw fit. Whatever duty it may have owed to others using the yard at the same time is a question which is not pertinent here since the plaintiff must recover on proof consistent with the Federal Employers' Liability Act, 45 U.S.C.A. §§ 51-59, which expressly recognizes the defense of assumption of risk as a defense in bar to the action.

Upon this issue the authorities are practically unanimous. The situation confronting the deceased was similar to that referred to in *Toledo, St. L. & W. R. Co. v. Allen*, 276 U.S. 165, 48 S.Ct. 215, 216, 72 L.Ed. 513, where the Supreme Court said, "In any event plaintiff assumed the risk. He was familiar with the yard and width of the space between the tracks and knew that cars were liable to be shunted without warning to him." In accord are: *Northwestern Pacific R. Co. v. Bobo*, 290 U.S. 499, 54 S.Ct. 263, 78 L.Ed. 462; *Chesapeake & O. R. Co. v. Nixon*, 271 U.S. 218, 46 S.Ct. 495, 70 L.Ed. 914; *Aerkfetz v. Humphreys*, 145 U.S. 418, 12 S.Ct. 835, 36 L.Ed. 758, and *Chesapeake & O. R. Co. v. Mihas*, 280 U.S. 102, 50 S.Ct. 42, 74 L.Ed. 207.

The respondent relies upon *Great Northern Ry. Co. v. Mustell* (C.C.A.) 222 F. 879; *Payne v. Connor* (C.C.A.) 274 F. 497; *Lehigh Valley Railway Co. v. Scanlon* (C.C.A.) 259 F. 137; *Director General of Railroads v. Templin* (C.C.A.) 268 F. 483 and *Reed v. Director General of Railroads*, 258 U.S. 92, 42 S.Ct. 191, 66 L.Ed. 480. Appellants correctly answer that all these cases were either decided before the *Mihas* Case or made no reference to it. Some of these cases are discussed and reviewed in *Pacheco v. New York, N. H. & H. R. Co.* (C.C.A.) 15 F.(2d) 467, where the conclusion was reached that in view

of the decisions of the United States Supreme Court it must be held that among the risks assumed is that of inattention of other employees in train movements. The Mihas Case is so closely parallel to the case at bar that we can see no escape from the application of its rule. For these reasons, we are compelled to the conclusion that the injury here complained of was the result of a risk which the deceased assumed as a part of the constant and necessary operation of the cars within the yard, and that, since the defendant had the right to move the cars within the yard as the necessities of its business required, the only duty it owed plaintiff was to "refrain, if possible, from injuring him in case his precarious condition had been discovered." The failure to prove any breach of duty on the part of the defendant under the circumstances of this case fails to charge the defendant with actionable negligence. *Hinson v. Atlanta & C. Air Line Ry. Co.*, 172 N.C. 646, 90 S.E. 772.

The judgment is reversed.

We concur: STURTEVANT, J.;
SPENCE, J.



13 Cal.App.2d 427

Ex parte ZUKER (two cases).

Cr. 2811, 2814.

District Court of Appeal, Second District,
Division 1, California.

April 24, 1936.

Execution ☞416

Order adjudging witnesses guilty of contempt for false testimony and failure to produce books and records held void, where neither affidavit, certificate of referee, findings of court, nor commitment recited facts affirmatively showing wherein testimony was false or materiality thereof or precisely specifying books or records which were not produced (Code Civ.Proc. § 1211, as amended by St.1933, p. 1906).

Proceedings in the matter of the applications for writs of habeas corpus by Hannah Zuker and James M. Zuker.

Petitioners discharged, and orders or judgments by which petitioners were adjudged to be guilty of contempt declared void.

Wolfson, Swetow & Brown, of Los Angeles, for petitioners.

Buron Fitts, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

HOUSER, Presiding Justice.

Habeas corpus.

In this matter, it appears that in a proceeding supplementary to the execution of a judgment, on a hearing thereof before a referee appointed by the superior court, both Hannah Zuker and James M. Zuker were sworn, and testified that in so doing each of such witnesses testified to certain facts, as to which several other witnesses in effect testified to the contrary; also that, as to petitioner James M. Zuker, after having been orally ordered by the referee to produce certain books and records, he failed to do so; that thereupon, in pursuance of an affidavit made in the nature of a summary respecting such facts by the attorney who represented the judgment creditor on such hearing, together with a "certification" by the said referee relative to said facts, both of which instruments having been presented to the superior court, the said Hannah Zuker and James M. Zuker were ordered by said court to show cause before it as for contempt, etc. At the latter hearing, no answer by either of the respondents therein having been filed in the proceeding, and no evidence having been introduced or offered by them or by either of them therein or thereat, the superior court made its findings of fact, and thereupon adjudged each of said respondents guilty of contempt of said court, pronounced its judgment, and made its order of commitment thereon, to the effect that, as to one specification only of contempt, the respondent Hannah Zuker be confined in the county jail in the custody of the sheriff of Los Angeles county for a period of five days thence next to ensue, and, in addition thereto, that she pay a fine of \$500, etc.; and that as to each of four separate specifications of contempt, including that with respect to his failure to produce certain books and records, the respondent James M. Zuker likewise be confined in the county jail in the custody of said sheriff for a period of five days, and that, in addition thereto, he

pay a fine of \$250, etc.—the several jail sentences “to run consecutively.” Thereafter, in pursuance of the separate application of each of said respondents to this court therefor, a writ of habeas corpus was issued in the premises.

As compelling reasons for an order or judgment by this court by which the invalidity of the respective orders of commitment by the superior court should be adjudged, it is urged by each of said petitioners that neither the affidavit of the attorney who represented the judgment creditor, nor the certificate by the referee, nor even the findings of fact by the superior court, was or were sufficient as a matter of law to form a basis for the order or judgment that was pronounced or rendered by said court. In other words, that since nowhere, either within any of the foundational documents or within the order constituting the commitment, does either the exact alleged contempt appear, neither the physical personal restraint of petitioners or either of them by the said sheriff, nor the money judgment rendered against them or either of them, is legal. In that connection, it is confidently asserted by petitioners that the most that is contained within all or either of the several basic documents is a general statement or summary of the facts; likewise, that nowhere is any sufficient showing made regarding the materiality of such facts to the “issues,” if any, that were pertinent to the inquiry or hearing of the proceedings supplementary to the execution of the judgment before the referee at the time when the alleged several contempts were committed. In that regard, as to petitioner Hannah Zuker, an examination of the affidavit of the attorney who represented the judgment creditor at such hearing discloses that, instead of incorporating within the affidavit the precise questions propounded to the petitioner and the precise respective answers made thereto, the affiant contented himself with the statement contained in his affidavit that “a true transcript of the testimony given by all of the aforesaid witnesses in said proceedings, including the questions, admissions and objections of counsel, the rulings and orders of the referee, are fully set forth and appear in Exhibit ‘A,’ hereto attached, and which is by reference thereto made a part hereof,” which transcript consists of five volumes of testimony. In addition to that statement and reference, the specification by affiant of the respect in which petitioner Hannah Zuker was alleged to have testified falsely consisted solely in

his several conclusions as to the substance and the effect of her testimony—all of which was coupled with a statement by the affiant regarding the alleged materiality “to the issues * * * in that if testified to truthfully by said witness, it would have tended to establish the following facts: [Setting them forth.]”

As to petitioner James M. Zuker, with regard to each of two counts on which he was committed, said affidavit contained the general statement only that “the aforesaid James M. Zuker wilfully testified falsely in said proceedings relative to facts material to the issues then pending before the referee, in that he repeatedly stated, in answer to questions that were obviously within his knowledge, and to which he could have given a definite answer, that he ‘did not know,’ or ‘could not remember.’” But as affecting his alleged contempt in other particulars, in substance, the affidavit was identical in form with that hereinbefore outlined with regard to the alleged contempt of Hannah Zuker.

Nor with respect to the respective recitals or summaries regarding the testimony given by said respondents in the certificate of the referee were the essential foundational elements of the alleged contempt of either of the respondents in said proceeding made more definite. The statements therein contained were to the effect that each of the said respondents “testified as set forth in the affidavit of Amos Friedman” (the attorney for the judgment creditor). The said certificate of the referee also contained a statement to the effect that the testimony given by each of said witnesses was false “within the judicial knowledge of your referee”; furthermore, that petitioner James M. Zuker had failed to comply with the order given him by the said referee “to produce therein, the Minute Book and Stock Certificate Book of Ashmont Holding Co., Inc.” But nowhere within the said certificate of the referee was any statement contained whereby the materiality of either the alleged false testimony of the respondents or the books in question might be ascertained. Indeed, no reference was made therein regarding their materiality. In addition thereto, it is noted that as to the material findings of fact made by the judge of the superior court, in substance, they are identical with the allegations of the affidavit and the certificate, and that in no respect are such allegations made more definite or certain than those contained in the said affidavit and the said certificate; and

as to the commitment, with reference to the essential foundational facts, all it contains is a reference to the findings of fact made by the said court and its conclusions thereon, to the effect that the said respondents were guilty of contempt of court, etc., and that in punishment therefor they should be respectively dealt with as hereinbefore has been indicated.

With reference to the basis upon which a commitment for contempt of court may legally rest, section 1211 of the Code of Civil Procedure, as amended by St.1933, p. 1906, provides that:

"When a contempt is committed in the immediate view and presence of the court, or of the judge or justice at chambers, it may be punished summarily; for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed.

"When the contempt is not committed in the immediate view and presence of the court, or of the judge or justice at chambers, an affidavit shall be presented to the court, judge, or justice, of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators, or other judicial officers."

In that connection, in the case entitled *In re Battelle*, 207 Cal. 227, 277 P. 725, 65 A. L.R. 1497, in which the respondent therein was charged with the commission of a direct contempt, it was held that (syllabus):

"A witness before a court or any other inquisitorial body who is otherwise orderly and respectful cannot be adjudged guilty of contempt committed in the presence of such tribunal for his failure or refusal to answer any question or to produce any record, book or paper, in the absence from the order so adjudging him guilty of contempt of an express recital of the facts affirmatively showing not only the precise question which he has declined to answer, or the precisely specified books or papers which he has refused to produce, but also affirmatively setting forth the facts which show the materiality and pertinency of each of these forms of evidence to the issue before the court or other tribunal.

"Where the order and adjudication of contempt which the senate purported to adopt and enforce against petitioner did not contain a recital of the particular questions

that petitioner refused to answer or the particular books or papers which he refused to produce, the fact that the order made 'reference' to the transcript of the testimony taken before the committee did not satisfy the requirement of section 1211 of the Code of Civil Procedure with respect to what the recitals in said order must contain."

In the instant matter, although it may be that, as asserted by the respondent herein, the alleged contempt of the petitioners was not direct, but that it was constructive only, nevertheless, even assuming (without deciding) the correctness of that contention, as far as the statutory requirements mentioned in section 1211 of the Code of Civil Procedure are concerned, no substantial difference is apparent between the situation that was presented in the cited case and that of the instant matter. As therein is set forth, in the case of a direct contempt, "an order must be made, reciting the facts"; whereas, in the case of a so-called constructive contempt, an "affidavit * * * or a statement of the facts," is required to be presented to the court. As applied to the present inquiry, the ruling and the language of the opinion in *Re Battelle*, 207 Cal. 227, 255, 277 P. 725, 65 A.L.R. 1497, to which reference hereinbefore has been had, are particularly pertinent. In the face of the facts established herein, to wit, that neither the affidavit, the certificate, the findings by the superior court, nor the commitment complied with either or any of the requirements mentioned in the cited case, it must be concluded that the petitioners are, and each of them is, illegally detained and deprived of his or her respective liberty by the sheriff of Los Angeles county.

Although, for the purpose of having each of the commitments in the premises declared of no validity, petitioners urge several other separate points, it is deemed unnecessary to devote to them the consideration which, in the absence of the ruling hereinbefore indicated, they, or at least some of them, might well be given.

It is ordered that the petitioners herein be discharged from custody, and that the orders or the judgments heretofore made or rendered, by which each of the petitioners herein was adjudged to be guilty of contempt of court, be, and they are hereby, declared to be null and void.

We concur: YORK, J.; DORAN, J.

13 Cal.App.2d 254

JACKSON v. WASHINGTON NAT. INS. CO.

Civ. 9919.

District Court of Appeal, First District,
Division 2, California.

April 16, 1936.

Rehearing Denied May 16, 1936.

Hearing Denied by Supreme Court
June 15, 1936.

1. Insurance *§*146(3)

Rule of liberal construction in favor of insured is applicable only when policy presents some uncertainty or ambiguity.

2. Insurance *§*360(1)

Payment on September 9, of premium due September 1, on accident and health policy providing that payment of past-due premium should not continue policy in force beyond 1st day of succeeding month, did not continue policy in force until October 9, so as to cover accidental death of insured after 1st of October, notwithstanding that period between September 1 and September 9 was not covered by policy, where policy provided for return of premiums paid for any period not covered by policy.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by Gertrude Jackson against the Washington National Insurance Company. From a judgment for the plaintiff, the defendant appeals.

Reversed, with directions.

Breed, Burpee & Robinson, of Oakland, for appellant.

Vaughns & Larche, of Oakland, for respondent.

SPENCE, Justice.

Plaintiff, as the assignee of the beneficiary of an accident and health policy issued by defendant to William A. Jackson, sought to recover a death benefit of \$1,000 for the accidental death of said William A. Jackson. Plaintiff had judgment, and defendant appeals.

The sole question presented by this appeal is whether the policy was in force when said William A. Jackson was accidentally killed on October 3, 1933. Appellant contends that the payment of the premiums as hereinafter set forth continued the policy in force until October 1, 1933, and no longer, while respondent contends that said payments continued the policy in force until October 9, 1933.

The policy was dated April 26, 1924, and, in consideration of the payment of a premium of \$3.75, it was provided that the company "does hereby insure William A. Jackson * * * subject to all the conditions and limitations hereinafter contained, from the day this contract is dated, 12 o'clock noon, standard time of the place where Insured resides when this policy is issued, until 12 o'clock noon, such standard time, of the *first day of June, 1924*, and for such further periods of *one calendar month* each as the renewal premium of \$3.75 per month will maintain the policy in force." (Italics ours.) The acceptance of any renewal premium was made optional with the company. It was also provided that if default was made in payment of the agreed premium, the subsequent acceptance of a premium by the company would reinstate the policy but only to cover accidental injury thereafter sustained. Clause N provided: "The payment of a past due premium shall not continue this insurance in force beyond *the first day of the succeeding month*." (Italics ours.) Another provision of the policy provided: "Any premium paid to the Company for any period not covered by this policy will be returned upon request."

The insured's renewal receipt card shows that the premiums during the last eleven months were ordinarily paid within a few days following the first day of each month. The entries on said card relating to the last payment shown thereon were as follows: "Herewith find \$3.75 as payment of Monthly Premium on Policy No. 8363 for which please receipt below.—Date of Payment, 8/9/33.—Month on which it Applies, Sept.—Amount of Monthly Premium \$3.75.—Accepted only subject to all the conditions of the policy—(Signed) M. Flory, Collector,—Jackson, Wm. A. Insured." Similar entries appeared on the card giving the dates of the making of the ten preceding payments and specifying the particular month for which each of such payments applied. It will be noted that the date of the last payment shown on said card was "8/9/33," which payment was specified as the one applying to the month of September. The next preceding date of payment appeared as "8/4/33," which payment was specified as the one applying to the month of August. August is the eighth month, but the parties have assumed, without making mention of any er-

ror in the date, that the payment which was dated "8/9/33" was made upon September 9 rather than on August 9. Our attention has not been called to anything in the record to justify this assumption, but we will nevertheless proceed, as have the parties, upon the assumption that said last payment was in fact made on September 9 and was not made prior to that time.

From what has been said we are of the opinion that the payment of the last premium on September 9, 1933, continued the policy in force until October 1, 1933, and no longer. The provisions of the policy were entirely clear and unambiguous and the payment of the past due premium on September 9 did "not continue this insurance beyond the first day of the succeeding month," to wit, October 1. It is true under the terms of the policy that said payment caused a reinstatement of the policy only to cover injuries sustained after September 9, and that the period between September 1 and September 9 was not covered by the policy; but it is also true that the insured was entitled under the terms of the policy to a return of the premium paid for any period not covered by the policy. We therefore conclude that said policy was not in force on October 3, 1933, when said William A. Jackson met his death.

[1,2] No authority directly in point has been called to our attention and we have found none. Respondent relies mainly upon the case of *Fallis v. Massachusetts Bonding & Insurance Co.*, 210 Mo.App. 579, 243 S.W. 217; but in that case and others cited by respondent the policy provisions differed from those before us. In said cases the rule of liberal construction was applied, but it is well settled that the rule of liberal construction in favor of the insured can only have application when the policy presents some uncertainty or ambiguity. *Ogburn v. Travelers Ins. Co.*, 207 Cal. 50, 276 P. 1004; *First Nat. Bank v. Maryland Cas. Co.*, 162 Cal. 61, 121 P. 321, Ann.Cas.1913C, 1170; *Carabelli v. Mountain States Life Ins. Co.* (Cal.App.) 46 P. (2d) 1004. The policy before us presents no such uncertainty or ambiguity, and in the absence thereof, we cannot, by construction, read out of the policy the plain provision that, "The payment of a past due premium shall not continue this insurance

beyond the first day of the succeeding month." To do so would be equivalent to making a new and different contract for the parties in the place of the one which they had made for themselves.

While the case is not directly in point, we may quote the language used by the court in *Fuchs v. Germantown Farmers' Mut. Ins. Co.*, 60 Wis. 286, 18 N.W. 846, at page 847: "The difficulty with this contention is that it calls upon the court to make an agreement for the parties, instead of construing the agreement which they made for themselves. This is not the province of this court. * * * If it is true, as claimed, that the plaintiff had no contract of insurance binding upon the company during the first nine days of the year stipulated for, yet that would not authorize the court to extend the contract for a period of nine days after the expiration of the year." We may also quote the language of the court in *Scholz v. Standard Acc. Ins. Co.*, 145 Va. 694, 134 S.E. 728, 731, as follows: "As we have hereinbefore stated, under the terms of the policy, if a premium was paid for any period not covered by the policy, the effect was not to extend the period of the risk, but to render the company liable for a refund of the excess. In the instant case, the period of the risk fixed by the renewal receipt was from May 6, 1923, till May 6, 1924, and, if the policy was not in force between May 6, 1923, and July 10, 1923, that time was 'a period not covered by this policy,' and, if an excess premium was charged for the period stipulated for, the effect was to render the company liable to refund the excess, and not to extend the period of the risk. Such was the contract of the parties."

As the provisions of the policy and of the renewal receipt in the present case were certain and unambiguous and were wholly consistent one with the other, we cannot sustain respondent's contention which does violence to the provisions of both.

The judgment is reversed, with directions to the trial court to enter judgment in favor of the defendant.

We concur: NOURSE, P. J.;
STURTEVANT, J.

13 Cal.App.2d 405

GROSSO v. MONFALCONE, Inc., et al.
Civ. 9615.

District Court of Appeal, Second District,
Division 1, California.

April 23, 1936.

Rehearing Denied May 16, 1936.

1. Principal and agent §145(4)

Person who deals with another believing him to be a principal and subsequently learns that he was dealing with agent of undisclosed principal may recover either from person with whom he dealt or from undisclosed principal, but is not entitled to hold both agent and principal, and on demand therefor must elect against whom he will proceed.

2. Principal and agent §145(4)

Bailor of electric generator held not entitled to judgment against agent and undisclosed principal for rental of generator or for value of generator in lieu of its return, where no election to proceed against either undisclosed principal or agent had been made after demand.

3. Bailment §26, 30

To maintain trover for bailee's conversion of personalty which bailee refuses to deliver to bailor in accordance with terms of contract, commencement of action must be preceded by bailor's demand that bailee redeliver possession of subject of bailment, coupled with failure and refusal on part of bailee so to do, and complaint must contain allegation by which such demand and failure and refusal are clearly stated.

4. Bailment §31(1, 3)

To maintain trover against bailee for conversion of personalty upon failure of bailee to redeliver personalty to bailor in accordance with terms of contract, bailor must show ability of bailee to comply with demand at time it was made and evidence of demand and refusal may be repelled by proof that compliance was impossible.

5. Bailment §26

Where gist of action of trover is negligent loss of bailor's property by bailee, no demand is necessary before action is commenced, since demand for return would be fruitless.

6. Bailment §11

Liability of bailee for negligent loss of bailor's property must rest upon negligent

act committed by bailee or for which he was personally responsible, which act proximately was reason for his failure to return property to bailor.

7. Negligence §119(1)

Existence of negligence as cause of action may not be assumed or presumed, but in order to be available to plaintiff, he must both allege and prove negligence of defendant.

8. Bailment §11

Bailee of electric generator on boat of which he was in charge as manager held not chargeable with negligence of boat's engineer which caused fire destroying generators so as to be liable to bailor for negligent destruction of generators where engineer was not employee of bailee.

9. Negligence §54

Negligence will not be imputed except where parties stand in such relation of privity that maxim "Qui facit per alium facit per se" directly applies.

10. Appeal and error §171(1)

Judgment against bailee of electric generator for use on boat upon which bailee was employed for negligent destruction of generator, which was destroyed through negligence of boat's engineer, would not be affirmed on ground that bailee was guarantor where complaint in action showed that bailee was not sued on guaranty and case was not tried upon that theory.

Appeal from Superior Court, Los Angeles County; H. Parker Wood, Judge.

Action by Paul J. Grosso against the Monfalcone, Incorporated, and Tommy Jacobs, and others. Judgment for plaintiff, and Tommy Jacobs, sometimes known as Thomas M. Jacobs, appeals.

Reversed.

Charles W. Lyon and Fleming & Robins, all of Los Angeles, for appellant.

Charles A. Thomasset, of Los Angeles, for respondent.

HOUSER, Presiding Justice.

As disclosed by the record herein, it appears that the defendant Monfalcone, Inc., a corporation, was the owner of a boat which, in accordance with an agreement that existed between Monfalcone,

Inc., and one Bob Goldie relative to a division of profits, was being operated by the latter for "amusement" purposes; that in thus operating the said boat, defendant Tommy Jacobs was in charge thereof as manager; that in the course of conducting the "amusement" afforded on said boat, its electrical lighting system became out of order, with the result that, at the instance and the direction of defendant Tommy Jacobs, another employee on the boat contacted plaintiff, from whom was rented an electric generator for a specified period of three days, at a price of \$75 per day—said generator to be returned to plaintiff on the day following that period; also, that defendant Tommy Jacobs would be personally responsible for the rent of said generator; that thereupon said generator was delivered on board said boat; but that because of the fact that on the seventh day following said delivery, it and the said boat were destroyed by fire, the said generator was never returned to plaintiff.

Although the evidence introduced on the trial of the action would appear to preponderate to the contrary, in its findings of fact the trial court found that after the expiration of the four-day period, the holding by the defendants of said generator was "against plaintiff's will and consent."

With reference to a demand by plaintiff for a return of the generator, from testimony given by plaintiff it appears that some time after the boat and the generator had been destroyed, plaintiff "looked up Mr. Jacobs in regard to my (plaintiff's) plant. * * * He said the plant burned up. I said, 'Well, how about it?' I says, 'I got a plant out here, it is mine. I want my money.' 'Well,' he said, 'you will have to go see Nick Oswald and that bunch. You will have to see them to get your money.'"

In his amended complaint, plaintiff presented three alleged separate causes of action, to wit: First, for rent of the generator in the sum of \$3,500, being at the rate of \$75 per day for four days, and thereafter at the rate of \$350 per week from the date of the expiration of the four-day period to the date of the commencement of the action; secondly, presumably by way of the statutory action known as "claim and delivery," with relation to which plaintiff demanded that defendants either return the generator to him, or, in lieu thereof, that defendants

pay to plaintiff, the sum of \$4,250, its alleged value; in substance, and excepting differences in the respective forms of expression only of the allegations, the alleged third cause of action is identical with the alleged second cause of action, but as to which plaintiff demanded a straight money judgment for damages suffered by him in the premises.

In addition to the general facts hereinbefore outlined, the findings of fact made by the trial court included the finding, "that at the time of said rental said Tommy Jacobs did not disclose and did not inform plaintiff that he was an employee and servant of Monfalcone, Inc., and plaintiff was not aware and had no knowledge of said fact; that on the contrary and at the time of said rental, defendant, Tommy Jacobs, stated to plaintiff that he would be personally responsible for (1) said portable gas driven generator, (2) the aforesaid rental at the rate of Seventy Five (\$75.00) Dollars a day, and (3) the return to North Hollywood, California, at the expiration of the said four (4) days to plaintiff of the said portable gas driven generator"; also, a finding to the effect "that prior to the commencement of this action, * * * plaintiff requested and demanded the return of the said portable gas driven generator but said defendants, * * * failed and refused to return the same and * * * converted and appropriated said portable gas driven generator to their own use; * * *"

Not only from the amended complaint, but as well from the evidence, the findings made by the trial court, and its judgment thereon, it appears that the theory upon which liability of the defendant Monfalcone, Inc., was predicated was that defendant Tommy Jacobs was an agent who assumed responsibility, but who in fact was acting for an undisclosed principal. On the trial of the action, as soon as that theory had been developed by evidence introduced by plaintiff, the defendants made a motion, coupled with a demand, to the effect that in such circumstances plaintiff be required and compelled to elect as to whom he would seek to hold liable—the agent, Tommy Jacobs, or the principal, Monfalcone, Inc. In response thereto, in part, plaintiff's attorney stated that, "You must make your demand. However, the plaintiff does not have to elect until the case is entirely in, after the evidence is in"; and after all the evidence had been intro-

duced, the judge remarked, "That brings it down to the argument of the case," to which the attorney for defendants responded, "There is an election at this time, your Honor." The court: "Yes. * * *". However, plaintiff did not elect, nor did the court require him to do so. Some time thereafter, probably through inadvertence, the trial court rendered its judgment against both defendants, first for the sum of \$4,250, and, secondly, for the sum of \$300. It is from such judgment that the defendant Tommy Jacobs has appealed to this court.

[1,2] "The rule is well established that where one deals with another believing him to be a principal, and subsequently learns that he was dealing with an agent of an undisclosed principal, he may recover either from the person with whom he dealt or from the undisclosed principal." 1 Cal. Jur. 860. See, also, 1 Cal. Jur. Ten Year Supp. 173. But he is not entitled to hold both the agent and the principal. On demand therefor, the plaintiff must elect. *Ewing v. Hayward*, 50 Cal.App. 708, 195 P. 970; *McDevitt v. Chas. Corriea & Bros.*, 70 Cal.App. 245, 233 P. 381; *Klinger v. Modesto Fruit Co.*, 107 Cal.App. 97, 290 P. 127; *Miller v. San Francisco C. E. Soc.*, 125 Cal.App. 85, 13 P.(2d) 824; *Hannin v. Fisher*, 5 Cal.App.(2d) 673, 43 P. (2d) 815. It follows that as to counts 1 and 2 of the complaint, the judgment cannot be permitted to stand.

Notwithstanding that situation, plaintiff contends that because of the failure and refusal of the defendants to return the generator to plaintiff after demand had been made by him upon them so to do, in law they were guilty of a conversion of said generator, and that having thus become tort-feasors, plaintiff was entitled to a judgment against each of said defendants.

[3-6] It may be conceded that in proper circumstances, a conversion may exist where the bailee of personal property refuses to redeliver it to the bailor in accordance with the terms of the contract; and that in such a case an action by the bailor against the bailee in the form of trover is proper; but in order to maintain such an action, ordinarily, at least, it is necessary that the commencement thereof be preceded by a demand by the bailor upon the bailee that the latter redeliver to the former the possession of the subject of the bailment, coupled with the failure

and the refusal on the part of the bailee so to do. Furthermore, the complaint must contain suitable allegations by which such demand and such failure and refusal are clearly stated. More than that, "the plaintiff must show the ability of the defendant to comply with the demand at the time that it is made"; and evidence of the required demand and refusal "may be repelled by proof that a compliance was impossible." 4 Cal. Jur. 34, et seq., and authorities there cited. But it has been held that where the gist of the action is the negligent loss of the bailor's property no demand is necessary before the action is commenced (6 Cor. Jur. 114), because manifestly, in such circumstances, a demand for the return of the property would be fruitless. However, even conceding that such a rule may obtain within this state, and consequently, the facts herein considered, that no demand was required; or, if necessary, that, as found by the trial court, a sufficient demand was made, nevertheless, as to the third cause of action it is apparent that the right of plaintiff to recover a judgment against defendant Tommy Jacobs must rest upon some negligent act either committed by him, or for which he was personally responsible, which act proximately was the reason for his failure to return the generator to plaintiff.

[7] In pleading, it is a well settled rule that the existence of negligence as a cause of action may not be assumed or presumed. To the contrary (with the possible exception of the application of the doctrine of *res ipsa loquitur*), in order to be available to a plaintiff in an action, he must both allege and prove the negligence of the defendant. 6 Cor. Jur. 1156, 1158. With respect to the third count, an inspection of the allegations of the complaint discloses no charge of negligent conduct whatsoever against either of the defendants. The complaint is absolutely silent in that regard. But for the reason that in his answer to the complaint, defendant Tommy Jacobs negatived the commission by him of any negligent act and set up the fact that, in the absence thereof, the boat and the generator were destroyed by fire, it may be considered that the issue of negligence was passably presented to the trial court for its determination. At any rate, among other facts, the trial court found "that the aforesaid portable gas driven generator was lost by reason of the negligence, misconduct and default of the de-

FEINBERG v. ÆTNA LIFE INS. CO.

Civ. 9508.

District Court of Appeal, Second District,
Division 1, California.

April 22, 1936.

Rehearing Denied May 18, 1936.

Hearing Denied by Supreme Court
June 19, 1936.

endants, Monfalcone, Inc., and Tommy Jacobs, and each of them; that the said portable gas driven generator was lost by reason of the unsafe equipment to-wit, a gasoline storage fuel tank having no shut off valve on said boat Monfalcone contained and by reason of the negligent, careless, and reckless conduct of the said Monfalcone, Inc., its agents and/or servants in attempting to repair said gasoline storage tank contained on board said ship without draining the same by reason whereof the gasoline in said tank contained was caused to ignite when it came into contact with an open electrical switchboard."

[8,9] From such finding of fact, it becomes apparent that the theory upon which the judgment was rendered on said third count (if at all), was that the generator was lost through and by reason of the inexcusable negligence of the defendants. In that regard, the evidence shows that the negligence of the engineer on the boat was the direct cause of the fire. Whether in reality he was an employee of Monfalcone, Inc., or of Bob Goldie, who was operating the boat, is not so important. But considered either way, the engineer was not an employee of defendant Tommy Jacobs; nor was the latter, as an employee either of Monfalcone, Inc., or of Bob Goldie, responsible for the negligent act of his coemployee. In other words, the engineer's negligence could not be imputed to defendant Tommy Jacobs. 45 Cor.Jur. 1028. As is stated in the case of Bryant v. Pacific Electric Ry. Co., 174 Cal. 737, 742, 164 P. 385, 387, "There can be no such thing as imputable negligence, except in those cases where such a relation exists as that of master and servant or of principal and agent. In order that the negligence of one person may be properly imputed to another, they must stand in such relation of privity that the maxim qui facit per alium facit per se directly applies."

[10] As a final reason for affirming the judgment against defendant Tommy Jacobs, respondent suggests that he was a guarantor. But the complaint in the action discloses that said defendant was not sued upon a guaranty, nor was the case tried upon any such theory. It follows that the judgment should be, and it is, reversed.

I concur: DORAN, J.

I concur in the judgment: YORK, J.

1. Insurance ⇨646(1), 665(2)

Possession of life policy by beneficiary is prima facie evidence of its delivery as valid and subsisting contract, and burden of overcoming prima facie case made by production of policy in action to enforce it rests on insurer.

2. Insurance ⇨668(3)

Whether insurer's evidence overcame prima facie case that life policy had been delivered as valid and subsisting contract, made by beneficiary's possession of policy, held for jury.

3. Insurance ⇨654½

In action on life policy where defense was that policy was conditionally delivered and first payment had not been paid during lifetime of insured, notice from home office of payment of second premium due held admissible as raising inference that credit had been extended to insured as to first payment, in view of testimony of insurer's witness that after first premium is paid and home office is notified, it forwards original notice of subsequent premium.

Appeal from Superior Court, Los Angeles County; H. Parker Wood, Judge.

Action by Rose Shannon Feinberg against the Ætna Life Insurance Company. From an adverse judgment, defendant appeals.

Affirmed.

Gibson, Dunn & Crutcher and Philip C. Sterry, all of Los Angeles, for appellant.

Eugene H. Marcus and Harry Rabwin, both of Los Angeles, for respondent.

YORK, Justice.

The complaint in this case alleges that on June 18, 1931, the defendant, in consideration of the premiums therein agreed to be paid by the insured, issued its policy of life insurance to one Samuel Feinberg. The death of Feinberg is then alleged; that the plaintiff became entitled to the sum of \$10,000; that demand for payment of

said sum had been made; and "that each and every condition stated in said policy has heretofore been performed in accordance with the terms thereof before the commencement of this action."

Defendant in its answer admitted the issuance of said policy of insurance for and in consideration of the premiums therein agreed to be paid; denied that any sum became due plaintiff from defendant; denied that said policy ever became effective; and as a special defense alleged that the policy was delivered to insured by defendant for examination only; that, among other things, the policy provided that it should not become effective until the first premium was paid during the good health of the insured and that said premium was never paid during the lifetime of the insured or at any other time, and that said policy never became effective.

On the issues thus formed the cause was tried, the jury returning a verdict in favor of plaintiff for the sum of \$10,000. From the judgment entered pursuant to the verdict, defendant appeals.

It appears from the record before us that in the latter part of May, 1931, W. L. Ewing, an assistant general agent of the defendant company, talked to Samuel Feinberg, the insured, at Metro-Goldwyn-Mayer Studios where Feinberg was employed as manager of the musical department, and at the same time talked to Lew Smith, an employee in the same department, regarding their taking out life insurance policies with his company. As result, both men were examined by the company's doctor on or about June 1st, at which time Feinberg signed an application for a \$10,000 policy of life insurance, which application was accepted by Ewing and forwarded by him to the home office of the company at Hartford, Conn. Thereafter, the home office asked for further information regarding the insured's weight, and on June 5th Feinberg sent this information to the agent Ewing, and on June 18th the home office of the defendant company issued to said Feinberg a policy of life insurance in the sum of \$10,000, at the same time issuing a similar policy to Smith. Both policies arrived in the Los Angeles office of the defendant about June 22, 1931, but were held by the agent Ewing in his desk in the Los Angeles office of defendant until they were delivered to Lew Smith. On the day Mr. Ewing went to the studios to deliver the policies, Mr. Feinberg was not there, and Ewing delivered the Feinberg policy to

Smith, who signed a "receipt for policy contract delivered for examination" without reading the same; Smith in turn delivered the policy to Feinberg without mentioning that he had signed the receipt. The record without dispute shows that a few days after Mr. Ewing left the policies with Smith, Ewing returned and picked up Smith's policy.

Ewing testified that he had no independent recollection of the date when he delivered the policies to Smith and depended solely upon the date shown upon the "receipt for policy contract delivered for examination" signed by Smith. This receipt shows an alteration in the date, viz., an 8 superimposed upon a 7, dash 1, dash 193—. Ewing read the date August 1, 1931. The policy issued to Feinberg remained in Feinberg's possession until his death, which occurred on August 14, 1931, as the result of an accident. Mrs. Feinberg, the respondent herein, testified that the first time she saw her husband's policy was on July 6, 1931, when her husband handed it to her. She said she recalled the date plainly because on July 8th she went into the Santa Monica Hospital for a major operation; that she saw the policy several times before she went to the hospital and after her return therefrom on July 23, 1931; and that she saw the policy in the drawer where it was kept whenever she had occasion to go there for other things. She also testified that between the 14th and 17th of August she received through the mail a notice of second premium due on the policy.

Appellant contends on this appeal that the evidence is insufficient to sustain the judgment, and that the court erred in the admission of evidence and in the giving and refusing to give certain instructions.

In connection with its first point, appellant maintains that the evidence was wholly insufficient to sustain the implied finding of the jury that the delivery of the Feinberg policy to Smith by the agent Ewing was an unconditional delivery; that, on the contrary, the very great preponderance of the evidence conclusively established the facts that said policy was delivered for inspection purposes only and was not accepted by Feinberg, and that the first premium due thereon was never paid during the lifetime of Feinberg.

[1,2] The possession of the policy by the insured or by the beneficiary is *prima facie* evidence of its delivery as a valid and

subsisting contract, and the burden of overcoming the prima facie case made by production of the policy by the plaintiff, in an action to enforce it, rests upon the insurance company. Whether the defendant's evidence did or did not overcome the prima facie case thus made by the plaintiff was for the jury to determine. *Berliner v. Travelers' Ins. Co.*, 121 Cal. 451, 53 P. 922. The factual situation of the cited case is similar to that of the case at bar, the defense to the action being that the premium on said policy was never paid, that its payment was not waived, that the policy was never delivered, and therefore never took effect between the parties. It was there testified on behalf of the defendant that the premium was not paid, that no arrangements had been made for credit, that payment had not been waived, and that the delivery of the policy was for the purpose of examination and not as an absolute or unconditional delivery. The court there held that the general agent of a life insurance company may waive the payment of the first premium and deliver the policy, and thereby make it a valid and subsisting contract of insurance, notwithstanding the provision in the policy that it shall not take effect until the first premium is paid while the insured is in good health.

[3] The jury in the case before us apparently believed that there was an arrangement for credit made between the agent Ewing and the insured, and this belief may have been strengthened by the testimony of plaintiff that she received notice of second payment due on the policy. The notice of second payment was introduced over the objection of defendant company, which it now contends was prejudicial error. The general agent for defendant had already testified that, "After the first premium is paid and the home office has been notified of that fact, the original notice of the subsequent premium being due is forwarded by the home office direct to the insured. * * * If the premium was not promptly paid it would be the job of my office to follow up the collection, see that the policy did not lapse; by that I do not mean that the home office sends the notice for the second premium after the first premium has been paid necessarily. They send it when it is due."

While we are not of the opinion that the notice of second payment of premium due amounted to an admission by defendant

company that the first premium had been paid, as is contended by respondent, we do believe it was sufficient to raise the inference that credit had been extended to the insured by the agent Ewing, and that some credit arrangement had been made by Ewing with the home office of defendant. We do not believe that the admission into evidence of this notice of second payment of premium due amounted to prejudicial error, in view of the testimony of the attaches of defendant company which preceded its admission. We are of the opinion that the evidence adduced on the trial of this action is sufficient to sustain the judgment, and that there was no prejudicial error in the admission of evidence.

We have studied the instructions given and believe that, taken as a whole, they fully and fairly instructed the jury on the various legal phases of the case, and that no prejudicial error resulted therefrom or from the refusal of the trial court to give the instructions requested by appellant.

The judgment is affirmed.

I concur: DORAN, J.

I concur in the judgment: HOUSER, P. J.



13 Cal.App.2d 273

AARONSON v. AARONSON.

Civ. 1801.

District Court of Appeal, Fourth District,
California.

April 16, 1936.

Appeal and error ⇐627(2)

Failure to file record within required time after appeal required dismissal of appeal where no request for preparation of transcript had been filed, or additional time allowed for preparation of record, and no proceedings for preparation of record were pending in trial court.

Appeal from Superior Court, Fresno County.

Suit by Effie Arline Aaronson against P. V. Aaronson. From a judgment for plaintiff, defendant appeals. On plaintiff's motion to dismiss appeal.

Appeal dismissed.

Leslie F. McGregor, of San Francisco, for appellant.

Everts, Ewing, Wild & Everts and R. H. Reeve, all of Fresno, for respondent.

BARNARD, Presiding Justice.

The respondent has moved to dismiss this appeal and has filed a certificate of the county clerk from which it appears that notice of appeal was filed on July 1, 1935; that no request for the preparation of a transcript has been filed; that no proposed bill of exceptions has been filed; that no additional time for the preparation of a record has been allowed; that no proceedings for the preparation of a record are pending in the trial court; and that the time within which a record might be prepared under either method has expired. No appearance was made in opposition to the motion and the same should be granted. *Steffey v. Standard Stations, Inc.*, 131 Cal.App. 202, 20 P. (2d) 971.

The appeal is dismissed.

We concur: MARKS, J.; JENNINGS, J.



13 Cal.App.2d 350

BUSHEY v. UNION OIL CO. OF CALIFORNIA et al.

Civ. 5535.

District Court of Appeal, Third District, California.

April 21, 1936.

Hearing Denied by Supreme Court
June 19, 1936.

1. Appeal and error ⇨1008(1)

Whether truck driver's negligence in entering intersection while driving on left side of street, in cutting corner in attempting left turn, and in driving at excessive speed, was proximate cause of collision with motorist on truck driver's left *held* for trial court sitting without jury (St.1935, pp. 176, 184, §§ 510, 540(b)).

2. Appeal and error ⇨994(3)

Finding of trial court resolving conflict in testimony of one witness binds reviewing court in same manner as finding resolving conflict in testimony of witnesses of opposing parties.

3. Appeal and error ⇨1008(1)

Contributory negligence of motorist colliding with defendant's truck in intersection, as regards failure to properly apply brakes, excessive speed, and failure to avoid collision after observing truck, *held* for trial court sitting without jury.

4. Negligence ⇨65

Plaintiff who does all that ordinarily prudent person would do under circumstances to avoid accident is not contributorily negligent, although it was possible for plaintiff to avoid accident.

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Action by Grace Bushey against the Union Oil Company of California and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Hamilton Wright, of Oakland, for appellants.

Merwin C. Lernhart, of Napa, for respondent.

TUTTLE, Justice pro tem., delivered the opinion of the court.

Plaintiff recovered judgment for \$6,500 on account of personal injuries received in an automobile collision, and defendants appeal from said judgment.

The appeal is based entirely upon the insufficiency of the evidence to support the findings made by the trial court, the case being tried without a jury.

[1,2] It is first contended that the evidence is insufficient to support the finding that the negligence of defendant was the proximate cause of the injury. The collision occurred within the intersection of Lincoln avenue and Trancas road, on the outskirts of the city of Napa, at the hour of 9:30 a. m. Plaintiff was driving a coupé on Trancas road, which coupé was equipped with a governor which limited her speed to 35 miles per hour. The brakes on her car were in good order. She did

not know of the existence of the intersection. Due to the obstructions of her view, she did not see the truck driven by defendant Brown until she was 160 feet from the intersection. She then applied her brakes and her car slowed down. Prior to that time, her speed was about 28 miles per hour. In her attempt to apply her brakes she found that they did not work properly, as they held her in the center of the highway. She released the brakes, and then attempted to apply them a second time, and they still had the effect of holding her in the center of the highway. During this period the truck, which belonged to defendant company, entered the intersection from Lincoln avenue to the right of plaintiff. The latter testified that the truck was on the left side of the avenue when it entered the intersection, and that while still in the intersection it turned to the right and the collision occurred.

Plaintiff also testified that the truck "cut the corner" when it entered the intersection. This was a violation of section 540, subdivision (b), of the California Vehicle Code (St.1935, p. 184) as the driver testified that he was attempting to make a left turn when he entered the intersection. That such act constituted negligence may have been the proximate cause of the collision, there can be no doubt. From the map in evidence, the course of the truck within the intersection is similar to the letter "S." Entering the intersection on the left side of Lincoln avenue, it swerved to the right and then went slightly to the left, turning over and landing on its side just as it was passing out of the intersection. The truck weighed some 15,000 pounds. It was struck by the car of plaintiff at the rear end, and while it was in the middle of the highway. Most of the foregoing facts are taken from the testimony of plaintiff. It is urged by appellant that the effect of this testimony was destroyed by the cross-examination of plaintiff. Where there is a conflict in the testimony of a witness, we are bound by a finding of the trial court in respect to such testimony, in the same manner as this court is bound by a finding based upon the conflicting testimony of the witnesses of op-

56 P.(2d)—80½

posing parties. *Pedrow v. Federoff*, 77 Cal.App. 164, 247 P. 212. It was for the trial court to say, from all the evidence before it, whether or not, in approaching such an intersection, defendant Brown was driving at a speed which endangered the safety of persons or property. California Vehicle Code, § 510 (St.1935, p. 176). The court has made its findings on these issues adverse to defendants' contention, and it cannot be said there is an absence of substantial evidence to justify the finding that the proximate cause of the injury was the negligence of defendants.

[3, 4] As to the contention that there is no evidentiary support for the finding that plaintiff was not guilty of contributory negligence, the same rule is applicable. The argument of appellants is that plaintiff did not properly apply her brakes, that she was traveling at an excessive rate of speed, and that she could have avoided the collision by the exercise of due care. "But contributory negligence is not based upon a possibility of avoiding an accident. If a person does all that an ordinarily prudent person would do under the circumstances to avoid the accident, such person is not chargeable with neglect which proximately causes the accident and resulting damage." *Lloyd v. Boulevard Express*, 79 Cal.App. 406, 249 P. 837, 838. The trial court not only heard the evidence, but also viewed the premises. Numerous photographs are in the record, and there is testimony concerning skid marks of both vehicles. Whether, under such circumstances, plaintiff exercised due care after she observed the approach of the truck, was a question for the trial court. We have gone over the entire record and are satisfied that there is sufficient evidence to justify the finding of the court that plaintiff was not guilty of contributory negligence.

Other points urged for reversal arise out of the insufficiency of the evidence, and what we have said is applicable to them. We find them to be without merit.

The judgment is affirmed.

We concur: PULLEN, P. J.;
THOMPSON, J.

13 Cal.App.2d 412

**CRISS v. ANGELUS HOSPITAL ASS'N
OF LOS ANGELES et al**

Civ. 9908.

District Court of Appeal, Second District,
Division 1, California.

April 23, 1936.

Hearing Denied by Supreme Court
June 22, 1936.**1. Hospitals ⇨8****Physicians and surgeons ⇨18(5)**

Plaintiff suing hospital and physicians for death of his child allegedly as result of malpractice in four particulars was not required to prove all the allegations of negligence to perfect a cause of action.

2. Hospitals ⇨8**Physicians and surgeons ⇨18(4)**

Plaintiff suing hospital and physicians for death of his child allegedly as result of malpractice had right to allege several specific acts of negligence generally, rather than to plead them in separate causes of action.

3. Appeal and error ⇨1061(4)

In action against hospital and physicians for death of plaintiff's child allegedly as result of malpractice, refusal to take from jury's consideration allegation of negligence as to which there was no evidence held not prejudicial error, where there were no separate causes of action and recovery could be had on proof of any one of the negligent acts alleged (Code Civ.Proc. § 473, as amended by St.1933, p. 1851; Const. art. 6, § 4½).

4. Evidence ⇨506

An expert witness gives his opinion whether the doing or not doing of a certain thing conforms to what a hypothetical doctor, endowed with ordinary skill and learning and exercising ordinary care and prudence, practicing in the locality in question would or would not do.

5. Evidence ⇨553(1)

In malpractice action hypothetical question asked physician whether in his opinion, having in mind the facts and circumstances surrounding treatment of particular baby, practice followed was such as a physician and surgeon possessing and exercising degree of skill, care, and knowledge ordinarily possessed and exercised in city would exercise under same or similar circumstances in city, held substantially correct in form.

6. Appeal and error ⇨1048(3)

In malpractice action, hypothetical question asked physician whether in his opinion this doctor, in treating this baby, exercised that degree of skill, care, and learning ordinarily possessed and exercised by physicians and surgeons practicing in city in treatment of similar condition, held, although incorrect in form because of reference to "this physician" instead of "a physician," not prejudicial error in absence of showing of prejudice or objection at time specifically pointing out vice in question.

7. Appeal and error ⇨1004(3)

Unless District Court of Appeal can say that award of damages made by jury and sustained by trial court was so grossly disproportionate under facts as presented to court on appeal as to shock sense of justice and raise at once a presumption that it was result of passion and prejudice, or corruption, court may not exercise power of revision.

8. Death ⇨99(3)

Award of \$6,000 in malpractice case for death of twelve day old child held not excessive.

9. Hospitals ⇨7**Physicians and surgeons ⇨16**

That husband's contract with health foundation only called for obstetrical services to wife held not to relieve foundation and physicians from all liability for malpractice resulting in death of newborn child.

DORAN, J., dissenting.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Action by Loren E. Criss against the Angelus Hospital Association of Los Angeles and others. Judgment for plaintiff as against all the defendants, and defendants R. B. Jenkins, Incorporated, R. B. Jenkins, Raymond Byrne, A. J. Schramel, and R. E. Morris appeal.

Affirmed.

Mills, Hunter & Dunn and Noel B. Martin, all of Los Angeles, for appellants.

Holbrook, Taylor, Tarr & Reed, of Los Angeles, for respondent.

ROTH, Justice pro tem.

Plaintiff brought this action for damages alleging malpractice resulting in the

death of an infant, twelve days old. The jury brought in a verdict against all defendants upon which judgment was entered. All defendants appeal except Russell and Moore, doing business under the name of Columbia Health Foundation. Defendants Schramel, Byrne, and Morris are doctors and employees of R. B. Jenkins, Incorporated, a corporation (first sued herein as the Angelus Hospital Association of Los Angeles), which corporation operates a hospital to which plaintiff's wife—the baby's mother—was, as plaintiff claims, negligently admitted, in which she was confined and her baby negligently allowed to become infected with impetigo and thereafter negligently treated, and from which she and her baby were negligently discharged. R. B. Jenkins is president of the corporation hospital, the principal owner of its stock, and its general surgeon. As to his qualifications, when asked whether he could describe impetigo "as well as any other man," he admitted that "modesty prevented me from saying better than some." As already appears from what has been said, separate acts of negligence were charged in a single complaint, to wit:

- (1) Admitting plaintiff's wife to the hospital;
- (2) Permitting the infant to become infected with impetigo;
- (3) Treatment of the infant after infection;
- (4) Discharge of the plaintiff's wife and the infant from the hospital.

There was no evidence which would sustain a finding that there was negligence on the part of any of the defendants in the admission of the wife to the hospital, and this presents the first question of substance raised by defendants. Defendants requested and the court refused to give the following instruction to the jury: "The complaint in this case, among other things, charges that the defendants were negligent in admitting Mrs. Bernice Criss to the hospital. You are instructed, however, that there is no evidence in the case which will justify you in finding any of the defendants were negligent in that respect, and so far as that feature of the case is concerned, you will find that none of the defendants were negligent."

[1-3] Defendants contend that the failure to give this instruction constitutes prejudicial error; respondent asserts that

since the evidence sustained the other allegations of negligence, it was not proper to give the instruction, and that in any event the failure to give it was harmless error. It is undoubtedly proper for a trial court to take from the jury an issue upon which there has been no evidence. *Selden v. Cashman*, 20 Cal. 56, 81 Am.Dec. 93; *Kinsey v. Pacific Mutual Life Ins. Co.*, 178 Cal. 153, 172 P. 1098. The trial court in this case did, however, adequately instruct the jury on all phases of the case, including that of burden of proof. It was, as a matter of law, unnecessary for plaintiff to prove all the allegations of negligence to perfect a cause of action. *Froeming v. Stockton Elec. Ry. Co.*, 171 Cal. 401, 153 P. 712, Ann.Cas. 1918B, 408; *Potvin v. Pacific Greyhound Lines*, 130 Cal.App. 510, 20 P.(2d) 129. Plaintiff alleged several specific acts of negligence generally, as he had a right to do. *Bergen v. Tulare County Power Co.*, 173 Cal. 709, 714, 161 P. 269; *Champagne v. A. Hamburger & Sons*, 169 Cal. 683, 147 P. 954; *Cunningham v. Los Angeles Ry. Co.*, 115 Cal. 561, 47 P. 452; *Manica v. Smith*, 138 Cal.App. 695, 33 P.(2d) 418. If the several acts of negligence had been separately pleaded in separate causes of action, a motion for nonsuit or a directed verdict on the first cause of action for the first alleged act of negligence in this case would, if it had been made, have had to be granted. Since there were no separate causes of action, and since the foregoing cases establish that recovery may be had on proof of any one of the negligent acts, we are of the opinion that no prejudicial error was suffered by defendants or any of them by failure of the trial court to give the requested instruction. Article 6, § 4½, Const. of California; section 473, Code of Civ.Proc., as amended by St.1933, p. 1851; *Etienne v. Kendall*, 202 Cal. 251, 259 P. 752; *Murnane v. Le Mesnager*, 207 Cal. 485, 495, 279 P. 800; *Clark v. McClurg*, 215 Cal. 279, 285, 9 P.(2d) 505, 81 A.L.R. 908. Further, the case of *Eppinger v. Kendrick*, 114 Cal. 620, 625 et seq., 46 P. 613, on an analogous factual situation, while not direct authority for this view, squints in favor of respondent's position.

[4-6] The next question of importance raised by appellants is that the trial court erred in overruling their objections to hypothetical questions propounded by respondent to his expert witnesses. Some of the questions, to which objection was made,

ended in substantially the following language: "Assuming these facts, Doctor, have you an opinion as to whether or not *this physician* in treating *this baby* exercised that degree of skill, care and learning ordinarily possessed and exercised by physicians and surgeons practicing in the City of Los Angeles in the treatment of similar conditions?" When the doctor responded in the affirmative to such question, he was then asked: "And in your opinion, did or did not *this doctor* exercise that degree of care which I have stated in the question?" Appellants' contention in this regard is that a hypothetical question thus propounded invades the province of the jury and asks the expert to decide the very question the jury must decide. Technically, appellants' position is correct. This court said, in the case of *Thomason v. Hethcock*, 7 Cal.App.(2d) 634, 637, 46 P.(2d) 832, 833: "In short, the ultimate question which the jury must answer, and the question or questions which a doctor testifying as an expert must answer for the purpose of furnishing to the jury evidence upon which a jury is to make up its mind, are not identical." The question put in the *Thomason Case* was as follows: "In your opinion, based upon this statement of facts, was the procedure of the defendant, in advising and in administering the treatment and in the care of the patient thereafter, such as, in the exercise of due caution and ordinary skill, would be commonly adopted and used by reputable physicians and surgeons generally in this locality under the same or similar circumstances?" The vice of this question was pointed out in the opinion, where we state, 7 Cal.App.(2d) 634, at page 636, 46 P.(2d) 832, 833, of that case: "It may be conceded that the question which the jury must ultimately decide is not whether the treatment administered is such as would be commonly adopted and administered by doctors of ordinary skill in the use of ordinary care, but that the ultimate question is whether the treatment administered or the method used, whether a common method of treatment or not, was such, or was given in such a manner as indicated, suggested, or demonstrated a lack of that care, training, and skill which is ordinarily possessed by physicians and surgeons practicing in the same or similar communities."

An expert testifying as a witness gives his opinion whether the doing or not doing

of a certain thing conforms to what a *hypothetical doctor*, endowed with ordinary skill and learning and exercising ordinary care and prudence, practicing in the locality in question, would or would not do. *Reynolds v. Struble*, 128 Cal.App. 716, 733, 18 P.(2d) 690. The expert's testimony is thus confined to what he thinks a hypothetical doctor with ordinary qualifications, exercised with ordinary skill and care, would or would not do. Such an opinion, in legal supposition at least, is different from saying that the actual doctor in a given case is skilled or unskilled, careless or careful. The expert's opinion sets up for the use of the jury or the court a hypothetical doctor, by which the jury or court must test the skill of and the care used by the doctor actually involved. This in contemplation of the law and as a matter of actual fact is necessary, because ordinary laymen know nothing at all of medical practice and proficiency, or not enough to set up for themselves a hypothetical test doctor. In other situations growing out of lay facts, when conformity to a standard must be determined, the direct mandate of the law is that the right or wrong of such actions must be decided by what "a reasonable man" or an "ordinarily prudent man" would or would not do. The hypothetical doctor and the reasonable or ordinarily prudent man belong to the same genus homo. When the reasonable or prudent man is used as a test, however, all that is necessary is that the jurors search themselves and accept as final, subject to certain specific instructions, what they think a reasonable or ordinarily prudent man will or will not do. The hypothetical doctor, however, must be built up by expert testimony. So, when a hypothetical question is put to a doctor the evidence sought is not what the doctor personally thinks of what was or was not done, not whether he would do or omit to do the particular act or omission charged as negligence; not whether the actual doctor in the case was negligent in the commission or omission charged; but whether, in his opinion, a doctor of ordinary attainments practicing in the same locality and using ordinary skill and care would have done or failed to do the thing charged. When the testimony of the expert is thus limited, the expert does not, in legal theory at least, decide the question which the jury must decide. The expert does not say that the actual doctor was careless, clumsy, or below the ordinary standard of medical at-

tainment. The jury does that, using the standard set up by the experts. The testimony of the expert is for the guidance of the jury. *Kershaw v. Tilbury*, 214 Cal. 679, 692, 8 P.(2d) 109. The question in the *Thomason Case*, as originally asked, set up a false standard, and the vice of that question was whether the doctor there involved used ordinary methods. It is obvious that the use of methods not ordinary or usual may suggest or demonstrate a doctor of the highest skill, as well as one who did not have ordinary skill. If courts were confined in their decisions on the question as to whether a doctor has used ordinary skill and care to evidence of whether or not he used ordinary practices and methods, all progress in medicine would cease. It is also apparent that ordinary methods and practices may be employed with less than ordinary skill and care. Technically speaking, therefore, defendants' question should have ended substantially in the following formula: "Doctor, have you an opinion on the facts as outlined, whether a doctor practicing in this locality and endowed with ordinary training, knowledge and skill, exercising ordinary care, would have treated a baby in the manner indicated?" In short, as we understand the rule, any and all hypothetical questions of the type here involved must be predicated upon what the expert thinks a hypothetical doctor should have done or should not have done. In the case at bar, however, all of the hypothetical questions asked by respondent were not subject to the objection made. The question in its objectionable form was propounded to Dr. Salvin, a witness for respondent. His answer thereto cured the objectionable portion of the question. His response to the question in the objectionable form was: "The treatment differs from the usual treatment of these conditions," which, according to defendants, is exactly what the question should have called for. Also, while defendants argue at great length that the question as propounded invaded the province of the jury, defendants, instead of specifically pointing out the actual defect in the question, insisted as already appears that the question should have been confined to whether the doctor thought ordinary methods and practices were used, which, as we have pointed out, is itself a defective question. *Thomason v. Hethcock*, supra. Furthermore, we find that in propounding the second hypo-

thetical question to Dr. Salvin, respondent completed the question as follows: "Q. In your opinion, Doctor, having in mind the facts and circumstances * * * surrounding the hospitalization and treatment of this Criss baby, was the practice followed in that case such practice as a physician and surgeon possessing and exercising the degree of skill, care and knowledge ordinarily possessed and exercised in the City of Los Angeles, would exercise under the same or similar circumstances in the City of Los Angeles?" The question thus put is substantially correct. On at least two other occasions, we find still other hypothetical questions put to the same doctor in substantially the same manner. In fact, except with reference to the first hypothetical question addressed to Dr. Salvin, all the others are in form and substance substantially correct. Furthermore, even with reference to the questions which are conceded to be defective, it should be borne in mind that each and every one of them after referring to "this physician," instead of to "a physician," ended with "exercised that degree of skill, care and learning ordinarily possessed and exercised by physicians and surgeons practicing in the City of Los Angeles, in the treatment of similar cases?" There is no doubt but that the criticized question is technically correct except in its allusion to "this" physician instead of "a" physician, and while we are convinced that the distinction between a hypothetical doctor and the actual doctor which we have pointed out is sound and should be adhered to, it would require a substantial showing, in the absence of specific objection, to prove prejudicial error thereby. In this case, it is true that the legal objection made was good, but the specific vice of the question was never pointed out, although there was much discussion on the subject. As a practical matter, the expert when testifying as to what a hypothetical doctor would or would not do, is in effect levelling at the actual doctor in the case. The law, it is true, allows only the jury to make specific application to the actual doctor in the case. There is, however, an invasion of the jury's prerogative when *this* doctor, instead of *a* doctor, is inadvertently used, but all expert testimony is an invasion of the jury's prerogative as a fact finding body. If, in legal contemplation, laymen were thoroughly conversant with the field of medicine, no doctor would be allowed to give an opinion

in answer to a hypothetical question, any more than a lay witness in an ordinary collision case can give an opinion as to what an ordinarily prudent man would have done under a certain set of circumstances. We feel, therefore, that while appellants' position is technically correct, there is in this case no prejudicial error committed by the court.

[7,8] The verdict and judgment entered thereon in this case was for \$6,000. Appellants contend that the amount thereof is excessive. In support of this contention the case of *Fox v. Oakland St. Ry.*, 118 Cal. 55, 50 P. 25, 62 Am.St.Rep. 216, is cited, in which our Supreme Court held that the verdict for the death of an infant boy was excessive. That case was decided in 1897. The case of *O'Meara v. Haiden*, 204 Cal. 354, 367, 268 P. 334, 60 A.L.R. 1381, specifically takes judicial notice of the fact that there is a pronounced decrease in the purchasing power or value of the dollar since decisions have been made in some of the earlier cases. There is nothing in the record in this case which would indicate at first blush that the verdict was the result of passion or prejudice (*Connor v. Henderson*, 108 Cal.App. 237, 242, 291 P. 641); and the later cases of our state demonstrate that the amount of the judgment in this case is not too substantial. *Fortier v. Hogan*, 115 Cal.App. 50, 1 P.(2d) 23; *Frazzini v. Cable*, 114 Cal.App. 444, 300 P. 121; *Hill v. Peres*, 136 Cal.App. 132, 28 P.(2d) 946. As was said in the case of *Connor v. Henderson*, supra, 108 Cal.App. 237, at page 242, 291 P. 641, 643: "Unless we are able to say that the award of damages made by the jury and sustained by the trial court was so grossly disproportionate to any compensation reasonably warranted by the facts as presented to us on appeal as to shock the sense of justice and raise at once a presumption that it was the result of passion, prejudice, or corruption, rather than an honest and sober judgment, this court may not exercise the power of revision." The quotation expresses our feeling in the matter.

[9] Appellants argue further with an abundance of detail that the evidence does not support the verdict against them and specifically that the verdict is without support in the evidence as against Drs. Jenkins, Moore, and Schramel. We do not intend to review the evidence in any detail, because it would serve no useful pur-

pose. There is ample evidence to support a finding that the two defendants, who did not appeal, to wit, Russell and Moore, operating as the Columbia Health Foundation, sold health and medical services and hospitalization for a stipulated sum per month; that plaintiff was one of their customers, and his wife one of the beneficiaries of such service; that defendants Jenkins and R. B. Jenkins, Incorporated, through Jenkins, took care of the customers of the health foundation for a stipulated sum and understood and agreed to take care of plaintiff's wife and child. In this regard defendants contended that plaintiff's contract only called for obstetrical services to the wife, and did not require any care for the child, but the distinction is too strained to be substantial, as we do not understand that when an obstetrician undertakes to deliver a woman of a child, he may order the child trundled off without a spank or a preliminary look and devote his entire attention at the time and during the hospital confinement to the mother alone. It should be said in justice to the doctors in this case that they undoubtedly feel the same way, since they did proceed to look after the infant. The evidence also shows that Drs. Schramel, Morris, and Byrne were employed by the hospital corporation, as well as Dr. Jenkins, and that the three first-named doctors worked under the supervision of Dr. Jenkins. The record substantially supports the jury's verdict on three charges of negligence, to wit: Negligently permitting the infant to become infected with impetigo; negligence in the treatment of the infant after infection; and negligence in discharging the mother and the infant at a time when the infant was suffering from an acute attack of impetigo.

Other questions are raised by appellants, but it is unnecessary to treat them, as respondent admits in his brief: "A hospital is not a guarantor against infection. Negligence must be proved beyond a mere possibility. A physician defendant is not liable for the acts of another whom he is able neither to control nor direct. An expert witness cannot invade the province of the jury. A jury cannot decide a medical question involving scientific knowledge which has not become common knowledge, in the absence of expert testimony."

The judgment is affirmed.

I concur: YORK, Acting P. J.

DORAN, Justice.

I dissent.

That the evidence supports the verdict, I have grave doubts. If the evidence were overwhelming, or even substantial, the danger of a miscarriage of justice as a result of the error complained of by appellants, would have been removed, or at least reduced to a minimum. In the light of the evidence, however, the form of the question complained of and the evidence elicited thereby, become vital. Practically all of the evidence upon which the judgment depends was given in response to the alleged improper question, and the mere asking of the question in the proper form, on one or two occasions, does not appeal to me as a remedy sufficiently effective to counteract the damage, and thus eliminate the prejudice. The question in its proper form, complained of by appellants, called for the determination by plaintiff's experts of the vital questions presented for the jury's sole determination. Although competent experts testified for the defense, no invasion of the jury's prerogatives was attempted by them, and thus the defendants were left to contend, at an embarrassing disadvantage, with plaintiff's evidence on the subject.

The prevailing opinion concedes that appellants' position is technically correct, but asserts that no prejudice resulted from the error. I am unable to bring myself to this conclusion. The evidence in response to the alleged improper questions, and by far most of the evidence upon which plaintiff relied, was in response to such questions, was incompetent, and I seriously question whether there was any valid evidence at all to support the verdict.

It is contended by appellants and conceded by respondent that there was no evidence of negligence on the part of defendants in admitting plaintiff's wife to the hospital, and, as pointed out in the prevailing opinion, if the several acts of negligence had been separately pleaded in separate causes of action, a motion for nonsuit or directed verdict as to this issue would have had to be granted.

The trial court declined to withdraw such issue from the jury, which the prevailing opinion concedes was error, but

concludes was harmless. My associates evidently do not regard this error as the possible source of serious consequences—a conclusion which under ordinary circumstances would be warranted. But, in the light of the character of the evidence received, who can say that the jury was not influenced in arriving at its verdict by a consideration of an issue tendered by the pleadings and upon which there was admittedly no proof? Particularly is this true when, by the instructions, the liability of the hospital, under the circumstances, was unlimited. In other words, the jury was left to consider the question, upon which there was no evidence, in the light of the doctrine that the *mere admission* of a patient into a hospital would constitute negligence. With such a broad doctrine in mind as a measure of responsibility with respect to that particular charge of negligence, the jury very easily and erroneously could have reasoned on the same basis with respect to the other charges of negligence.

It is to be expected that infectious and contagious diseases are likely to appear in all hospitals, and it is a matter of common knowledge that isolation wards are established for patients afflicted with such diseases. When, under such circumstances, modern, improved, and accepted methods are employed to reduce the hazard of contagion to a minimum, it would be a harsh doctrine, indeed, that would nevertheless charge a hospital with responsibility to a patient who, in spite of such scientific safeguards, might happen to develop a contagious disease.

The issue of the hospital's responsibility for negligently admitting a patient was submitted to the jury, not only in the absence of evidence on the subject, but also without adequate, or any, instructions on the limit of its liability.

The prevailing opinion does not treat of the above question because, as is quoted therein, respondent admits that "a hospital is not a guarantor against infection. Negligence must be proved beyond a mere possibility." The subject of guaranty is beside the issue, and respondent's admission on appeal affords appellants slight comfort as a remedy for the error of which they complain.

PEOPLE v. WORKMAN.*

Cr. 1480.

District Court of Appeal, Third District,
California.

April 24, 1936.

Rehearing Denied May 9, 1936.

Hearing Granted by Supreme Court
May 21, 1936.1. Jury $\Rightarrow$ 129

Mere statement that counsel challenged juror for cause *held* insufficient under statute (Pen.Code, § 1076).

2. Jury $\Rightarrow$ 133

Overruling challenges *held* not abuse of discretion where testimony of prospective jurors was conflicting on question whether they would tend to believe sheriff in preference to other witnesses.

3. Jury $\Rightarrow$ 133

Where prospective jurors gave conflicting answers on voir dire, it is for trial judge to determine which answers most truly represent jurors' minds, and judge's decision is ordinarily conclusive and will be reviewed only when it can be said as matter of law that juror was biased.

4. Jury $\Rightarrow$ 131(6)

In prosecution for possessing prohibited weapon, allowing district attorney to ask whether prospective jurors or members of their family belonged to Communist party *held* not error, as against contention that jury inferred therefrom that defendant was a Communist.

5. Criminal law $\Rightarrow$ 404(4)

In prosecution for possessing billie, handles of hammer and hatchet offered as basis of comparison to decide whether weapon involved was billie or not *held* properly excluded (St.1923, p. 695, as amended).

6. Weapons $\Rightarrow$ 17(5)

In prosecution for possessing billie, whether weapon involved was billie or not *held* for jury to determine from statutory definition and court's instructions (St.1923, p. 695, as amended).

7. Criminal law $\Rightarrow$ 730(5)

In prosecution for possessing billie, district attorney's argument that weapon involved need not be concealable on person *held* harmless where court instructed jury what billie was, stating that it must be object easily concealable on person so that it can be quickly drawn for use as weapon (St.1923, p. 695, as amended).

Appeal from Superior Court, Amador County; Roy B. Maxey, Judge.

J. F. Workman was convicted of possessing a weapon of the kind commonly known as a billie, and he appeals.

Affirmed.

George Olshausen and George Andersen, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for the People.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

The facts in this case are practically the same as in *People v. Canales* (Cal.App.) 55 P.(2d) 289. At the time of the arrest of Workman and Canales they were riding in the front seat of an automobile in the city of Jackson. Defendant was charged in an amended information with a violation of chapter 339 of the Statutes of 1923 (page 695), as amended in 1931 (St.1931, p. 2316), commonly known as the "Deadly Weapons Act," the amended information alleging in substance that at a certain time and place defendant did "unlawfully, maliciously and feloniously possess an instrument or weapon of the kind commonly known as a billie." Upon this information defendant was found guilty by a jury, and from the judgment of conviction thereon, prosecutes this appeal.

The first point urged by appellant is that the evidence is insufficient to support the verdict. This same question was raised in the case of *People v. Canales* and practically the same testimony was there under review as is presented in the instant case, and the contention was then answered adversely to the defendant; we here likewise find the evidence was entirely sufficient to support the verdict and judgment.

The principal contention here advanced for reversal, however, is the alleged error in overruling certain challenges for cause to prospective jurors. It is the claim of appellant that prospective jurors Marks and Stowers, were disqualified because the testimony given by them in answer to certain questions propounded upon their voir dire indicated that they would judge the witnesses on the basis of extra judicial knowledge of the sheriff of Amador county; that is to say, they would believe the testimony of the sheriff rather than the defendant or his witnesses because of the jurors' acquaintance with the sheriff and their knowledge of him as a man. As to prospective

$\Rightarrow$ For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 59 P.2d 1005.

jurors Wait and Peyton, appellant claims the record shows they considered themselves to be deputy sheriffs, and were therefore disqualified.

We will first consider the objections to Marks and Stowers. Mr. Marks testified in part, to questions asked of him upon his voir dire, as follows:

"Q. You know Sheriff Lucot, do you?
A. Yes sir. * * *

"Q. Do you feel you would be inclined to believe him in preference to other people?
A. Yes sir.

"Q. In other words, you feel if Sheriff Lucot would testify you would attach such credibility to his testimony that you wouldn't believe the people who testified against him? A. I would be inclined to believe Mr. Lucot. * * *

"The Court: Q. You would not be influenced by your friendship for the sheriff? A. No, I don't think so; I would be inclined to believe him though. * * *

"Q. If the sheriff on the one hand told his story and if the defendant on the other hand told a contrasting story relating to this case, would you be inclined to believe Mr. Workman in preference to Mr. Lucot? A. No.

"Q. Would you be inclined to believe Mr. Lucot against Mr. Workman. I am talking only about friendship? A. No. * * *

"Q. Would you simply take their testimony at face value? A. I think I would.

"Q. Why would you attach greater credibility to the testimony of the sheriff and lesser credibility to the testimony of Workman? A. Because I know the sheriff better.

"Q. * * * If the sheriff told a story, in a sense gave testimony here, and assuming that his testimony were in fact false, and that the testimony of the defendant were in fact true, nevertheless due to your friendship or knowledge of the sheriff, you would believe the sheriff's testimony in preference to the testimony of this defendant? A. That would have to be proved to me.

"Q. What would have to be proved? A. The testimony."

Mr. Stowers, when examined as to his qualifications as a juror testified:

"Q. For instance would you be inclined to give greater weight to the sheriff's testimony than you would to the testimony of the defendant whom you don't know? A.

Sure. I think the sheriff's evidence is heavier than a common layman. * * *

"Q. Well, then, if the sheriff testified, as he will in this case, as the sheriff, then you would believe his testimony in preference to the testimony of a layman? A. Sure.

"Q. Even if the court instructs you to the contrary? A. Well, I am inclined to think if I was instructed to the contrary, of course, it would be different, I think his preponderates more than any other layman. * * *

"The Court: * * * Mr. Stowers, if the court should instruct you that the testimony of the defendant was entitled to the same credence and the same belief as the testimony of any other person, would you follow that instruction? A. I would.

"Mr. Andersen: Q. Then, you wouldn't give greater weight to Mr. Lucot's testimony? A. Not under those conditions, no.

"Q. Would you be willing to accept the testimony in the same light as you would accept anybody else's testimony? A. Yes."

[1,2] The people contend that not only were these prospective jurors not disqualified, but that the challenges were improperly made, and therefore appellant cannot now be heard to complain. The challenge to Mr. Marks was in substantial conformity with the provisions of section 1076 of the Penal Code. As to Mr. Stowers, counsel merely said: "I challenge the juror for cause." The Court: "Denied. That is not a ground for challenge." No further objection was made to Mr. Stowers, and he was finally sworn as a juror in the cause. This latter challenge was insufficient, but undoubtedly both court and counsel knew what the challenge was supposed to cover, as they had been discussing the objection just prior to the challenge. From an examination of the voir dire of these prospective jurors, however, it is apparent that there was a conflict in their testimony with regard to whether or not they would act upon extra judicial knowledge or would follow the instructions of the court. It could not therefore be said there was an abuse of discretion, and the trial court's decision under such circumstances will not be disturbed.

[3] The rule is expressed in 15 California Jurisprudence p. 429, wherein it is said that many persons, competent jurors, being inexperienced as witnesses, are unable to comprehend the effect of the language in which questions are propounded to them, and as a result their answers are often

conflicting and contradictory. It is therefore for the trial court to determine which of the answers most truly represent the state of the jurors' minds. Inasmuch as the trial judge is in the best position to pass upon the question of the jurors' aptitude, his decision on accepting a juror is ordinarily conclusive and will be reviewed only when it can be said as a matter of law that the juror was biased. We cannot here say there was an abuse of discretion.

The qualifications of the prospective jurors Wait and Peyton, who the defendant claims were disqualified by reason of the fact they either were or considered themselves to be deputy sheriffs, were developed by the following questions, asked first of Mr. Wait:

"Q. Do you belong to the American Protective League? A. Yes sir.

"Q. * * * And during the time you were a member of this organization, continuing through the strike and up to the present time, you have always held yourself as a deputy to sheriff Lucot? A. Yes sir.

"Q. You pledged yourself to be summoned, to be called upon at any time that immediately requested your presence? A. Yes sir.

"Q. And that was particularly to be in, at or near the vicinity of these mines to quell any picketing and striking at or near the mines, that is true, isn't it? A. Any disturbance. * * *

"Q. You knew that was one of the purposes of the American Protective League, didn't you? A. To assist the law enforcing officers. * * *

"Q. You consider yourself at the present time a deputy sheriff subject to the call of Sheriff Lucot? A. Subject to the call of the sheriff. * * *

"Q. Mr. Wait, have you ever been deputized? A. I came here to the office.

"Q. You have been deputized by the sheriff just as every member of the American Protective League was deputized, that is correct? A. Yes sir.

"The Court: Are you a deputy sheriff at the present time? A. No."

In regard to Mr. Peyton, the following questions were asked and answered:

"Q. You were a deputy sheriff yourself weren't you? A. Supposed to be.

"Q. Supposed to be, you were deputized by Sheriff Lucot weren't you? A. Yes.

"Q. You still consider yourself a deputy sheriff don't you? A. If they call for me I suppose I am. * * *

"Q. Do you know the man's name who deputized you?

"Q. Who? A. Lucot.

"Q. Sheriff Lucot himself? A. Sure.

"Q. What did he tell you when he sent you out there? A. Go out there and keep peace, see there is no fighting or anything if you can help it."

As to neither prospective jurors Wait nor Peyton was there any evidence of any act of appointment by the sheriff himself of these men as deputy sheriffs. Inasmuch as these men were not acting under color of an appointment, they cannot be held to be either deputy sheriffs or de facto officers. Merely because a person considers himself to be an officer is not sufficient to constitute him a de facto officer. These jurors were under the same obligation to an officer of the law as any citizen called upon to assist in preservation of the peace.

[4] The court did not err in permitting the district attorney to ask prospective jurors if they or members of their family belonged to the Communist party. Counsel had the right to know whether or not the prospective juror ascribed to the doctrine that force and violence might properly be resorted to, to obtain the object sought. The district attorney had a right to know whether or not the prospective jurors believed in law and order as recognized under the established order of society, and the asking of the simple question was legitimate and appropriate. Appellant claims the asking of the question caused the jury to infer that he was a Communist, but we do not believe the asking of this proper question justifies the inference contended by appellant.

[5, 6] The defense also attempted to offer in evidence a hammer handle and a hatchet handle as a basis of comparison to decide whether or not "People's Exhibit I" was or was not a billie. Such evidence was properly excluded. It was the function of the jury to consider if "People's Exhibit I" was or was not a billie from the definition of such weapon in the Deadly Weapons Act, and the instructions of the court.

[7] Some criticism is also made of the arguments of the district attorney to the effect that "Exhibit I" need not be such a weapon as was capable of being concealed upon the person. Whether or not this

statement was correct is immaterial as the court instructed the jury as to what a billie was, stating in one place, "you are instructed that one of the principal tests of the characteristics of a billie is that it must be an object which can be easily and readily concealed upon one's person in such a way that it could be easily and quickly drawn from one's person for use as a weapon."

It appears from the record that defendant was fairly tried and convicted, and no errors appearing in the record justifying a reversal, the judgment and the order are affirmed.

We concur: LEMMON, J. pro tem.; THOMPSON, J.



13 Cal.App.2d 424

PATRICK FARMS, Inc., v. SUPERIOR COURT IN AND FOR SANTA CRUZ COUNTY.

Civ. 10191.

District Court of Appeal, First District,
Division 2, California.

April 24, 1936.

**1. Appeal and error ☞961
Depositions ☞9**

While ordinarily a party is entitled, as a matter of right, to issuance of a commission for taking of deposition of a witness at any time after service of summons or appearance of defendant, exercise of such right is subject to a reasonable control by trial court, and in absence of an abuse of discretion a refusal to issue commission should not be disturbed (Code Civ.Proc. § 2020).

2. Depositions ☞37

Refusal to issue commission to plaintiff in action for an accounting for taking of deposition of witness in foreign state in matter relating solely to the accounting and not to plaintiff's right to an accounting held not error, where defendant had denied plaintiff's right to an accounting and evidence sought was from corporate records which would presumably be available for such purpose at any time (Code Civ.Proc. § 2020).

Petition by the Patrick Farms, Inc., for a peremptory writ of mandate to compel the Superior Court of the state of California, in and for the county of Santa Cruz, to issue a commission for the taking of a deposition of a witness.

Petition denied.

Rosendale, Scott & Thomas, of Salinas, for petitioner.

Wyckoff, Gardner & Parker, of Watsonville, and Hubert Wyckoff, Jr., of San Francisco, for respondent.

SPENCE, Justice.

Petitioner seeks a writ of mandate to compel the respondent court to issue a commission for the taking of the deposition of a witness in the city of Chicago.

A motion for the issuance of said commission was made by petitioner in the respondent court in an action for an accounting in which petitioner was the plaintiff. The defendant in that action had filed his answer denying certain material allegations of the complaint. It was also alleged in said answer that the parties had theretofore had an accounting regarding the matters mentioned in the complaint and that defendant had paid to plaintiff the full amount found due. It was further alleged that there was, at the time of the commencement of the action, another action pending in the same court between the same parties and for the same cause of action. In opposition to the motion for the issuance of the commission, a counter affidavit was filed setting forth the foregoing facts as alleged in the answer and further setting forth that said issues had not been determined by the court and that it had not yet been determined that plaintiff was entitled to an accounting. Upon the hearing, the trial court determined that the testimony to be elicited from the witness related solely to the matter of the accounting and not to plaintiff's right to an accounting. It therefore concluded that the motion for the issuance of the commission should not be granted until the question of plaintiff's right to an accounting had been first determined. The trial court filed a written opinion stating its views, which written opinion is attached to the petition herein.

[1] Petitioner contends that it was entitled to have the commission issue as a matter of right and that the trial court had no discretion in passing upon the motion for

the issuance of the commission. In our opinion, this contention cannot be sustained. While ordinarily a party is entitled to the issuance of a commission as a matter of right at any time after the service of summons or the appearance of the defendant [Code Civ.Proc. § 2020; *San Francisco Gas & Electric Co. v. Superior Court*, 155 Cal. 30, 99 P. 359, 17 Ann.Cas. 933], the exercise of that right is subject to a reasonable control by the trial court [Levin v. Superior Court, 139 Cal.App. 693, 34 P. (2d) 832; *Bar Ass'n of San Diego v. Superior Court*, 64 Cal.App. 590, 222 P. 185]. In other words, we believe that the authorities last cited clearly indicate that the trial court is not compelled under all circumstances to order the issuance of the commission at any time that a request is made therefor after the service of summons or appearance of the defendant, and that the trial court may exercise its discretion and refuse the issuance thereof under certain circumstances. Therefore the action of a trial court in refusing to issue a commission should not be disturbed in the absence of a showing of an abuse of discretion in the particular case.

[2] We find no abuse of discretion in the case before us. Where, as here, the right to an accounting is denied by the answer, it is the general practice to determine said issue first and to make an interlocutory decree determining the right of plaintiff to an accounting before going into the account itself. 1 Cor.Jur. 692. The trial court merely determined that prior to the determination of plaintiff's right to an accounting, the parties should not be put to the trouble and expense of taking the deposition of a witness at a distant point on matters relating solely to the account itself rather than to plaintiff's right to the accounting. There is nothing to show that plaintiff would be prejudiced in any way by this procedure. In fact the affidavit in support of plaintiff's motion showed that the evidence sought was from the books and records of a corporation of which the witness was an officer and it was no doubt assumed by the trial court, in the absence of any showing to the contrary, that such books and records would be available for that purpose at any time.

The views expressed herein are not in conflict with the decision in *San Francisco Gas & Electric Co. v. Superior Court*, supra. The trial court there denied the motion upon the ground that it had no jurisdiction

to order the issuance of a commission. It was held that the trial court had jurisdiction and the writ was granted. While there is language in the opinion indicating that the trial court had no discretion, the facts set forth in the opinion show that the witness, who was the only one who could establish a material fact, was under sentence of death and was to be executed within a short time after the application was made in the trial court. It therefore clearly appeared in that case that the trial court had erred in refusing to order the issuance of the commission and the language of the opinion relating to discretion was not necessary to the decision.

The petition for a peremptory writ of mandate is denied.

We concur: NOURSE, P. J.; STURTEVANT, J.



13 Cal.App.2d 456

HALL et al. v. PACIFIC ELECTRIC RY. CO.
Civ. 9709.

District Court of Appeal, Second District,
Division 1, California.

April 27, 1936.

Rehearing Denied May 22, 1936.

1. Appeal and error ⇨922

Admissions of two jurors three days after trial, when called for service on another jury in case against same defendant, that they had feelings of prejudice with respect to defendant held not to entitle defendant to new trial, since reviewing court presumed that prejudice was not acquired until after first trial.

2. Trial ⇨253(1)

If instruction by its terms purports to state conditions necessary to a verdict, instruction must state all those conditions and must not overlook pleaded defenses on which substantial evidence has been introduced.

3. Trial ⇨296(11)

In action for injuries to automobile passengers in street car collision case, instruction authorizing recovery for aggravation of pre-existing unsound physical condition, which ignored defense of contributory negligence, held not erroneous as formula instruc-

tion which omitted element essential to plaintiffs' right to recover, when read with other instructions.

4. Trial §253(4)

In action for injuries to automobile passengers in street car collision case, instructing that plaintiffs could recover for injuries resulting solely from defendant's negligence held not erroneous for failure to state that such negligence must be proximate cause of injuries.

5. Damages §213

In action for injuries to automobile passengers in street car collision case, instruction authorizing recovery for aggravation of pre-existing unsound physical condition of designated plaintiff held supported by evidence and hence proper.

Appeal from Superior Court, Los Angeles County; Thomas P. White, Judge.

Action by Herbert C. Hall and another against the Pacific Electric Railway Company. From a judgment for plaintiffs, defendant appeals.

Affirmed.

Frank Karr, E. E. Morris, C. W. Cornell, and O. O. Collins, all of Los Angeles, for appellants.

Voltaire Perkins, and Walker Sanborn, both of Los Angeles, for respondents.

SHINN, Justice pro tem.

Appeal by defendant from a judgment after verdict in favor of plaintiffs in an automobile and street car collision case.

[1] The first point urged on the appeal is that two women jurors were prejudiced against the defendant so as to be unable to give it a fair trial, although they denied having any prejudice upon their voir dire examinations. The evidence relied upon to show prejudice consisted of admissions of the two jurors, when called for service upon another jury in a case against the same defendant, that they had feelings of prejudice with respect to said defendant which they thought would prevent their acting as impartial jurors. These admissions were made three days after the verdict was rendered in the present case. The record does not show whether the jurors were prejudiced in favor of or against the defendant, the statements show-

ing only that they entertained a feeling of prejudice. But if we assume, as the defendant does, that the jurors were prejudiced against the railway company, it does not appear from their statements, nor is it a fair inference, that the state of mind they admitted when questioned in the second case was not acquired after the close of the first trial. In the absence of evidence to the contrary, it will be presumed that the jurors were truthful at both times and so were qualified to act as jurors in the present case. Such is the impression we gain from reading the testimony.

[2] The following instruction was given at the request of plaintiffs: "You are instructed that if you find from the evidence that both Herbert C. Hall and Ann Hall, or either of them, were suffering any ailment prior to the accident in question, and that the accident in question was caused by the negligence of the Pacific Electric Railway Company, then nevertheless the plaintiffs herein are entitled to recover for damages for such aggravation of their pre-existing condition as was caused by the accident. If, as a result of the defendant's negligence, the condition of Herbert C. Hall and Ann Hall was aggravated thereby, they are entitled to recover for damages for such amount as they have suffered by reason of such aggravation of their condition." The instruction was incomplete in that it omitted the element of contributory negligence. Other and correct instructions were given upon the defense of contributory negligence. The defendant contends that the instruction was a formula instruction and that therefore it should have stated all of the conditions essential to plaintiffs' right to recover and that the failure to include therein a statement of the doctrine of contributory negligence requires a reversal of the judgment. The general rule is that "if an instruction by its terms purports to state the conditions necessary to a verdict, it must state all those conditions and must not overlook pleaded defenses on which substantial evidence has been introduced." *Beyerle v. Clift*, 59 Cal.App. 7, 209 P. 1015, 1016.

[3] Read by itself, the instruction is subject to the criticism directed against it, but we think it takes on a different meaning when read with other instructions given at the request of the parties. In three

separate instructions relating to the claimed injuries to Herbert C. Hall, suffered in the accident, the jury was told that he could not recover for any physical infirmities that may have existed prior to the time of the accident, and that if it was not shown by a preponderance of the evidence that the condition of said plaintiff was the result of the accident and not of some physical disability, illness, or disturbance unrelated to the accident, he could not recover damages on account of his physical condition. Three similar instructions were given as to the claimed injuries of plaintiff Ann Hall. When the instruction questioned is read with these other instructions, it does not appear to cover the broad field which defendant assumes that it covers. We do not think it would have been understood by the jury as a direction to bring in a verdict in favor of plaintiffs upon the certain condition stated, but that it would have been understood as we understand it, as an instruction upon the matter of damages. It deals with the aggravation of pre-existing conditions solely. It does not even purport to cover the entire subject of damages but only a particular phase thereof. Read with the other instructions, a reasonable interpretation of this instruction would be that the defendant would be liable for the aggravation of existing ill or infirm conditions, rendered more serious by the injuries received in the accident. The subject of liability for negligence was covered in numerous other instructions with such clarity and emphasis as to convince us that the rules therein stated could not have been overcome by the references to negligence and the absence of a statement of the rules of contributory negligence in the instruction in question. While the instruction is faulty in treating of the question of negligence and liability without a complete statement of the rules applicable thereto, it is not to be considered as an attempted formula instruction which omitted one or more of the conditions which must exist to support a recovery. The instruction falls within the class of which it was said in *Alloggi v. Southern Pacific Co.*, 37 Cal.App. 72, 173 P. 1117, 1119, quoted and approved in *Douglas v. Southern Pacific Co.*, 203 Cal. 390, 264 P. 237, and *Saltzen v. Associated Oil Co.*, 198 Cal. 157, 244 P. 338, "While it is true that the instruction complained of in the present case is erroneous, and in a measure in conflict with several other instruc-

tions which correctly stated the rule of law relative to contributory negligence, nevertheless the correct rule of law was so specifically stated and restated to the jury that we feel that the idea in the several correct instructions must have preponderated in the considerations of the jury, and that as a consequence the erroneous instruction neither contributed to nor controlled the verdict."

A second instruction complained of by defendant was subject to the same criticism as the first one. What we have said as to the first instruction applies equally to the second one, which also, we think, would have been understood by the jury as placing such emphasis upon the question of damages as to render the references to liability quite incidental and harmless.

[4] In other instructions it was stated that plaintiffs were entitled to recover for injuries which might be found to be the result of the negligence "solely of the defendant Pacific Electric Railway Company." Of these instructions the defendant complains that they failed to state that the negligence of the defendant, for which recovery might be had, must be the proximate cause of the injuries. Defendant was not hurt by the instructions. The "sole" cause of an accident is necessarily the "proximate" cause. The instructions were more favorable to the defendant than they were to the plaintiffs.

[5] It is finally contended that no instruction should have been given upon the matter of the aggravation of pre-existing unsound physical conditions of Mrs. Hall, for the reason that the testimony of Dr. Desser, relied upon by plaintiffs, failed to show any aggravation of such conditions attributable to the accident. The doctor's testimony as a whole does leave the matter enshrouded in doubt, but we find therein a statement substantially to the effect that in his opinion the aggravated condition of his patient was the result of the jar she received in the accident. Although this opinion was strongly contradicted by the testimony of other witnesses, it was sufficient, in our opinion, to justify the submission of the issue to the jury. The instructions upon the subject were in proper form and in giving them the court did not err.

The judgment is affirmed.

We concur: HOUSER, P. J.; DORAN, J.

13 Cal.App.2d 365

LAGAR v. ERICKSON.

Civ. 1956.

District Court of Appeal, Fourth District,
California.

April 21, 1936.

Hearing Denied by Supreme Court
June 19, 1936.

1. Trial ☞401

Additional findings or inferences drawn by trial court would not be disregarded as surplusage on ground that they went beyond stipulated facts, where stipulated facts contained merely evidentiary matter, leaving ultimate facts or inferences to be found or drawn by court in order to settle issues presented.

2. Joint tenancy ☞1

Property acquired through other property held in joint tenancy retains same character in absence of agreement to terminate joint tenancy.

3. Joint tenancy ☞5

Joint property, in so far as personality is concerned, can be changed to separate property by oral agreement to that effect.

4. Joint tenancy ☞5

While act of one joint tenant without express or implied authority or consent of cotenant cannot prejudicially affect cotenant's right, such act, when done with consent of cotenant and under circumstances showing implied authority to so act, may be sufficient to terminate joint tenancy.

5. Appeal and error ☞996

Joint tenancy ☞5

Whether there was intention to terminate joint tenancy depends upon particular circumstances, and, where inferences may be drawn either way, question is one of fact for trial court.

6. Appeal and error ☞931(1)

Every intendment must be indulged in favor of findings made on question of fact.

7. Appeal and error ☞1008(1)

Whether joint tenancy in bonds existing between deceased and plaintiff was terminated by acts of both parties indicating deceased's complete ownership of bonds, so as not to entitle plaintiff to recover from deceased's administrator, held for trial court.

Action by Mary Alice Lagar against Charles E. Erickson, as administrator with will annexed of the estate of Addie M. Brooks Erickson, also known as A. M. Brooks, deceased. From a judgment, plaintiff appeals.

Affirmed.

Hillyer & Boldman, of San Diego, for appellant.

George H. Stone, of San Diego, for respondent.

BARNARD, Presiding Justice.

The plaintiff brought this action to recover certain Home Owners' Loan Corporation bonds of the face value of \$1,100, claiming the same as surviving joint tenant.

The case was tried upon an agreed statement from which the following facts appear: Mrs. Addie M. Erickson owned a note and mortgage, the title to which she caused to be transferred to herself and the plaintiff as joint tenants on May 7, 1931. She had theretofore caused a bank account to be opened as a joint account between herself and the plaintiff, with the right of survivorship. All funds placed in this account and all withdrawals therefrom were made by Mrs. Erickson. On August 1, 1934, she and the plaintiff received and receipted for \$1,975 of Home Owners' Loan Corporation bonds in satisfaction of said note and mortgage. On the same day Mrs. Erickson sold to plaintiff and her husband five of these bonds for \$500, \$400 of which she deposited in the joint account referred to. At the same time she gave Mrs. Lagar a \$100 bond as a birthday present. Mrs. Lagar placed the six bonds in her own safety deposit box, and Mrs. Erickson placed the remaining bonds in a safety deposit box which she rented that day in her own name, naming Mrs. Lagar as her "deputy." Both were present when this box was rented, and both signed the card; the cost of the box being paid by Mrs. Erickson. When the card was signed the bank attendant asked to whom she wished the contents delivered in case of her death, to which she replied that she did not know, but would let them know later, which was never done. On August 21, 1934, Mrs. Erickson took out and sold two of the bonds, placing the proceeds in the joint account. She died about two months later, at which time there was \$589.39 in the joint account, which was turned over to the plaintiff as survivor. In her will, dated July 24, 1933, Mrs. Erickson

Appeal from Superior Court, San Diego County; Clarence Harden, Judge.

referred to the mortgage held by her and Mrs. Lagar jointly and stated that she would like to have \$900 of its proceeds given to certain people in a certain way, that if any of them had passed or could not be found the money was to revert to Mrs. Lagar, that Mrs. Lagar was to use her own judgment in all cases, and that she desired none of it to go to "the Erickson clan."

In addition to the stipulated facts "and as inference drawn by the court from those facts, and as additional findings," the court found as follows:

"That the \$1975.00 of Home Owners' Loan Corporation bonds delivered to plaintiff and defendant's testatrix were, on the day of such delivery and immediately thereafter, divided by said two parties, part to one and part to the other.

"II. That said parties by said partition intended that the joint tenancy character of said bonds be terminated."

As a conclusion of law the court found that the bonds found in the testatrix's safety deposit box after her death were her sole property and now are the property of the defendant. From the judgment entered the plaintiff has appealed.

[1] It is first contended that the additional findings or inferences drawn by the court, above referred to, went beyond the stipulated facts and therefore must be disregarded as surplusage. The stipulated facts contained merely evidentiary matter, leaving ultimate facts or inferences to be found or drawn by the court in order to settle the issues presented and, under such circumstances, further findings were proper. *Crisman v. Lanterman*, 149 Cal. 647, 87 P. 89, 117 Am.St.Rep. 167; *Towle v. Sweeney*, 2 Cal.App. 29, 83 P. 74; *Zimmerman v. Continental Life Ins. Co.*, 99 Cal. App. 723, 279 P. 464; *Richert v. City of San Diego*, 109 Cal.App. 548, 293 P. 673.

[2,3] The main question presented is whether the evidence is sufficient to support the finding or conclusion that the joint tenancy character of these bonds had been terminated by the agreement of the parties. It is well settled that property acquired through other property held in joint tenancy retains the same character in the absence of any agreement to terminate the joint tenancy. *In re Estate of Harris*, 169 Cal. 725, 147 P. 967; *In re Estate of McCoin* (Cal.App.) 50 P.(2d) 114. In so far as personal property is concerned, joint property can be changed to separate by an oral agreement to that effect. *Young v. Young*,

126 Cal.App. 306, 14 P.(2d) 580. *In Re Estate of Putnam*, 219 Cal. 608, 28 P.(2d) 27, 29, the court said: "A suggestion is advanced that perhaps the joint tenancy was not in fact terminated, that perhaps there was no contract or understanding between the parties to that effect. The findings of the court upon this question constitute a sufficient answer thereto. The court found that the joint tenancy was terminated and every intendment must be indulged to support it."

[4,5] While the act of one joint tenant without the express or implied authority or consent of his cotenant cannot prejudicially affect the rights of the latter [*Swartzbaugh v. Sampson* (Cal.App.) 54 P.(2d) 73], such an act, when done with the consent of the cotenant and under circumstances showing an implied authority to so act, may be sufficient to terminate a joint tenancy. Whether or not there was an intention to terminate the joint tenancy must depend upon the circumstances in a particular case, and where inferences may be drawn either way the question is one of fact for the trial court.

[6,7] The deceased was an elderly woman who apparently needed all of her income for her support and the arrangement between her and the appellant was doubtless made for the purpose of leaving to the appellant any part of this property which remained at her death. In her will, made the year before she died, she expressed the wish that \$900 should go to certain other people. When she first wanted to give the appellant a birthday present the appellant told her she did not want any of her money. When the bonds were taken in exchange for the mortgage she exercised acts of ownership over them with the appellant's knowledge and with her implied consent. She gave one of the bonds to the appellant as a birthday present, and sold five others to her for \$500. If the appellant regarded herself as the owner of a half interest in all of the bonds, the natural thing would have been to pay Mrs. Erickson for the other half only. The appellant then placed six of the bonds in her private lock-box and the deceased placed the others in her own box which she then rented, telling the bank officials that she would later give them directions as to what to do with them in the event of her death. All this was done in the presence of the appellant, with her knowledge and implied consent. Still later Mrs. Erickson sold two of the bonds. The actions of both parties in connection with these bonds were inconsistent with the joint

tenancy which had existed, and the evidence sustains the inference drawn by the trial court, even though a contrary inference might have been drawn. The question was one of fact and every intendment must be indulged in favor of the findings made.

The judgment is affirmed.

I concur: JENNINGS, J.

MARKS, Justice (concurring).

I consider it necessary to briefly explain my concurrence in view of the recent case of *Swartzbaugh v. Sampson*, 54 P.(2d) 73, 75, where this court said: "An estate in joint tenancy can be severed by destroying one or more of the necessary unities, either by operation of law, by death, by voluntary or certain involuntary acts of the joint tenants, or by certain acts or omissions of one joint tenant without the consent of the other." I believe this correctly states the rule applied at common law and prevailing in the great majority of the states which follow that law. It is evident that if the rule be strictly applied the conclusion follows that where personal property is purchased with joint tenancy funds and title is placed in the name of one of the cotenants the joint tenancy estate is terminated by the destruction of one of its necessary unities [*Siberell v. Siberell*, 214 Cal. 767, 7 P.(2d) 1003], namely, unity of title.

In California there has been recognized and established an exception to the application of this rule which to me seems to have become a rule of property that now must be followed. The exception found its definite origin in *Re Estate of Harris*, 169 Cal. 725, 147 P. 967. There a husband and wife had agreed that all property held and acquired by them should be held together in joint ownership as joint tenants. They opened a bank account as joint tenants with the right of survivorship. With money withdrawn from this account they purchased corporate stock and some of the certificates were issued in the name of the husband. The Supreme Court held that this stock retained the character of the joint tenancy and formed no part of the husband's estate.

A similar situation was presented in the case of *In re Kessler*, 217 Cal. 32, 17 P.(2d) 117, 118, in respect to a deposit of \$600 in the individual bank account of a cotenant. It was there said: "The balance, \$600, represented interest paid by the maker on one of the notes held in joint tenancy, and the

court was justified in finding, as with the above-mentioned notes, that the proceeds took on the character of the property with which they were acquired, and were, consequently, held in joint tenancy." See, also, *Young v. Young*, 126 Cal.App. 306, 14 P.(2d) 580; *Chamberlain v. Chamberlain*, 2 Cal.App.(2d) 684, 38 P.(2d) 790; *In re Estate of McCain* (Cal.App.) 50 P.(2d) 114, and cases there cited.

From the foregoing cases, and others that might be cited, it would seem to me to follow that in California where property is purchased with funds of the joint tenancy and title is placed in the name of one of the joint tenants it will retain its character as joint tenancy property unless there be facts from which the reasonable inference may be drawn that the cotenants agreed that the joint tenancy in the newly acquired property be terminated and it be held in a different estate. In the instant case there were such facts which justified the trial judge in drawing such an inference. See *In re Estate of Putnam*, 219 Cal. 608, 28 P.(2d) 27.



13 Cal.App.2d 440

NICHOLLS v. ANDERS et al.

Civ. 10374.

District Court of Appeal, Second District,
Division 1, California.

April 25, 1936.

Hearing Denied by Supreme Court

June 22, 1936.

1. Partnership ⇨213(1)

In action against persons transacting business under common name, plaintiff held not required to name partnership as such in complaint in order to bind joint and individual property of associates, since merely designating business by common name would have been sufficient (Code Civ.Proc. § 388).

2. Partnership ⇨216(1)

Plaintiff suing to bind joint property of persons transacting business under common name should allege and prove existence of association of two or more persons transacting business under common name (Code Civ.Proc. § 388).

3. Judgment ⇨98

In suit against partnership and against individual partners both of whom answered,

identity of partners merged to extent that no default judgment could be secured effectively against partnership, until trial had been had upon issues raised by partners' answer.

4. Judgment ☞98

In suit against partnership and against both partners, default judgment against partnership could not bind joint property of partners or individual property of partners, where both had filed answers joining issue with plaintiff (Code Civ.Proc. § 388).

5. Judgment ☞203

Where same court renders two conflicting judgments upon same rights of same parties, later in point of time prevails.

6. Judgment ☞203

Where plaintiff in suit against partnership and members thereof obtained default judgment against partnership, later judgment in favor of partners, entered before plaintiff enforced default judgment, freed individual property of each partner, including personal interest in partnership property, from any liability (Code Civ.Proc. § 388).

7. Judgment ☞203

In suit against partnership and members thereof, judgment in favor of defendant partners, a later judgment than plaintiff's default judgment against partnership, inured to benefit of partnership, since partners' joint answer admitted allegations that they owned and operated business establishment named in complaint.

8. Judgment ☞150

In suit against partnership and members thereof, plaintiff impliedly consented to vacating default judgment against partnership by going to trial as to partners on merits.

9. Judgment ☞138(1)

Wherever possible, the law favors bringing about trial on merits.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by H. O. Nicholls against Carl D. Anders and others. From an order vacating a judgment rendered for plaintiff after a default and quashing the writ of execution which had been issued thereon, plaintiff appeals.

Affirmed.

Spencer L. Halverson and Lester L. Lev, both of Los Angeles, for appellant.

Gibson, Dunn & Crutcher and Norman S. Sterry, all of Los Angeles (E. E. Bacon and George D. Jagels, both of Los Angeles, of counsel), for respondents.

DESMOND, Justice pro tem.

Appeal from an order vacating a judgment rendered after a default, and quashing writ of execution which had been issued thereon. The complaint in this action was filed May 4, 1934, and was entitled, "H. O. Nicholls, Plaintiff, v. Carl D. Anders, A. V. Spencer, and the Partnership Consisting of Carl D. Anders and A. V. Spencer, Defendants." The individuals, Anders and Spencer, defended the action successfully in a jury trial, judgment in their favor being entered February 20, 1935. Meanwhile, on June 22, 1934, plaintiff had secured entry of a judgment after default claimed, in the sum of \$10,000 against the partnership; no answer or other plea having been filed by said partnership as such, although Anders and Spencer, mentioned in the caption of the complaint as sole members of the firm, had joined in an answer which was then on file. This default judgment which plaintiff's counsel had held up his sleeve, figuratively speaking, for eight months (the adverse parties being unaware of it), he undertook to collect on February 21, 1935, the day following entry of the contrary judgment in favor of defendants Anders and Spencer. A deputy sheriff, acting under a writ of execution, at that time, took possession of the premises and business known as "Carl's," a restaurant operated by Anders and Spencer. On February 26, 1935, hearing was had upon a motion filed by Anders and Spencer individually "and on behalf of Carl's, a restaurant owned and operated" by them, by which they sought to quash the service of summons "or purported service of summons heretofore made upon 'a partnership consisting of Carl D. Anders and A. V. Spencer' and to set aside and vacate all proceedings herein based upon said purported service of summons," including the entry of the default and judgment thereon. The motion was directed also to the recall and quashing of the writ of execution. The court granted the motion as related to all items mentioned, "upon the grounds stated" in the notice thereof. Appellant claims that the court committed

error in granting the motion; also claims that the court had no jurisdiction to hear the motion or to set aside the judgment.

In considering these claims reference must be had to section 388 of the Code of Civil Procedure. It reads as follows: "When two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates, and the individual property of the party or parties served with process, in the same manner as if all had been named defendants and had been sued upon their joint liability."

Our next reference is to the complaint, the caption of which we noted in our opening paragraph, and to which we again invite attention. Nowhere in the body of this complaint do we find the word "partnership," "firm," or "association," nor is there any allegation that a partnership existed or that it had a common name, or that it was being sued under a common name.

[1] There is, however, an allegation in the first paragraph of the complaint: "That defendants are the owners, managers and operators of a certain restaurant and drive-in eating establishment located at the northeast corner of Figueroa and Flower Streets in the City of Los Angeles, California; that they conduct and maintain said restaurant under the fictitious name and style of 'Carl's', and cater to and serve food, drinks and meals to the general public in the operation of said restaurant business." It appears from this that at the time the complaint was drawn, the pleader knew that Anders and Spencer were associated in business and transacting such business under a common name, and that the common name was "Carl's." It was not necessary in order to bind the joint and individual property of the associates, to name a partnership as such; merely designating "Carl's" as the common business name of the associates in business would have been sufficient, if plaintiff's counsel was not sure of the "common name" of the partnership.

[2] We are of the opinion that where reliance is had by a plaintiff upon section 388 of the Code of Civil Procedure, good

practice requires him to allege and prove the existence of an association of two or more persons transacting business under a common name.

In *Colquhoun v. Pack*, 28 Cal.App. 319, 152 P. 319, relied upon by appellant as an authority on the matter of service where a partnership and its individual members are named as defendants, we note, as briefly stated in the Syllabus, that "the complaint in the action, a copy of which was served with the summons upon said defendant, shows that he was sued individually, and *alleges* that he was a member of the partnership joined as defendant under the firm name." (Italics ours.)

[3-7] Appellant practically rests his entire case, in this appeal, upon the contention that a partnership is a separate entity for purposes of suit. So it appears to be, but where the partnership is made up of two persons both of whom answer, it would seem that the identity of the parties becomes merged, at least to the extent that no default judgment can be secured effectively against the partnership until trial has been had upon the issues raised by the answer of both parties. Especially so, because of the liability arising when service is made upon all parties; individual liability and liability of the entire partnership property. In this case, if the default judgment had been given force, at or about the time it was entered it would have bound "the joint property of all the associates, and the individual property of the party or parties served with process" (section 388, Code Civ.Proc.), namely, both Anders and Spencer. But how could this be, when both these individuals had filed answers joining issue with the plaintiff? If any attempt had been made to enforce the judgment at that time, undoubtedly the provisions of section 473, Code of Civil Procedure, as amended by St.1933, p. 1851, would have been invoked to set it aside. Counsel knew this and made no attempt to enforce the default judgment against partnership or members until more than the six months provided for by section 473 Code of Civil Procedure, as amended, had elapsed. In the meantime, however, the jury had returned a verdict in favor of Anders and Spencer, who constituted the entire partnership. There can be no question that by the judgment rendered upon this verdict, the individual property of each partner, including his personal interest in the partnership property, was freed

from any liability, though by the default judgment against the partnership their individual properties had been bound under section 388, Code of Civil Procedure. Since the two individual defendants were the sole owners of the partnership, a fact known to plaintiff's counsel, we have in effect two conflicting judgments rendered by the same court upon the same rights of the same parties. In such circumstances, the later in point of time prevails. 2 Freeman on Judgments (5th Ed.) § 629, p. 1326; California Bank v. Traeger, 215 Cal. 346, 351, 10 P.(2d) 51; 15 Cal.Jur. 105. And the court, upon declaring void the prior judgment, properly quashed the execution which had issued thereon. 11 Cal.Jur. 58. It may further be said that, since the two partners by their joint answer admitted the allegations contained in the first paragraph of the complaint, the judgment in their favor, a later judgment than the default judgment, inures to the benefit of the association or partnership under which they conduct their business. Minehan v. Silveria (Cal.App.) 53 P.(2d) 770, to be read in conjunction with Minehan v. Silveria, 131 Cal.App. 317, 21 P.(2d) 617.

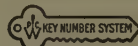
[8] It is urged also, and we believe rightly, that "appellant waived both the default and the judgment, and by going to trial on the merits, impliedly consented to the default judgment being vacated." This position seems sound under the reasoning of Madison v. Octave Oil Co., 154 Cal. 768, 99 P. 176. See, also, Pollard & Haw v. American Stone Co., 111 Va. 147, 68 S.E. 266, 267, and cases there cited; Semple v. Ware, 42 Cal. 619, 621.

[9] As to the discretion of the trial court in passing upon a motion to set aside a default judgment, it is said in Waite v. Southern Pacific Co., 192 Cal. 467, 470, 221 P. 204, 206: "This discretion, however, is not capricious or arbitrary, but it is an impartial discretion guided and controlled in its exercise by fixed legal principles. 'It is not a mental discretion, to be exercised ex gratia, but a legal discretion, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice.' Bailey v. Taaffe, 29 Cal. 422, 424. It is also well established that it is the policy of the law to bring about a trial on the merits wherever possible, so that any doubts which may exist should be resolved in favor of the applica-

tion, to the end of securing a trial upon the merits. Jergins v. Schenck, 162 Cal. 747, 748, 124 P. 426."

Under these principles, a trial having been had on the merits of the case, we believe the order should be affirmed. It is so ordered.

We concur: YORK, Acting P. J.; DORAN, J.



13 Cal.App.2d 330

HILTBRAND v. HILTBRAND.

Civ. 10928.

District Court of Appeal, Second District,
Division 2, California.

April 21, 1936.

1. Joint tenancy ☞5

Joint tenancy may be terminated by conveyance from one joint tenant to the other.

2. Appeal and error ☞1010(1)

In action for partition of property alleged to be held by plaintiff and her former husband in joint tenancy, whether assignment by wife to husband was intended to release interest of wife in such property held for trial court where there was substantial evidence to sustain finding that wife had so intended.

3. Appeal and error ☞989

Duty of appellate court to search for evidence ceases when it finds any substantial evidence to support findings of trial court.

4. Appeal and error ☞1008(1)

In action for partition of property allegedly held by plaintiff and her former husband in joint tenancy, whether there had been property settlement as pleaded in defense and whether property settlement was invalid for lack of consideration and under presumption of undue influence held questions of fact for trial court.

5. Fraud ☞50

Fraud is never presumed.

6. Husband and wife ☞31(2)

Where trial court found that plaintiff in action for partition of property, alleged to be held by plaintiff and her former husband in

joint tenancy, and for an accounting had assigned her interest to husband, no recovery could be had for plaintiff's alleged share of amounts collected for rents and profits thereafter.

7. Husband and wife Ⓒ31(2)

In action for partition and accounting, wherein trial court found that plaintiff had paid over to former husband a sum of money in Swiss francs for investment, and that husband had commingled moneys with his funds, finding of trial court that plaintiff had assigned her interest in such property precluded recovery of money so turned over.

8. Husband and wife Ⓒ270(9)

Finding that real property had been acquired by husband after interlocutory decree of divorce was granted and during marriage and was not owned by him before marriage and was not property acquired by husband by gift, bequest, devise, or descent was a finding that such property was community property in which wife would be entitled to her share.

9. Appeal and error Ⓒ1071(1)

Conflict between specific findings and general finding that allegations in one of paragraphs of plaintiff's complaint were true could not be reconciled on appeal.

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Action by Julia Hiltbrand against Rudolph Hiltbrand. From an adverse judgment, plaintiff appeals.

Affirmed in part, and reversed in part.

Ratzer, Bridge & Gebhardt, by H. A. Gebhardt, all of Los Angeles, for appellant.

Eli F. Bush and Fred N. Whichello, both of Los Angeles, for respondent.

CRAIL, Presiding Justice.

The plaintiff brought this action for partition and accounting against her former husband, the defendant, to partition certain property which she alleged was held by the parties in joint tenancy, and for an accounting of the rents and profits therefrom, and also for an accounting of the sum of 3,000 Swiss francs or its equivalent in American money, which the plaintiff alleged was her separate property and was delivered by her to defendant for investment, but was commingled with defendant's funds and invested. The parties had been divorced. In

paragraph VII plaintiff further alleged that defendant acquired one of the properties on May 20, 1931, which was after the interlocutory decree but before the final decree of divorce was entered; and, further, "that said real property was acquired by defendant after said interlocutory decree of divorce was granted and during marriage and was not owned by him before marriage and is not property acquired by defendant by gift, bequest, devise or descent." Answering plaintiff's complaint, defendant denied that plaintiff was an owner and joint tenant of said properties; that plaintiff on June 6, 1929, for a valuable consideration sold, assigned, transferred, and delivered all her interest in said property to defendant as his sole and separate property; that plaintiff conveyed all her interest in the property referred to in paragraph VII of plaintiff's complaint to defendant by grant deed, and denied that plaintiff had any interest therein; and for a separate and affirmative defense the defendant alleged that plaintiff left defendant in the month of June, 1929, and went to Switzerland, but that before she went they had a complete and full settlement of all their financial and property affairs; that as part of said settlement plaintiff conveyed all interest or claim she had in all of the properties referred to by the plaintiff; that an accounting was then and there had between the parties of all moneys, properties, or claims of the respective parties, and that defendant paid plaintiff in full and complete settlement; that the sum referred to was \$1,200, and that plaintiff accepted the same in full satisfaction and settlement of all claims and demands she then had or would have against defendant arising out of all properties then had or thereafter to be acquired, and asked judgment accordingly.

The trial court found that plaintiff had paid over to defendant the Swiss francs for investment and that defendant had commingled the same with his funds and invested said moneys. The court found that the allegations of paragraph VII of plaintiff's complaint above set out were true. The court also found that defendant had retained exclusive possession of the properties described in the plaintiff's petition and had not accounted to plaintiff for any of the rents, issues, or profits thereof, but that plaintiff on June 6, 1929, had signed and executed written instruments by which she surrendered, transferred, and delivered any and all interest that she had in all said

property to defendant. The court concluded that plaintiff should take nothing by her complaint and that the defendant should have judgment for his costs. Judgment was rendered accordingly. It is from this judgment that plaintiff appeals.

[1] The first contention of plaintiff is that a joint tenancy cannot be terminated by a mere assignment of one joint tenant to another, and in this behalf she says "that one joint tenant can terminate and sever the joint tenancy by deeding to a stranger, but a joint tenant cannot bind his co-tenant by any contract which he may make relating to the common property. *Oberwise v. Poulos*, 124 Cal.App. 247, at page 251, 12 P.(2d) 156, and cases therein cited." At the outset it should be observed that whether one joint tenant can bind the other by a contract which he may make relating to the other's property is wholly beside the question. The plaintiff cites to us no authority to sustain her actual contention and we know of none. In California the law is that a joint tenancy may be severed and ended by a conveyance by one of the tenants of his share. *Ten Year Suppl. to Cal. Jur.*, vol. 4, p. 376, § 7. We see no reason either in common sense or morals why the conveyance may not be from one joint tenant to the other. It is the rule in other jurisdictions that such tenancy may be terminated either by mutual agreement between the parties or by any conduct or course of dealing sufficient to indicate that all parties have mutually treated the joint tenancy as terminated. 33 C.J. 909, § 11, and cases cited.

[2,3] It is the next contention of the plaintiff that the evidence shows that at the time said assignments were made it was not the intention of the parties to release the interest in the joint tenancy properties which the defendant held. The answer is that this was a question of fact for the trial court to determine, and that there is substantial evidence to sustain the implied finding of the trial court that plaintiff so intended. Plaintiff argues this and other questions of fact as if she were having a retrial in this court. She presents the evidence which is favorable to herself, but nowhere undertakes to marshal all the evidence bearing upon the questions or to contend that there is no substantial evidence to sustain the finding. This court will not undertake to weigh evidence. Its duty to search for evidence ceases when it finds any substantial evidence to support the findings of the trial court.

[4,5] The plaintiff's next contention is that the property settlement between the parties was invalid "on the grounds: (a) Lack of consideration; (b) Presumption of undue influence; and (c) Presumptive fraud." In this respect the plaintiff argues as follows: "In order to prove a post-nuptial settlement the 'act must be clear and unequivocal.' (*Jennings v. Davis*, 31 Conn. 134; *Taggart v. Boldin*, 10 Md. 104.) 'Good faith is the cardinal principle in contracts and transactions of this character.' (30 C.J. 632, and cases cited under Annotation 26.) The testimony of Mr. Hiltbrand as to the property settlement is very vague. He claimed he paid his wife \$1,200.00 altogether but was unable to prove that he gave her more than the following amount: He paid plaintiff \$235.00 to buy her ticket. * * * The plaintiff in her deposition testified 'I do not know anything about a property settlement.' [Supp., p. 26.] It is apparent that there was 'no clear and unmistakable intention of the parties to barter away their rights.'" Thus on and on plaintiff argues the weight of the evidence. But whether there was a property settlement and whether the property settlement was invalid for the reasons stated are questions of fact for the trial court. Unfortunately, the trial court made no findings as to this defense. As to the "presumptive fraud," plaintiff cites no authorities to the effect that fraud is ever presumed. The cases are legion in which it is said that fraud is never presumed. In *re Luckenbach's Estate*, 205 Cal. 292, 270 P. 961; *Moore v. Giffen*, 110 Cal.App. 659, 294 P. 730; 12 Cal.Jur. 816.

[6,7] Plaintiff next contends that the trial court erred in not allowing an accounting and a recovery of her share of amounts collected for rents and profits by defendant. The answer is that since plaintiff had assigned all her interest in the property to defendant as his sole and separate property she had no share in the rents and profits. Plaintiff also contends that the court erred in not directing that the Swiss francs or their equivalent in value be turned over to the plaintiff. The answer again is that the court found that plaintiff had so assigned her interest in this property to the defendant.

[8,9] Plaintiff's most meritorious contention is that the court erred in not giving to her the portion of the property which the court found was acquired by defendant after the interlocutory decree and al-

most a year after the deed of June 6, 1929, but before the final decree was entered, and as to which the court found "that said real property was acquired by defendant after said interlocutory decree of divorce was granted and during marriage and was not owned by him before marriage and is not property acquired by defendant by gift, bequest, devise or descent." Such property, of course, in the absence of any finding limiting the broad implication of the general finding, would be community property, and plaintiff would be entitled to her share. *Brown v. Brown*, 170 Cal. 1, 147 P. 1168. It may be that the finding was an inadvertence as it is in conflict with other findings. It is contained merely in the general statement "that the allegations contained in Paragraphs VI, VII and VIII of said complaint are true," but for the purposes of this appeal we are unable to reconcile the conflict. As to this particular property the judgment must be reversed and a new trial had on the issues which are or may be joined in regard thereto.

Judgment affirmed in part and reversed in part, as indicated. Each party to pay his or her own costs.

We concur: WOOD, J.; GOULD, Justice pro tem.



13 Cal.App.2d 315

**MILLNER v. LANKERSHIM PACKING
CO. et al.
Civ. 10131.**

District Court of Appeal, Second District,
Division 1, California.

April 21, 1936. *

1. Chattel mortgages ☞208

Assignment of a chattel mortgage on cattle held not to have carried with it cause of action for a previous conversion of cattle covered by mortgage.

2. Chattel mortgages ☞208

Provisions of Civil Code referring to rights which inure to benefit of a transferee of a chattel mortgage held not to contemplate that assignee of chattel mortgage thereby succeeds to right of action for tortious acts com-

mitted by way of conversion against mortgaged property prior to time assignee acquired interest by way of lien in mortgaged property (Civ.Code, §§ 964, 1084, 2936, 3510, 3511, 3522)

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Frank Shaw Millner against the Lankershim Packing Company, Samuel M. Jackson, and others. Judgment for plaintiff, and the second-named defendant appeals.

Reversed and remanded, with directions.

Henry O. Wackerbarth, of Los Angeles, for appellant.

Mark A. Hall and Welburn Mayock, both of Los Angeles, for respondent.

WHITE, Justice pro tem.

This is an appeal by defendant Samuel M. Jackson from a judgment rendered against him in favor of Frank Shaw Millner, the substituted plaintiff herein, for \$2,958.66. Before judgment the action was dismissed as to all defendants except the appellant herein.

Plaintiff's complaint presented two causes of action, both seeking damages for conversion.

In the first cause of action plaintiff alleged the execution and delivery by the defendants George R. Shuey and Elma Shaw Shuey to one Clara M. Shaw of a promissory note for \$20,000, dated January 3, 1928; that said note was secured by a chattel mortgage upon certain cattle; that said mortgage was acknowledged and contained the customary affidavits of good faith; that the same was recorded in the office of the county recorder of Inyo county, Cal., and thereafter a certificate of the recording of said mortgage was filed with the secretary of state of the state of California; that thereafter said chattel mortgage was recorded in the offices of the county recorders of Mono county, Cal.; Esmerelda county, Nev., and Ventura county, Cal.; that at the time of the execution of said mortgage and at the time of recording the same in said Inyo, Esmerelda, and Mono counties, and at the time of the filing of said certificate, said cattle were situated in said counties; that thereafter a part of said cattle were moved to Ventura county; that on or about March 11,

1929, the defendant Bunney sold certain of said mortgaged cattle to the defendant Samuel M. Jackson, who was doing business under the firm name and style of Lankershim Packing Company; that said last-named defendant slaughtered the cattle, thereby converting the same to his own use, to plaintiff's damage in the sum of \$535.50; that thereafter, on or about March 25, 1931, said Clara M. Shaw assigned said note and mortgage to the plaintiff; that thereafter, on or about March 26, 1931, an action was filed in the superior court of Ventura county to foreclose said chattel mortgage, and upon foreclosure and sale of the remaining mortgaged cattle a deficiency judgment for \$13,071.23 was rendered. Plaintiff further alleged that the value of the cattle remaining under said chattel mortgage at the time of foreclosure and sale was "insufficient to satisfy the amount due plaintiff as the indebtedness represented by said note, chattel mortgage, and deficiency judgment as aforesaid."

In the second cause of action, plaintiff repeated substantially all of the allegations of the first cause of action, and alleged that on or about April 16, 1929, the defendant Jackson, doing business as Lankershim Packing Company, bought certain of said mortgaged cattle from the defendant Bunney and slaughtered the same, thereby converting said cattle to his own use, to plaintiff's damage in the sum of \$2,304.23.

Among the several defenses pleaded, defendant claimed that if a conversion occurred, it occurred prior to the assignment of the chattel mortgage to the plaintiff, and that said assignment did not assign to said plaintiff a cause of action for the conversion of said cattle.

It appears from the record in this case that the defendant Bunney, who was alleged to have sold the cattle in question to appellant herein, obtained possession and control of said cattle during 1923, under and by virtue of a written agreement between the original owner, George R. Shuey, and defendant Bunney, whereby Shuey delivered said cattle to Bunney and Bunney agreed to drive the same to cattle ranges and to keep and care for the same and all increase. On July 1, 1925, said Shuey, as first party, and Bunney and the latter's wife, as second parties, entered into a written agreement, the preamble of which recited that Shuey was the owner of 424 head of stock cattle, and a number of calves over six months of age, and five head of

bulls, which cattle, according to the agreement, were then in charge of said Bunney under the 1923 agreement. The 1925 agreement further set forth that Shuey contemplated purchasing an additional 275 head of cattle, together with the range on which the same were kept, and it was agreed that Bunney should take all of the cattle, including the last-mentioned 275 head, and keep and care for the same. Said agreement further provided that said Bunney would be entitled each year to sell such cattle as he might see fit, provided, however, that he could sell only mature steers and cows, and heifers that were of inferior quality, and that he could not sell such a number as would reduce the amount of cattle below an agreed aggregate. Said agreement further provided the manner and terms under which Bunney could purchase said cattle.

Plaintiff acquired said note and chattel mortgage through an assignment executed March 25, 1931. The assignment of the note and mortgage to the plaintiff, Margie Shaw Kewley, for whom Frank Shaw Millner was substituted as plaintiff by reason of the death of said Margie Shaw Kewley and Millner's succession to her estate, was merely an assignment of the chattel mortgage, together with the note secured thereby, and did not contain any assignment of a cause of action against the defendant for the two conversions alleged in plaintiff's complaint. We therefore find that plaintiff's rights herein are predicated upon an assignment of the note and chattel mortgage under date of March 25, 1931, while the conversions are alleged to have taken place on March 11, 1929, and on April 16, 1929, approximately two years prior to the time that plaintiff herein acquired any right, title, or interest in or to the chattel mortgage and note secured thereby.

[1] Appellant assails the judgment herein principally upon the ground that an assignment of a chattel mortgage does not carry with it a cause of action for a previous conversion, and with that contention of appellant we find ourselves in accord.

The rule in this regard is laid down in Jones on Chattel Mortgages (vol. 2, § 510), as follows: " * * * A right of action for an injury to the property or to the mortgagee's rights does not pass by his assignment of the mortgage. Thus, an assignee cannot sue for a conversion of property which has taken place before the execution of the assignment. The assignment

passes all the mortgagee's right to the property, but does not pass his right to sue for a conversion of the property, or for injuries to it, while he was the legal owner of it."

In *Cobbey on Chattel Mortgages* (vol. 2, § 646, p. 851), we find the following: " * * * A right of action for injury to the property, already incurred at the time of the assignment, is not transferred unless specially mentioned. * * * "

In *Cyc.* (vol. 27, p. 1299), the rule regarding a cause of action by the assignee for waste and conversion is contained in the following: "And while the assignee will have no right to maintain an action for waste committed upon the mortgaged property, or for any other injury to it or conversion of it, happening before the assignment to him, he may sue any person who injures the property or does any act diminishing the value of the security, after the assignment." See, also, *Cyc.*, vol. 7, p. 60.

Although there appears to be two lines of authority, one holding that the assignment of the mortgage carries with it the right to recover for injury to the personal property, either by conversion, waste, or destruction, we are of the opinion that the weight of authority supports the rule that in order to maintain such a suit the assignee must have been the owner or entitled to the possession of the property, or have had some right or interest in it, at the time of the wrongful act complained of. Had respondent here been the owner of the mortgage by assignment at the date of the alleged conversion, the lien created by the mortgage would have enabled him to maintain a suit for any act done by appellant injurious to respondent's rights, or he might pursue the property and assert his rights against any one in possession. The assignment upon which respondent herein predicates his rights passed all the mortgagee's right to the mortgaged property and invested the assignee with all the rights of the mortgagee of the property; but such assignment could not convey with it the right to sue all persons through whose hands it had passed for conversion of the property before the assignment and before respondent herein had any right, title, or interest in such property.

[2] Respondent cites us to sections 964, 2936, 3522, 1084, 3510, and 3511, of the Civil Code, referring to rights which inure

to the benefit of a transferee, but we are of the opinion that such sections do not contemplate that the assignee of a chattel mortgage thereby succeeds to a right of action for tortious acts committed by way of conversion against the mortgaged property prior to the time that such assignee acquired any interest by way of lien in the mortgaged property. *Bowers v. Bodley* (1879) 4 Ill.App. 279; *First National Bank of Grant County v. McCreary* (1913) 66 Or. 484, 132 P. 718, 134 P. 1180; *Hicks v. Cleveland*, 39 Barb.(N.Y.) 573; *Overton v. Williston*, 31 Pa. 155.

Respondent cites us to the case of *Lazard v. Wheeler*, 22 Cal. 139, but we do not believe that case in point, because it involved certain warrants owned by one Johnson, from whom the defendant was charged with wrongfully taking the warrants. Johnson transferred all of his right, title, and interest in and to the warrants to the plaintiff, Lazard. After the execution of the assignment the assignee made repeated demands upon the defendant for delivery to him, as the owner, of the warrants in question; but the defendant refused to deliver them to the assignee, but kept and detained them unlawfully from such assignee. This of itself gave to the assignee a right to institute a suit in replevin to recover the goods of which he was the owner, and which goods were being unlawfully detained, thereby depriving the owner of his right thereto. Conceding that a right of action for the wrongful taking and conversion of personal property is assignable, still we are of the opinion that the mere assignment of a note and mortgage does not give to the assignee thereof the right to sue for a conversion committed, as in the instant case, some two years before the assignee obtained any right, title, or interest by way of lien in and to the cattle in question.

The conclusion at which we have arrived on this proposition makes it unnecessary for us to discuss or decide the other points raised by appellant.

For the foregoing reasons, the judgment appealed from is reversed, and the cause remanded, with directions to the court below to enter judgment for the appellant.

We concur: YORK, Acting P. J.; DORAN, J.

13 Cal.App.2d 435

BARTLETT v. JACKSON et al.

Civ. 5476.

District Court of Appeal, Third District,
California.

April 24, 1936.

1. Automobiles ⇨238(7)

In action for injuries by automobile guest against owner and driver of automobile, complaint alleging that as result of driver's willful misconduct in operation of truck and trailer, plaintiff was thrown with great force and injured, *held* insufficient to state cause of action, where no facts were alleged which were deemed to have constituted willful misconduct (St.1931, p. 1693, § 141¼).

2. Automobiles ⇨238(7)

In action by automobile guest against host, complaint must specify particular acts upon which willful misconduct of host is charged (St.1931, p. 1693, § 141¼).

3. Automobiles ⇨244(20)

Evidence that truck driver drove onto wrong side of road while attempting to pull head of sleeping guest back on cushion, and struck automobile approaching from opposite direction, while driving at moderate speed on level and straight highway upon which no other vehicles were in sight *held* not to establish "willful misconduct" so as to render driver and owner of truck liable for injuries to guest (St.1931, p. 1693, § 141¼).

[Ed. Note.—For other definitions of "Willful Misconduct," see Words & Phrases.]

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by Dave Bartlett against A. B. Jackson and another. Judgment for plaintiff, and defendants appeal.

Reversed, with directions.

Redman, Alexander & Bacon, of San Francisco, Rutledge & Rutledge, of Colusa, and Herbert Chamberlin, of San Francisco, for appellants.

E. Vayne Miller, of Colusa, and Ralph O. Marron, of San Francisco, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendants have appealed from a judgment which was rendered against them in a suit for injuries sustained by the plaintiff while riding as a guest in their automobile. The appellants assert that the complaint fails to state facts sufficient to constitute willful misconduct on their part, and that the findings and judgment are not supported by the evidence.

[1] The complaint fails to state facts sufficient to constitute a cause of action in behalf of a guest on the ground of willful misconduct under the provisions of section 141¼ of the California Vehicle Act (St.1923, p. 517, as added by St.1929, p. 1580, as amended by St.1931, p. 1693). The complaint merely alleges that "As a result of the defendants' wilful misconduct in the operation of the aforescribed International truck and trailer, the plaintiff was thrown with great force * * *" and injured. No facts are alleged which are deemed to have constituted willful misconduct.

To this complaint the defendants demurred on the ground that it fails to state facts sufficient to constitute a cause of action, and that it is uncertain for the reason that it cannot be determined "wherein or in what respect said defendant wilfully misconducted himself." The demurrer was overruled.

In the case of Norton v. Puter, 138 Cal. App. 253, 258, 32 P.(2d) 172, 174, it is said: "Willful misconduct depends upon the facts of a particular case, and necessarily involves deliberate, intentional, or wanton conduct in doing or omitting to perform acts, with knowledge or appreciation of the fact, on the part of the culpable person, that danger is likely to result therefrom."

We are cited to no authority in this state which holds that a complaint which is based on willful misconduct, and which merely alleges in general language that the defendant was guilty of willful misconduct in the operation of his automobile, without reciting any specific facts upon which that charge is based is sufficient as against a special demurrer. In the case of Helme v. Western Milling Company, 43 Cal.App. 416, 185 P. 510, 512, it is said: "'Willful misconduct' means some-

thing different from and more than negligence, however gross. * * * The mere failure to perform a statutory duty is not, alone, willful misconduct."

In the case of *Nichols v. Smith*, 136 Cal.App. 272, 28 P.(2d) 693, in overruling the judgment, based on a complaint which merely alleged that the defendant was guilty of gross negligence, without reciting any facts in support thereof, the district court of appeal properly held that the language which was used in a similar automobile damage case based on gross negligence entitled *Malone v. Clemow*, 111 Cal. App. 13, 19, 295 P. 70, 73, wherein it is said that "the rule is also well settled that negligence may be pleaded in general terms" was mere dictum. The *Nichols* Case held that it is necessary to allege specific facts constituting the alleged gross negligence. In the *Malone* Case the complaint actually alleged the specific facts upon which the charge of gross negligence was based. The court there said in that regard: "In the cases at bar, the amended complaints have specified the particular acts of negligence relied upon, and have charged that these particular acts were done in a grossly negligent manner."

If it be necessary to allege in a complaint specific acts or facts which are deemed to constitute gross negligence, how much more essential it is to allege particular facts upon which one is charged with willful misconduct, for as the court said in the *Malone* Case, *supra*, willful misconduct is not necessarily negligence at all. It means "something different from and more than negligence, however gross."

In the case of *Harrison v. Formby*, 225 Ala. 260, 142 So. 572, 573, a complaint was held to be fatally defective which failed to allege specific facts constituting wantonness in the operation of an automobile. The language of that complaint was almost identical with the challenged statements of the complaint in this case. It was there charged that the defendant did "'wantonly cause or wantonly allow an automobile truck to collide with an automobile in which plaintiff was riding, thereby proximately causing the injuries and damages complained of.'"

[2] We are of the opinion the court erred in overruling the special demurrer to the complaint, for the reason that it is necessary to specify the particular acts

upon which the willful misconduct of a person is charged.

In a careful review of the entire record in this case, we are persuaded the findings and judgment are not sustained by the evidence. We are impelled to hold that the facts of this case do not constitute willful misconduct.

The court therefore erroneously found that: "The defendant Delbert Cage did then and there wilfully misconduct himself in the operation of said International truck and that he did intentionally and with knowledge that said acts of wilful misconduct would result in probable injury to the plaintiff, and that he did wilfully and intentionally and with knowledge of probable injury to the plaintiff drive and operate said International truck over into the western half of the highway," etc.

The evidence shows without conflict that the plaintiff was picked up on the highway near Arbuckle on the afternoon of May 31, 1933, by Delbert Cage, the driver of the defendant Johnson's International truck. He became a guest on that journey, for he rode either at his own request or by the invitation of the driver, without pay. He was very tired and promptly lay down on the cushion of the front seat and went to sleep. He knew nothing of the collision, for he did not awake until he found himself in the hospital after the accident occurred. Accepting the testimony of Alvah Leverett, a stranger to the transaction, which is most favorable to the plaintiff, with no evidence to the contrary, it appears that Cage was driving his truck northerly along a twenty-foot highway about a mile and a half south of Williams, when he overtook and passed Leverett's machine, driving at the rate of twenty-five miles an hour. Cage returned to his proper side of the highway after passing the machine of Leverett. He then, almost immediately, drove on to the wrong side of the highway so far that his outer wheels ran on to the dirt shoulder on the westerly side thereof. At that instant Leverett saw a Chevrolet truck approaching from the north on the westerly side of the highway at a distance of two or three hundred yards from the Cage machine. When the Chevrolet machine reached a point about seventy-five yards from the Cage truck, it suddenly turned to the easterly side of the highway to avoid a collision. Almost at the same

instant the Cage truck also suddenly turned back toward its proper side of the concrete. There is evidence that both machines may have changed their course from the right to the wrong side of the highway twice in an effort to avoid the collision which seemed inevitable. The collision occurred on the east side of the concrete, or possibly both cars overlapped the central white line when they collided.

Mr. Cage testified that the plaintiff was fast asleep on the seat by his side, and that his head had slipped from the cushion and was hanging downward; that he reached over and pulled his head back on to the cushion, during which performance his automobile veered off on to the wrong side of the highway, and that when he looked up and saw the approaching machine he promptly pulled his truck back to his proper side of the roadway at the very time the driver of the Chevrolet car turned in the same direction and the collision occurred. Mr. Meckfessel, who rode in the Leverett machine which had just been passed by the Cage car, testified in that regard: "I think they both just about turned together. He pulled over and then Cage hit him—pulled over too, trying to get back on his side."

Cage testified that the position of the plaintiff interfered with his driving. There is no evidence of circumstances in conflict with this evidence as to the cause of the accident. There is no evidence of drunkenness on the part of Cage, or any other circumstance from which it may be inferred that he deliberately, purposely, or willfully drove his truck over on to the

wrong side of the highway into the pathway of the approaching vehicle. Cage admits that he saw the approaching car before he lifted the plaintiff's head back on to the cushion. He was driving at a moderate rate of speed. The highway was level and straight. No other vehicles were in sight.

[3] The preceding facts furnish no evidence to support the assumption that Cage deliberately, intentionally, wantonly, or with knowledge that a collision was likely to occur, purposely drove his truck on to the wrong side of the highway, or that he turned his machine back to his proper side of the concrete with any such motive or purpose. It may have been negligent for Cage to have attempted to change the position of the plaintiff's head at that critical time, or it may even have constituted gross negligence for him to have done so, but certainly it was not a willful or deliberate act on his part. Nothing in the manner in which he had been previously operating his truck lends support to the assumption that he acted willfully. It was a negligent and deplorable act, but the facts do not constitute willful misconduct. In fact, the evidence indicates just the contrary, that the act was not willful or deliberate. The findings and judgment are therefore not supported by the evidence.

The judgment is reversed, and the court is directed to render judgment for the defendants.

We concur: PULLEN, P. J.; STEEL, Justice pro tem.



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